VAN NATTA'S WORKMEN'S COMPENSATION REPORTER

Merrily McCabe & Robert R. Coe, Editors

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VAN NATTA'S WORKMEN'S COMPENSATION REPORTER

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WCB CASE NO. 78-9459 April 1, 1980

CARL SOLOMON, CLAIMANT
Samuel A. Hall, Jr., Claimant's Atty.
Foss, Whitty & Roess, 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Workers' Compensation Board in the above entitled matter by the claimant, and said request for review now having been withdrawn,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.

Entered at Salem, Oregon and copies mailed to:

WCB CASE NO. 78-4374 April 1, 1980

RAY E. STEWART, CLAIMANT
R. Ray Haysell, Claimant's Atty.
Michael D. Hoffman, Employer's Atty.
Joint Petition & Order

Ray E. Stewart, while employed by Nikkel Lumber Company, allegedly sustained an industrial injury on December 2, 1977. The claim was made with the employer, and benefits were denied by the employer asserting that the claimant had not sustained a compensable industrial injury with that employer. Claimant had also filed an aggravation claim against Ameron Pipe Products Company, and that claim had been denied. However, the carriers had not agreed that the alleged incident was necessarily compensable, and no order was issued pursuant to ORS 656.307. A hearing was subsequently held on December 7, 1978, with Referee Lyle Wolff finding that the claimant had sustained an injury with Nikkel Lumber Company, but that was merely a temporary exacerbation of the prior condition generating only three days temporary total disability. Both claimant and employer Nikkel Lumber Company requested Board review from the referee's Opinion and Order. The case is currently pending before the Board on appeal. The bona fide dispute arose as to whether or not the alleged injury had arisen out of or occurred in the course of claimant's employment. Both parties had evidence sustaining their views.

PETITION

Claimant, Ray E. Stewart, in person and by his attorney, R. Ray Heysell, and employer, Nikkel Lumber Company, and its insurance carrier, Fireman's Fund Insurance Company, in person and by their attorney Michael D. Hoffman (Schwabe, Willianson, Wyatt, Moore & Roberts) now make this joint petition to the Board and state:

1. Ray E. Stewart and Nikkel Lumber Company and its insurance carrier, Fireman's Fund Insurance Company, have entered into an agreement to dispose of this claim for the total sum of $1,500.00, said sum to include all benefits and attorneys fees.

2. The parties further agree that from the settlement proceeds $300.00 shall be paid to the firm of Velure, Heysell & Pocock as a reasonable and proper attorney fee.

3. Both claimant and respondent state that this joint petition for settlement is being filed pursuant to ORS 656.289 (4) authorizing reasonable disposition of disputed claims. All parties understand that if this payment is approved by the Board and payment made thereunder, said payment is in full, final and complete settlement of all claims for whatever which claimant has or may have against respondents for injuries claimed or their results, including attorney fees, and all benefits under the Workers' Compensation Law and that he will consider said payment as being final.

4. It is expressly understood and agreed by all parties that this is a settlement of a doubtful and disputed claim and is not an admission of liability on the part of respondents, by whom liability is expressly denied.

WHEREFORE, the parties hereby stipulate to and join in this petition to the Board to approve the foregoing settlement and to authorize payment of the sum set forth above pursuant to ORS 656.389 (4) in full and final settlement between the parties to issue an order approving the compromise and withdrawing this claim.

IT IS SO STIPULATED:

IT IS SO ORDERED and this matter is dismissed.

WCB CASE NO. 79-2579 April 1, 1980

ANNIE WESTENSEE, CLAIMANT
Bischoff, Murray & Strooband, 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. 79-1872 April 7, 1980

VAN ARMITAGE, CLAIMANT
Dennis R. VavRosky, Employer's Atty.
Disputed Claim Settlement

Van Armitage, ("claimant"), contends that he suffered a compensable aggravation of his low back strain injury of February 7, 1977, which had occurred while working for the subject self-insured employer, Georgia-Pacific Corporation ("employer");

The employer, contends that the claimant's alleged medical condition arising on or after January, 1979, did not arise within the course and scope of his employment with Georgia-Pacific Corporation, but rather was the result of a new, distinct injury suffered while in the employ of his new employer, which injury would be compensable under Oregon law;

By letter dated February 19, 1979 the employer has denied benefits to the claimant and advised him of his rights to contest the denial;

There is presently pending a Request for Hearing dated March 1, 1979, to contest the employer's denial of the claimant's alleged aggravation; and

The parties hereto desire to settle this dispute and dismiss this claim on a disputed claim basis, in lieu of a formal hearing.

NOW, THEREFORE, IT IS HEREBY STIPULATED TO AND AGREED by and between the parties hereto that, in consideration of the payment of $300.00, claimant's Request for Hearing shall be withdrawn and dismissed and the employer's denial shall be affirmed.

It is understood by the parties, and agreed, that said payment is in full and final settlement of all benefits owed or all claims which claimant has or may have against the employer for injuries or diseases claimed or their results, relating to the alleged incident of February 7, 1977, and all benefits under the Workers' Compensation Law or otherwise. and this settlement is of a doubtful and disputed claim and is not an admission of liability on the part of the employer, who denies that the claimant has suffered a compensable aggravation from the alleged incident of February 7, 1977.

Claimant recognizes that he has a right to pursue his claim, filed against David Douglas School District and SAIF, if he so desires, but that he may or may not be able to establish such claim.

Claimant recognizes that execution of this settlement will preclude him from claiming any further benefits from the February 7, 1977, injury.

IT IS SO STIPULATED:

Based upon the stipulation of the parties hereto, and being fully advised in the premises, the Disputed Claim Settlement is hereby approved and the employer is ordered to pay claimant the sum of $300.00.

WILBURN AUTRY, CLAIMANT
Welch, Bruun & Green, Claimant's Attys.
Lang, Klein, Wolf, Smith, Griffith
& Hallmark, Defense Attys.
Request for Review by Employer

ISSUE ON REVIEW

The employer seeks Board review of the Referee's order that found claimant's shoulder condition had been aggravated by his work activities during his employment with this employer. The Referee remanded the claim for this condition to it for acceptance and payment of compensation pursuant to the Oregon Workers' Compensation Act and awarded claimant's attorney a $2,000 attorney fee. The employer contends claimant's claim is not compensable and that the attorney fee awarded is excessive.

FACTS

Claimant, a 54-yearold plant supervisor, alleges his daily work aggravated and caused a deterioration of his shoulder sockets and knees. Claimant filed this claim on January 2, 1979 alleging this condition had gradually developed. He had been employed with this employer since 1957. He stated he had been employed as a cheese maker until 1970. This job required cooking vats of cheese, stirring the cheese, and shoveling the cheese into 100-pound cans.

In 1970, claimant stated he was promoted to milk plant superintendent. He indicated this required running the milk plant operation and supervising 22 employees. He indicated he also ran the pasteurizer approximately two hours a day which required him to monitor a control panel, wash large milk tanks, scrub floors, pull empty milk cans, climb ladders for milk testing, mixing various fruit drinks, chocolate drinks and ice cream and egg nog. He testified that he climbed up and down ladders approximately 20 to 30 times a day.

Claimant stated that his condition started gradually and progressed over a five-year period to the point that he was forced to quit work on December 19, 1978 due to extreme pain in his shoulders and knees. Claimant stated the only time he obtained relief from this condition was during the weekend period or when he was on vacation. He indicated that the more he did, such as walking, the more pain he had.

The medical reports indicate that since approximately 1959 claimant had been having complaints of pain in his shoulder. In 1964 claimant suffered an industrial injury when he fell off a ladder and injured his right knee. Throughout the 1970's, claimant was treated by Dr. M. J. Urman for pain in his shoulders and knee.

On July 11, 1978, Dr. Urman reported claimant was having increasing left shoulder discomfort. He reported claimant had osteoarthritis in the shoulder which had not responded to a series of treatments. He referred claimant to Dr. Lisac for consultation.

On July 26, 1978, Dr. Gerald Lisac diagnosed: "Bilateral avascular necrosis of the humeral heads with degenerative changes of both shoulders, quite severe, much more on the left than on the right". He was unable to determine what caused these conditions.

On August 21, 1978, Dr. Lisac reported that claimant's condition had not improved with additional treatment. Claimant continued to complain of severe pain in the shoulders, pain in the left hip, and pain in both knees. He referred claimant to Dr. Peter Kane, an internist. In October 1978, Dr. Lisac reported that claimant had been seen by Dr. Kane and had various tests performed. Claimant told Dr. Lisac he wanted to quit work.

On December 4, 1978, Dr. Ronald Fraback reported claimant told him he had pain in the right shoulder for most of his life. Claimant denied any definite joint injuries, but indicated he used his shoulders extensively in his work with this employer as well as using his knees a great deal in climbing up and down ladders. Dr. Fraback diagnosed: "Severe degenerative joint disease, shoulders and knees, etiology most likely due to abnormal stresses on these joints from his job". He noted it was very unusual to see such marked degenerative changes in the shoulders. He indicated that he had reviewed the claimant's case and x-rays with the rheumatology group from the University of Oregon Medical School and that they also felt that the changes were most likely related to claimant's occupation. He discussed claimant's job with the claimant and he and claimant both agreed that claimant probably should stop work and go on medical disability. Dr. Fraback felt the only possible solution to claimant's condition would be a joint replacement when the pain became unbearable.

On December 28, 1978, Dr. Howard Cherry diagnosed severe degenerative arthritis of the shoulders and knees. He opined that this condition was related to the claimant's work and would result in permanent impairment.

On January 23, 1979, the employer denied this claim.

Dr. Cherry, in February 1979, reported that there was no known specific accident bringing on claimant's condition. He noted that it was unusual to see this condition in the shoulder joints. He felt that it was disabling to the degree that claimant could no longer continue his job. He reported there was no good available treatment for claimant's condition at the present time. Dr. Cherry felt that the condition could be helped by a shoulder prosthesis, except he felt the shoulder prostheses were "not very satisfactory".

On April 18, 1979, Dr. Gerald Lisac reported that claimant's condition was severe bilateral avascular necrosis of both shoulder joints and was not, in his opinion, related to his work as a plant supervisor. It was his opinion that any type of heavy work would have probably aggravated claimant's condition. He felt that it was more likely claimant's job and intermittent work at the dairy was producing symptoms of the disease rather than aggravating the underlying disease itself.

Dr. Peter Kane, in June 1979, was unable to comment whether claimant's work aggravated his condition.

At the hearing, Dr. Fraback testified he disagreed with the diagnosis made by Dr. Lisac. He felt the lab work did not support Dr. Lisac's diagnosis. Dr. Fraback testified that avascular necrosis could cause arthritis and the most common cause of avascular necrosis was the long term use of Cortisone or alcohol. He felt that claimant's disease was either caused by or aggravated by his work. He stated that the speed the progression of this disease was determined by the extent of claimant's activities on and off the job.

A representative of the employer testified that claimant worked about 3/4 of his shift operating the control panel. He testified claimant had not scrubbed floors since 1970 and that there was no full-time control panel operator as such.

Dr. Lisac was deposed. In the deposition, Dr. Lisac testified he is an orthopedist. He indicated the x-rays showed avascular necrosis which was an increase in the density of the bone, which occurred when the bone lost its blood supply. He indicated that claimant's left shoulder also had atrophied. He felt the disease process had been going on for "a long time" in claimant. It was his opinion that the claimant's work had been increasing claimant's symptoms by aggravating the underlying disease. He said that avascular necrosis was not a disease nor is it an ongoing type of process. He feels it is a one-time entity which occurs when the bone dies. He found no evidence of avascular necrosis in claimant's knees. He testified he made no notes of any degenerative changes in the knees and he does not know how much of claimant's work activities contributed to the degeneration.

The Referee found that as far as the claim for claimant's knee conditions were concerned, the evidence was not conclusive. Therefore, the Referee, not being persuaded by the evidence that claimant's knee symptoms and knee condition were either caused or aggravated by his work with this employer, denied that portion of the claim.

Further, the Referee found there was ample evidence to establish that both of claimant's shoulders were subject to a condition of either avascular necrosis or osteoarthritis which had been aggravated by his work activities with this employer. Therefore, the Referee remanded the claimant's claim to the employer for acceptance and payment of benefits and awarded claimant's attorney a $2,000 attorney's fee.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, affirms the Referee's order. The preponderance of the medical evidence clearly establishes that claimant's shoulder conditions are related to his work. The evidence indicates that claimant's work activity and conditions caused a worsening of the underlying disease resulting in an increase in his pain to the extent that it produced disability and required medical services. The preponderance of the evidence offered by claimant establishes that his condition was either caused by or aggravated by his work and that his work accelerated the underlying disease process. The Board concludes, as the Referee did, that claimant has established that his claim for the shoulder condition is compensable.

The Board likewise finds that the award of attorney fees by the Referee, in this case, was not excessive. The Board finds the evidence in this case indicates that it was a complicated matter that required much time and preparation by claimant's counsel in obtaining acceptance of his claim. Therefore, the Board would affirm the Referee's award of attorney's fees.

ORDER

The Referee's order, dated August 17, 1979, is affirmed.

Claimant's attorney is hereby granted the sum of $250 for his services at Board level, payable by the carrier.

WCB CASE NO. 78-8654 April 7, 1980

JOHN A. AVDEEF, CLAIMANT
Robert K. Udziela, Claimant's Atty.
David O. Horne, Employer's Atty.
Stipulation Order

THIS MATTER having come on before the undersigned on motion of the parties, and the undersigned taking jurisdiction over the matter pursuant to ORS 656.278, it is

HEREBY STIPULATED TO AND ORDERED AS FOLLOWS:

1. Claimant filed a claim for compensation injury occurring on September 29, 1978 with Evergreen Helicopters.

2. On or about February 8, 1979 the claim was denied and claimant requested a hearing.

3. On or about May 11, 1979 by Opinion and Order of Referee Page Pferdner, the denial was sustained.

4. On or about October 24, 1979, by Order on Review of the Workers' Compensation Board, the Opinion and Order of Referee Pferdner was reversed, and the claim held compensable.

5. Employer filed Notice of Appeal to the Court of Appeals in the above-captioned matter, disputing the correctness of the Order on Review of the Workers' Compensation Board.

6. On or about October 23, 1979, claimant was killed in an accident unrelated to his above claim for compensation with employer herein.

7. Temporary total disability benefits have been paid to the claimant and/or his widow pursuant to the above Order on Review of the Workers' Compensation Board.

As a result of claimant's death an overpayment of temporary total disability in the amount of $2,404.47 has occurred.

8. Employer has stipulated and agreed that claimant's claim was, and is compensable, and its denial of February 8, 1979 is hereby withdrawn.

9. Employer has further agreed that any amounts of temporary total disability payments made to the claimant and/or his widow after the date of claimant's death shall be recovered solely out of any award of permanent partial disability benefits made pursuant to ORS 656.268, and employer further stipulates that under no circumstances will it attempt to obtain said overpayments in any other fashion.

10. The claim is hereby deemed accepted by both parties, and will be submitted to the Closing and Evaluation Division of the Workers' Compensation Department for determination pursuant to law.

11. The employer agrees to dismiss the current appeal before the Court of Appeals of the State of Oregon.

12. Employer further agrees to pay the law firm of Possi, Wilson, Atchison, Kahn & O'Leary an attorney fee in the amount of $150.00 in addition to the compensation made payable by this order and not out of said compensation.

IT IS SO STIPULATED

IT IS SO ORDERED

WCB Case NO. 79-2240 April 7, 1980

ANNE C. DONATO, CLAIMANT
Pozzi, Wilson, Atchison, Kahn
& O'Leary, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

ISSUE ON REVIEW

The State Accident Insurance Fund (Fund) requests Board review of the Referee's order which granted claimant an additional award of compensation equal to 67.5° for 45% loss of function of her right forearm and granted claimant's attorney a fee. The Fund contends this award is not supported by the evidence.

FACTS:

Claimant, a 31-year-old beautician, sustained an injury to her right wrist and hand due to the "continual action of muscles and tendons in an unnatural position". On July 10, 1976 she filed a claim for this injury.

It was reported by Dr. Edward Rausch in July 1976 that claimant was complaining of pain in her right hand. The diagnosis was "Probable stenosing tenosynovitis right abductor pollicis tendon and extensor tendon, right index finger. Rule out right carpal navicular fracture". X-rays were interpreted as being normal. Dr. Rausch felt claimant's symptomatology was secondary to her "occupational duties" and would be "aggravated" by them.

Dr. Peter Nathan, in September 1976, diagnosed claimant's condition as a "first dorsal compartment syndrome (de Quervain's disease)". He performed a release of the first dorsal compartment. By November 1976, Dr. Nathan reported claimant was working on a part-time basis and recommended claimant begin physical therapy.

Claimant continued to complain about her right hand. Special x-rays were taken and did not reveal any bony abnormalities. Dr. Nathan, in May 1977, felt claimant's complaints were too diffuse to define her problem anatomically. He felt claimant could be gainfully employed although her complaints "may or may not be related to her current employment". Dr. Nathan noted an underlying factor could be a general collagen disease such as rheumatoid arthritis.

On July 13, 1977, Dr. Lawrence Garges indicated claimant had a positive rheumatoid factor. He felt claimant had arthritis of the joint of the thumb. Dr. Garges felt claimant would be unable to return to her previous employment. Dr. Garges and Dr. Nathan felt claimant needed vocational rehabilitation.

A Determination Order, dated July 15, 1977, awarded claimant temporary total disability compensation and compensation equal to 7.5° for 5% loss of her right forearm. This order was corrected by adding an additional period of temporary total disability.

Claimant entered a vocational rehabilitation program and was trained to perform her hairdressing duties left-handed. A Second Determination Order, dated March 27, 1978, and a Third Determination Order, dated February 27, 1979, awarded claimant additional temporary total disability.

On April 6, 1979, Dr. William King stated he was treating claimant for a carpal tunnel syndrome of the right wrist.

Dr. Nathan, in May 1979, indicated claimant continued to complain of discomfort in the right hand. Dr. Nathan found an excellent range of motion in both wrists. Claimant was able to make a full fist with her right hand and did not have any tenderness in the area of the surgical incision. Claimant had been seen by a therapist at the Hand Clinic of Providence Hospital, who were unable to find any organic basis for her complaints regarding the right hand or wrist. Dr. Nathan opined claimant's condition was medically stationary and she had a 5% impairment of the right wrist based on subjective findings. He noted no other impairments and felt claimant could be gainfully employed with no restrictions.

On July 27, 1979, Dr. Samuel Gill reported he diagnosed claimant's condition as "moderate chronic synovitis, first metacarpotrapezium joint, right thumb and possibly some similar synovitis, right wrist, etiology of which is not entirely clear". Dr. Gill injected these areas with xylocaine and Hydeltra-TBA which did not relieve claimant's complaints. A bone scan was normal. Dr. Gill was unable to explain claimant's limitation of her "left" wrist. He did believe she had some pain which was aggravated by moderate to heavy activity. He felt claimant would have to accept this discomfort and learn to get along with it.

At the hearing, claimant testified she returned to work for her employer in January 1979. She stated she now primarily does tinting work and is able to do one to three haircutting jobs a day. Before this injury, she said the majority of her work was cutting hair. She testified her right thumb aches and she has no strength in it. Further, she is unable to use tweezers. She says she works eight hours per day, but this is less than she worked prior to her injury. She also has fewer clients now because she can't cut as much hair. Claimant has difficulty vacuuming and driving her car long distances. Her thumb cramps and she is unable to open jar lids. Claimant and her employer testified claimant has suffered a loss of wages due to this injury.

The Referee found that claimant's pain was disabling and she had suffered a very substantial loss of wage earning capacity. Therefore, the Referee placed the loss of physical function at 50% of the right forearm.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, reverses the Referee's order. This injury is to a scheduled member of the body. Scheduled injuries are rated on the loss of function and not on the loss of wage earning capacity. One element in rating loss of function is impairment. Dr. Nathan rated claimant's impairment at 5% based on subjective findings. He felt claimant could return to her regular work without any restrictions. Dr. Gill was unable to explain claimant's continuing complaints. The Board finds the preponderance of the evidence does not support the award of compensation granted by the Referee, but does support the award granted by the Determination Order. Therefore, the Board reverses the Referee's order and restores the Determination Order award of compensation equal to 7.5° for 5% loss function of the right forearm.

ORDER

The Referee's order, dated October 2, 1979, is reversed in its entirety.

The Determination Order, dated February 27, 1979, which made no award over the 5% loss of function of the right forearm awarded by the Determination Order, dated July 15, 1977, is affirmed.

WCB CASE NO. 80-1818 April 7, 1980

STEPHEN C. DOOLEY, CLAIMANT
Malagon & Yates, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Order On Remand

On February 15, 1980, claimant, by and through his attorney, requested a hearing contending his claim should not have been closed under ORS 656.268.

On April 23, 1971 claimant was injured. A Determination Order, dated July 22, 1971, initially closed his claim. Claimant's aggravation rights began to run on July 22, 1971 and on July 22, 1976 his aggravation rights expired. Claimant, on October 2, 1978, filed an "aggravation" claim. A Stipulation, dated May 25, 1979, provided that the "aggravation" claim was accepted and the claim was reopened. The last paragraph provided an attorney fee out of the compensation "(if awarded) at the time of the next Closing and Evaluation Determination Order".

On October 10, 1979, the Evaluation Division recommended to the Board that this claim be closed and that claimant be granted an additional award of temporary total disability compensation.

The Board, on October 23, 1979, issued an Own Motion Determination awarding claimant additional temporary total disability compensation. It is this order with which claimant takes exception.

The Board finds that its order is correct. Claimant's aggravation rights expired on July 22, 1976. His "aggravation" claim, in October 1978, in fact, was not an aggravation claim because his aggravation rights had expired. It is apparent the insurer reopened this claim voluntarily. However, the Board, under ORS 656.278, had jurisdiction over this claim. The parties cannot stipulate or agree to confer jurisdiction upon the Board. The Board, under its own motion jurisdiction, had the power to close the claim.

Therefore, the Board remands this request for hearing to the Presiding Referee and directs that he issue an order dismissing claimant's request for hearing.

ORDER

Claimant's request for hearing is remanded to the Presiding Referee and he is directed to issue an order dismissing said request.

WCB CASE NO. 79-5357 April 7, 1980

SUSAN K, HARBOUGH, CLAIMANT
Jerry, G. Kleen, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

ISSUE ON REVIEW

The State Accident Insurance Fund seeks review by the Board of the order of the Referee which granted claimant an additional award of 48° for 15% unscheduled disability giving her a total award of 20%.

FACTS

Claimant, now 23 years of age, was employed by Fairview Hospital as a psychiatric aide and on September 16, 1978 she strained her back while assisting a resident in dressing.

Dr. Vigeland saw her on September 28, 1978 and diagnosed acute back strain. Dr. Shaw released claimant to return to her regular job on November 17, 1978.

On December 18, 1978 Dr. Shaw reported that he wanted to clear up a misunderstanding about claimant's disabilities. He indicated that when he released claimant to work he had failed to make it clear that heavy lifting, bending and stooping types of activities would cause pain in her dorsal spine. Claimant should avoid lifting and carrying weights in excess of 35 to 60 pounds. Dr. Shaw felt these limitations were likely to exist indefinitely because of the deformity of claimant's 9th dorsal vertebral body. He reported the claimant's condition was stationary.

A Determination Order, dated January 25, 1979, granted claimant compensation for temporary total disability and 16° for 5% unscheduled low back disability.

Claimant has a high school education and had some training in banking and finance in high school. She is presently attending Chemeketa Community College in a program of computer operation under the auspices of the Field Services Division. Claimant's past working experience has been as a desk clerk at a bowling alley, a cook and waitress and a substitute teacher's aide.

The Referee found claimant to be a credible witness and that she had proved, by a preponderance of the evidence, that she was entitled to a greater award for her loss of wage earning capacity. He granted her a total award of 20%.

BOARD ON DE NOVO REVIEW

The Board, on de novo review, would reverse the order of the Referee and reinstate the Determination Order.

Dr. Shaw placed lifting, bending and stooping restrictions on claimant but the evidence indicates these limitations were not for claimant's industrial low back injury. The restrictions Dr. Shaw reports are a result of the deformity of the 9th dorsal vertebral body.

The 5% award granted by the Determination Order is adequate for the residuals of her industrial low back injury. The Determination Order has properly compensated her for any loss of wage earning capacity she sustained from this injury.

ORDER

The order of the Referee, dated November 23, 1979, is reversed.

The Determination Order, dated January 25, 1979, is hereby affirmed.

WCB CASE NO. 79-3318 April 7, 1980

RAND S. HOWELLS, CLAIMANT
Gary K. Jensen, Claimant's Atty.
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 granted claimant an award of compensation equal to 22.5° for 15% loss of the left leg. This award was in lieu of, and not in addition to, the compensation awarded by a Determination Order, dated March 13, 1979, which had awarded claimant compensation equal to 15° for 10% loss of function of the left leg. The Fund contends that the increased award of compensation is not supported by the evidence in this case.

FACTS

Claimant, a 32-year-old clean-up worker, injured his left knee on April 3, 1978 while attempting to clear up a jam on a clipper tray. Claimant had previously injured the same knee several months prior to this injury. Dr. James Scott diagnosed this injury as an acute and chronic strain of the left knee with possible ligament or cartilage damage. Claimant indicated to Dr. Scott that he had injured his left knee in October 1977 and also in 1965, 1966 and 1975.

On May 16, 1978, Dr. Stanley James reported claimant complained of recurrent pain and swelling in the left knee since his last injury in April 1978. Claimant reported his standing tolerance was only two to three hours. He indicated he could walk quite well with the aid of a brace which had been prescribed by Dr. Scott. He stated he had difficulty going up and down stairs and inclines. Claimant indicated his left knee felt weak. Dr. James reported that claimant walked with a limp and kept the left knee stiff while walking.

He reported the claimant had difficulty in performing the stationary jog and was unable to do any other functional tests. The measurement of the left leg, 20 centimeters above the knee joint, was 44 centimeters on the left compared with 47 centimeters on the right. Dr. James found the range of motion of the left knee was full. His diagnosis was a possible internal derangement of the left knee.

On June 28, 1978, Dr. James performed an arthroscopy and medial meniscectomy on claimant's left knee.

On November 17, 1978, Dr. Theodore Pasquesi reported that claimant continued to have some swelling in his left knee. He also complained of a numb area lateral to the scar. Claimant felt that his left leg was not as strong as it had been before surgery. He was lifting weights to increase the strength in it. The diagnosis was: "Post-meniscectomy with considerable quadriceps weakness". Dr. Pasquesi opined that claimant's condition was probably stationary, although with continued exercises claimant would probably gain some additional quadriceps strength and recover some of the atrophy in the leg. He felt that the claimant could return to work not requiring repetitive climbing or walking on uneven ground. It was his opinion that the total impairment claimant had was 15%.

In December 1978, Dr. James indicated he agreed with Dr. Pasquesi's report. He indicated that he had examined claimant and the knee was functioning quite well. Claimant reported he had occasional aching in the knee with very continuous activity. Claimant indicated that he could return to his former place of employment and probably handle any job that they assigned him. He indicated he was still continuing to develop the strength in the left leg through an exercise program. Dr. James observed the claimant walked without a limp, he could jog in place, hop, squat, and duck waddle without any apparent discomfort or limitation. He found the left knee had a full range of motion without pain on the varus or valgus stress and motion.

A Determination Order, dated March 13, 1979, awarded claimant temporary partial disability from April 3, 1978 through June 27, 1978, and temporary total disability from June 28, 1978 through December 6, 1978, less time worked, and compensation equal to 15° for 10% loss of his left leg.

In April 1979, Dr. James recommended claimant be placed in a job assignment that did not require constant weight bearing in his lower extremity and avoid any heavy lifting and excessive climbing and squatting.

On August 17, 1979, Dr. James reported claimant had continued with his physical therapy which had helped him considerably. Claimant reported he felt the muscle strength in the left leg was equivalent to the right leg and he did not have as much soreness as he did before he began his course of physical therapy. He indicated he could go up and down steps and walk without any limitions. Claimant reported he was doing some jogging on the beach or on grass and could perhaps run a mile or two. However, he reported this caused achiness in the knee. Claimant was able to perform a stationary jog, fast jog, leaning hop test, squat, kneel and duck waddle without difficulty. Measurements taken 20 centimeters above the knee joint were 47.5 centimeters on both the right and left leg. Dr. James felt that the claimant should seek some form of occupation which did not require as much weight bearing as his current occupation or as much repetitive lifting. He found no evidence of any arthritis in the knee, but indicated without a meniscus, the mechanics of the knee joint were not normal. He placed no restrictions on claimant's activities but felt the claimant should seek his own level of activity.

Claimant testified he has worked for this employer since June 1977. Initially he worked as a spotter and then was promoted to clean-up which he indicated was more physical than the spotter job since it involved shoveling, raking, and sweeping. He stated that at the time of his injury in April 1978 to the time of his surgery he worked on a part-time basis and returned in December 1978 to work on clean-up for his employer. He stated in February 1979 he returned to the spotter job which was lighter. Presently, he complains of difficulty with heavy lifting, extended standing, pushing, negotiating stairs, bending, or running for long periods. He stated he can jog up to a mile to a mile-and-a-half on soft surfaces. Before this injury he said he could jog 4 to 6 miles. He indicated the main problem with his knee is pain which occurs with overuse. The knee will swell and becomes sore. Claimant stated he used to run his own printing business which he sold in December 1978. Currently he works for the present owners on a part-time basis.

Since he returned to work claimant has been able to work complete shifts including approximately five hours of overtime per week. He said he has sought no medical treatment since August 1979. Claimant testified that in July 1979 he was challenged by another worker to run three miles to a tavern. Claimant indicated he did this and lost the race by a block, however, appeared to be in better condition at the end of the race than the winner and challenged the winner to a rematch. There was also testimony that he had advised one of his co-workers that when he returned to work in December 1978 he had bid on a banding job because it would allow him more time to read. This job requires less physical activity than the clean-up or spotting job.

The Referee, based on all the evidence, found that claimant suffers a mild impairment as demonstrated by his physical activities. Therefore, the Referee increased the award of compensation granted claimant for his left leg injury an additional 5%. This gave claimant a total award of compensation equal to 22.5° for 15% loss of the left leg.

BOARD ON DE NOVO REVIEW

The Board, on de novo review, affirms the Referee's order. The Board notes that a doctor's opinion of impairment is one of the elements to be considered in arriving at an assessment of compensation for a scheduled injury. In this case, the Board finds, based on all the evidence, that the award granted by the Referee correctly reflects claimant's loss of function of the leg. Therefore, the Board would affirm the Referee's order.

ORDER

The Referee's order, dated September 25, 1979, is affirmed.

CLAIM NO. 166051 April 7, 1980

WILLIAM L. KELLER, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

On January 6, 1966, claimant sustained a compensable injury to his back. After a laminectomy, discectomy and an attempted fusion, claimant's claim was closed by a Determination Order, dated May 6, 1968 which granted claimant an award of compensation equal to 30% loss of the arm by separation for unscheduled low back disability. This Determination Order was appealed; the Referee granted claimant an additional award of compensation equal to 30% loss of the arm by separation for unscheduled low back disability.

In 1976, the claim was reopened and additional surgery was performed consisting of another laminectomy and discectomy at a different level, a laminectomy at the same level of the previous surgery, decompression of nerve roots, removal of the scar tissue and adhesions and a facet rhizotomy. The claim was again closed by a Determination Order which granted no additional permanent partial disability.

On September 13, 1978, claimant was examined by Dr. Donald Smith for a problem with his left neck, shoulder and arm with pain radiating to the elbow. Dr. Smith performed a myelogram and his final diagnosis was cervical spondylosis with nerve root compression at the C6 and C7 levels and pseudoarthrosis at the L4 and L5 levels. On December 13, 1978, Dr. Donald Schroeder performed a lumbar fusion of the L4-L5 level. This was because the previous fusion at that level had not been successful. The claim was reopened by the employer in September 1978. In July 1979, Dr. Schroeder released claimant for part time light duty beginning August 1, 1979. Claimant returned to work on August 1, 1979 and worked four hours per day. Dr. Schroeder released claimant to work, but to progress slowly to full time work. Claimant followed the doctor's advice and by October 9, 1979 was working eight hours per day. In December 1979, Dr. Schroeder indicated claimant had been working on a full time basis. Claimant still reported he had some burning in his back as well as intermittent cramping in his leg. Dr. Schroeder, in February 1980, reported that claimant's condition was medically stationary. He noted that claimant still had persistent episodes of spasm in his right leg and persistent long-term weakness in his right foot. Dr. Schroeder felt that claimant would have some degree of mild long-term residual disability because of this.

On February 24, 1980, the carrier requested a determination of claimant's current disability. The Evaluation Division of the Workers' Compensation Department, on March 26, 1980, recommended that claimant be granted an award equal to 5% loss of the right leg and additional temporary total disability compensation from September 18, 1978 through July 31, 1979, and temporary partial disability compensation from August 1, 1979 through October 28, 1979.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted temporary total disability compensation from September 18, 1978 through July 31, 1979 and temporary partial disability compensation from August 1, 1979 through October 28, 1979, less time worked. Claimant is also granted compensation for 5% loss of the right leg. These awards are in addition to all previous awards granted to claimant. The record indicates that most of the award granted for temporary disability has already been paid.

WCB CASE NO. 79-1366 April 7, 1980

CHRISTINE NELSON, CLAIMANT
Anson & Creighton, 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 ordered it to reopen claimant's claim for payment of temporary total disability compensation from January 8, 1979 to June 28, 1979, and to resubmit the matter to the Evaluation Division of the Workers' Compensation Department for a rating of claimant's permanent partial disability and awarded claimant's attorney a fee.

FACTS

Claimant, a 29-year-old psychiatric aide, alleges she sustained an injury to her neck and back on April 3, 1978 while participating in a self-defense class. Dr. John Messer diagnosed a muscle spasm in claimant's neck.

On April 17, 1978, Dr. John Stevens reported claimant injured her neck in a self-defense class while trying to learn how to break away from choke holds. He diagnosed this injury as a cervical strain. He felt claimant should participate in some form of physical therapy and that she could be released in a very short time for work. He felt that claimant should be engaged in modified work for 6 weeks with no heavy lifting, no overhead work and no prolonged exertion.

In May 1978, Dr. Darald Bolin, D. C., reported he found claimant had a minor "swelling and loss of flexibility of the first cervical". He diagnosed cervical strain resulting in suboccipital cephalgia. He reported that claimant had been injured in April 1978 and in 1969. Claimant had received 71 chiropractic treatments after her 1969 injury. He indicated after these injuries a sudden effort in lifting or an inertia type jarring often exacerbated the symptoms. He felt the incident of April 3, 1978 was such an episode. He felt claimant could return to regular employment on June 5, 1978. Dr. Bolin concluded claimant had a pre-existing dyskinesia of the first cervical motor unit that was strained on April 3, 1978. He indicated "the predisposition of this condition was caused by the complication of the pre-existing condition". However, he felt that there was no question that the claimant had been injured in April causing a recurrence of her symptoms.

On September 29, 1978, Dr. Bolin reported that claimant was complaining of suboccipital cephalgia, minor suboccipital swelling, and loss of flexibility in the first cervical segment. He felt these were an exacerbation of the symptoms caused by an injury of April 3, 1978 and had been recurring at the rate of about once every 30 days. He felt there was no disability and no evidence of any permanent impairment as a result of this injury. He did not feel there was any need to reopen the claim for disability at that time.

A Determination Order, dated October 30, 1978, awarded claimant temporary total disability compensation.

On January 24, 1979, Dr. Bolin reported that claimant had returned complaining of severe suboccipital cephalgia and loss of upper cervical flexibility. He reported that claimant denied any new incidents or injuries and she reported she was unable to perform the duties of her regular employment. Dr. Bolin felt claimant should be placed on total disability as of January 8, 1979, the date he examined her. Dr. Bolin referred claimant to Dr. Robert Anderson, an orthopedic doctor. Claimant was never examined by Dr. Anderson.

On February 1, 1979, the Fund denied claimant's request for reopening.

On April 13, 1979, Dr. Don Poulson reported claimant continued to complain of pain in the posterior portion of her neck which at times radiated into the right upper extremity. She described this pain in the cervical spine as constant and aggravated by bending or lifting. In his examination he found that claimant had limitation in the range of motion of her cervical spine. In his opinion claimant had a chronic strain and very likely had a degenerative disc which was slightly bulging, giving pain in the posterior neck and right extremity at times, depending upon her activity. He felt claimant should have a myelogram to verify this opinion. A myelogram was performed on May 9, 1979 and was normal.

On June 28, 1979, Dr. Poulson reported that he did not feel the slight change found in a myelogram which explained her symptoms, would warrant any further treatment. He felt the claimant's claim could remain closed without any increase in disability.

Dr. Poulson was deposed. He testified that claimant had not told him she had problems before she took the self-defense course. He said Dr. Lundberg had done a myelogram on May 9, 1979 and had concluded: "There is assymetry of the nerve roots at the C7-T1 root level, with filling of the nerve root on the left side and none on the right. However, there is extradural impression to indicate a herniated disc fragment". When asked to interpret the myelogram report he said there might be a very slight bulging on the C7-T1 level, just below the bottom vertebra of the neck. He felt it "could be" the bulging was very slight and that there had been no true herniation or fragments out of place. He said the claimant told him the first time she hurt her neck was during the self-defense course. He felt that her continuing symptoms were related to that injury based on the history given by the claimant.

Dr. Darald Bolin was also deposed. He stated that claimant had given him a history of having intermittent numbness in her arms and suboccipital headaches. She related that she had fallen down some steps just prior to the birth of her child and that the symptoms came on after that incident. He reported there was a recurrence of this condition on March 16, 1977 and again on June 22, 1977. He also treated claimant on April 3, 1978. He stated this was not emergency treatment, but was given to claimant only because she felt a "symptomatic" need for the treatment. He indicated that he had previously treated claimant for her problems and that when he treated her on April 3, 1978 he treated the lower sixth cervical area which was the same as he had previously treated. X-rays revealed there was a slight kyphosis of claimant's cervical spine. Dr. Bolin found that she had a slight postural defect. He felt her suboccipital headaches, given a history of eight or nine years duration, was a chronic problem. On cross-examination, Dr. Bolin opined that claimant had an injury on April 3, 1978 which aggravated her pre-existing condition. He indicated that after April 3, 1978 he found the presence of acute inflammatory reaction which represented a worsening of her condition. It was his opinion that claimant's condition had aggravated. Dr. Bolin indicated he released claimant for work on May 30, 1978.

At the hearing claimant testified that her previous treatment for her neck had been for the relief of headaches. She said she did not have actual pain in the neck area. She testified that since her injury in the self-defense course, she had had pain in the neck itself. She testified she had swelling at the base of her neck which she had never experienced before and her neck was stiff and sore. She indicated that exertion caused an increase of the pain in her neck. Claimant stated that after being released for work she returned to a different employer, however, had to cease this work because of an increase in the pain in her neck.

The Referee found, based on all the evidence, that the denial of the Fund was incorrect. The Referee found that Dr. Bolin was quite certain that the claim should be reopened for temporary total disability compensation. Therefore, the Referee reopened the claim for payment of temporary total disability compensation from January 8, 1979 until Dr. Poulson's report of June 28, 1978 which indicated that claimant was again medically stationary and ordered the matter be submitted to the Evaluation Division of the Workers' Compensation Department for closure pursuant to ORS 656.268 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 does not find that the preponderance of the evidence in this case establishes that claimant's condition has worsened since her last arrangement or award of compensation. The medical evidence indicates that claimant has a history of back and neck complaints pre-dating her injury in April 1978. The Board does not find the medical evidence indicates that her condition worsened after the claim was closed in October 1978. Dr. Poulson, in his report of June 28, 1979, indicates that in his opinion the claim should be reopened for additional diagnostic purposes. Dr. Poulson, in April 1979, indicated that there was nothing more he could offer claimant on a conservative basis, but that she needed additional diagnostic work. The Board finds this evidence coupled with reports of Dr. Bolin do not indicate that claimant's condition has worsened.

ORDER

The Referee's order, dated October 23, 1979, is reversed.

The State Accident Insurance Fund's denial, dated February 1, 1979, is affirmed.

CLAIM NO. 2-70-119 April 7, 1980

DWAIN H. OLSEN, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

On November 24, 1970, claimant sustained a compensable injury to his back. His claim was initially closed by a Determination Order, dated July 15, 1971, which granted temporary total disability compensation only. The claim subsequently had been reopened and closed resulting in claimant being granted a total award of 40% unscheduled disability for his back injury.

In October 1978, Dr. James Degge reported that claimant continued to complain of back pain and pain in both legs. Claimant had a history of having a lumbar fusion because of his injury in April 1975. Dr. Degge found that claimant had a pseudoarthrosis at the level which he previously operated on. He suggested that this be repaired. The carrier voluntarily reopened this claim in November 1978. The pseudoarthrosis was repaired on November 7, 1978 by Dr. Degge.

On February 14, 1980, Dr. Degge found claimant's condition to be stationary. He found that claimant had a solid fusion of the L4-5, S1 intervals. He opined that the permanent residuals in this case were in the mid range of mildly moderate. He released claimant for work on the date of his examination.

A referral to vocational rehabilitation was made to assist claimant in finding suitable employment.

On February 28, 1980 the carrier requested a determination of claimant's current disability. The Evaluation Division of the Workers' Compensation Department, on March 28, 1980, recommended claimant be granted an award of additional temporary total disability compensation from November 6, 1978 through February 14, 1980 and no permanent partial disability in excess of that which he had previously been granted.

The Board concurs in this recommendation.

ORDER

Claimant is hereby granted temporary total disability compensation from November 6, 1978 through February 14, 1980, less time worked. The record indicates that this award has already been paid to claimant.

WCB CASE NO. 79-1819 April 7, 1980

STAN OLSON, CLAIMANT
Vance M. Wolfe, Claimant's Atty.
Lawrence Paulson, Employer's Atty.
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 found that its denial of claimant's aggravation claim should be set aside and remanded the claim to it for acceptance and payment of compensation and awarded claimant's attorney a fee. The Referee affirmed Argonaut Insurance Company's denial of claimant's claim for a new injury.

FACTS

Claimant, a 20-year-old choker setter for Cree Logging Company, injured his left knee on October 25, 1977 when he fell. The Fund provided Workers' Compensation insurance for this employer. Dr. Herbert Spady diagnosed this injury as a medial-collateral ligament sprain. Dr. Spady indicated that claimant had also previously injured his right knee. Because claimant continued to have difficulty with his left knee, Dr. Spady, on January 17, 1978, performed an arthroscopy of the left knee. This revealed no abnormalities except for a synovitis of the patellar fat pad. Dr. Spady's diagnosis was traumatic synovitis.

Claimant had injured his right knee playing football in high school.

In April 1978, Dr. Daniel Halferty, medical examiner at the William A. Callahan Center, reported that based on this examination claimant should not return to his previous job or any job involving "climbing slopes, etc." He felt the claimant would have a fairly good recovery of normal function in the knees if he could walk on smooth surfaces, was not required to maintain a position of squatting, or did not have to climb and descend stairs and ladders repetitively.

Dr. Spady, on June 6, 1978, opined that claimant's condition was stationary and that vocational rehabilitation should be considered.

A Determination Order, dated June 19, 1978, awarded claimant temporary total disability compensation and compensation equal to 5% loss of his left leg. A Stipulation, dated November 9, 1978, increased this award an additional 15%.

On August 14, 1978, claimant began employment with Microflect Company. He obtained this employment with the assistance of the Field Services Division of the Workers' Compensation Department. This employer's workers' compensation coverage was provided by Argonaut Insurance Company.

On January 4, 1979, claimant fell from a ladder sustaining a twisting injury to his left knee. Claimant testified that while descending a ladder, his left leg "gave out". He then caught his foot in the ladder and slipped and fell. Dr. Spady reported the same day that he felt claimant had a simple sprain of the knee and that claimant's symptoms would subside rather quickly. Claimant's supervisor reported claimant had caught his foot on a ladder while descending it, injuring his knee.

On January 31, 1979, Argonaut Insurance Company denied claimant's claim. The basis of this denial was that claimant's present medical condition was due to a prior injury.

Dr. Spady, in February 1979, indicated that claimant had sustained a "new injury" on January 4, 1979. He reported that claimant's knee condition had not changed since the original closure of his claim except for this new injury and that the Fund could continue to assume that claimant's condition was stationary as far as its claim was concerned. Dr. Spady felt since claimant's injury occurred for a company covered by Argonaut Insurance, he didn't feel "this injury is of particular concern" to the Fund.

On February 16, 1979, the Fund denied claimant's aggravation claim. The basis of its denial was the fact that claimant's condition was related to a new injury.

On March 7, 1979, the Workers' Compensation Department issued an order designating paying agent pursuant to ORS 656.307 which ordered Argonaut Insurance Company to immediately commence payment of benefits due to claimant until such time as a responsible party had been determined by Hearing Order.

In his deposition, claimant testified that on January 4, 1979, he had gone up the moveable stairs, obtained three or four couplings and turned to go down the stairs. He indicated he had taken about two to three steps and his heel caught a little "but if my leg wouldn't have give out because of my weight on it and it gave out and I fell". Claimant denied having any prior incidences where his leg had given out.

Dr. Spady's deposition was also taken. Dr. Spady stated that he had been told that claimant had fallen from a ladder, twisting his knee. He said he based his opinion that this was a new injury on the history of the injury and the pain in the knee. He was unable to state that claimant's prior injury to the left knee caused him to fall on January 4, 1979. Dr. Spady indicated that he had not seen claimant from June 1978 until the day of January 4, 1979 injury. He assumed because of this claimant's knee had been in pretty good shape. He stated there was no history of any previous difficulty with the knee giving way. It was his opinion that the injury claimant suffered with Cree Logging Company did not increase the likelihood of his knee giving way.

The Referee found that claimant's claim for his January 4, 1979 disabling leg condition was compensable as an aggravation claim. The Referee based his opinion on the fact that claimant testified that his left leg gave out prior to the time that he caught his foot on the rung of the ladder and the claimant's opinion that except for his leg giving out he would not have fallen. The Referee did not give Dr. Spady's opinion much weight because he felt it was based on an inadequate history of the January 4, 1979 incident. The Referee, based on all the evidence, was unable to say that claimant's work with Microflect was a material factor in his January 1979 disabling leg condition. Therefore, the Referee allowed the claim as an aggravation claim 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 finds that the preponderance of the evidence establishes that claimant's fall from the ladder while employed by Microflect was the result of him having caught his foot on the ladder and not because of the original knee injury. The original report prepared by claimant's supervisor indicates that claimant had told the supervisor that he had caught his foot on the ladder and fallen. Claimant, in his deposition, also testified that he caught his foot a little and then that the leg gave out because he had put weight on it causing him to fall. Dr. Spady indicated that between June 1978 and January 1979 he felt claimant's knee was fairly good, but that claimant did not have a perfectly normal knee and had repeated incidences and opportunities for his knee to give way. However, claimant testified that his knee had never given way before. Dr. Spady stated that since the knee had not given way before there was no medical reason for it to give way on January 4, 1979. He was unable to say that the original injury caused the injury of January 4, 1979. It was his opinion that claimant's original injury in October 1977 was not the type that would give an increased likelihood of the knee giving way. Therefore, the Board concludes, based on all the evidence in the file, claimant's claim for a disabling leg condition resulting from a fall on January 4, 1979 is compensable as a new injury.

ORDER

The Referee's order, dated October 30, 1979, is reversed.

It is hereby ordered that the denial of claimant's aggravation claim issued by the State Accident Insurance Fund on February 16, 1979 is affirmed.

The denial of claimant's claim for a new injury issued by Argonaut Insurance Company on January 31, 1979 is set aside and claimant's claim is remanded to it for acceptance and payment of compensation as provided by the Workers' Compensation Law until the claim is closed pursuant to ORS 656.268.

Further, Argonaut Insurance Company is ordered to reimburse the State Accident Insurance Fund for payments it has made in compliance with the Referee's order.

CLAIM NO. C 295452 April 7, 1980

DARRELL C. THOMPSON, CLAIMANT
Malagon & Yates, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On March 23, 1971, claimant sustained an injury to both of his feet and his back. The claim was initially closed by a Determination Order, dated October 13, 1972, which awarded claimant permanent partial disability for 20% loss of the right foot equal to 27° and 40% loss of the left foot equal to 54° as well as a period of temporary total disability compensation. This claim was subsequently reopened and closed resulting in claimant being granted a total award of compensation equal to 54° fr 40% loss function of the right foot, 108° for 80% loss of function of the left foot and compensation equal to 32° for 10% unscheduled disability for his low back injury.

In June 1978, Dr. Robert Moseley reported that claimant complained of constant pain in both heels and pain in the low back. The diagnosis was severe post-traumatic osteoarthritis of the left sub-talor joint, chronic lumbar strain, due to abnormal gait and minimal osteoarthritis, and decreased range of motion in the left ankle probably due to chronic soft tissue scarring. He recommended that claimant continue using a cane and that eventually a triple arthrodesis might be necessary on the left foot. He noted that claimant's symptoms and the results of the examination were not entirely consistent. Dr. Moseley felt it was very difficult to state how much of claimant's back pain was organic in nature as a result of the limp and how much was emotional. He felt claimant was certainly disabled from any type of work requiring standing or ambulation because of the arthritis of the left foot and he felt this would not be significantly changed by a triple arthrodesis.

In November 1979, Dr. Arthur Eckhardt reported claimant appeared to be having increasing difficulty with his low back in the form of chronic myofascitis and limitation of back motion. He felt claimant's overall functional capacity was markedly decreased because of his back disability and because of pain in his heels. He reported that after comparing the findings of his physical examination with those reported by the Orthopaedic Consultants in December 1977, he did not find much difference in the objective findings and measurements. X-rays, when compared with x-rays taken earlier, revealed no significant differences. He noted claimant's history, however, suggested that he did, at the present time, have increasing low back difficulty which was severe enough at the present time to make it very unlikely that claimant could be gainfully employed considering also the chronic disability of his heels.

On February 28, 1980, the Orthopaedic Consultants indicated it was their opinion that claimant's condition was stationary and he would not benefit from any further treatment. They felt claimant definitely could not return to his former occupation with or without limitations. However, they felt that he would be able to do some type of sedentary work if such were made available. After noting the previous awards for loss of function of the right foot and loss of function of the left foot and unscheduled disability award for the low back injury, they felt that the low back injury should be increased to 20% loss of function in the low back. This is made on the assumption that the low back condition had been accepted as part of the injuries sustained in March 1971.

On March 24, 1980, the State Accident Insurance Fund forwarded copies of the medical reports to the Board. The Fund indicated it opposed reopening the claim as the recent medical reports indicated there was no worsening of the condition at this time. They would not oppose an order increasing the amount of disability in regard to claimant's low back injury.

The Board, after thoroughly reviewing all the evidence, concludes that reopening of the claim under its own motion jurisdiction for the injury to either foot is not justified. However, based on the evidence submitted, the Board concludes that claimant is entitled to an increased award of compensation for his low back disability. Therefore, the Board would grant claimant an award of compensation equal to 80° for 25% unscheduled disability for his low back injury. This is in lieu of all previous awards for unscheduled disability for this condition. Claimant's attorney is entitled to an attorney's fee equal to 25% of the increased compensation granted by this order, payable out of said compensation as paid, not to exceed $3,000.

IT IS SO ORDERED.

CLAIM NO. ZC213127 April 7, 1980

CAROLYN I. TURAN, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On November 13, 1979, claimant, by and through her attorney, requested the Board exercise its own motion jurisdiction and reopen her claim for her October 24, 1969 injury. Attached to this request were several medical reports.

In August 1979, Dr. Chen Tsai found claimant was "Status post lumbar diskectomy presumably at L4-5 of April, 1973; status post L4-5, L5-S1 interbody fusions of January, 1974 and status post C4-S1 fusion [sic] of March, 1978". Claimant reported since October 1969, she had been experiencing neck and right arm pain.

On October 9, 1979, the Orthopaedic Consultants reported claimant's condition was not medically stationary. They felt claimant needed a vascular surgery consultation to determine if she had a thoracic outlet syndrome. They indicated that if claimant had a thoracic outlet syndrome it would be difficult for them to relate it to her October 1969 injury.

Claimant was hospitalized in January 1980 for recurrent back pain and a "thoracic outlet syndrome?". Dr. Nelson opined claimant should be referred to the Pain Clinic. Dr. Nelson opined claimant's back complaints were related to her industrial injury of "10/24/79 [sic]".

In February 1980, Dr. Nelson indicated claimant had undergone three back surgeries, but still had back pain. He felt nothing further could be done with medicine, physical therapy or surgery and suggested claimant be referred to the Pain Clinic.

The State Accident Insurance Fund, on March 13, 1980, advised the Board "responsibility for the thoracic outlet syndrome continues to be opposed". Further, it felt any action on claimant's own motion request should be held in abeyance until claimant was again examined by the Orthopaedic Consultants.

The Board, after reviewing all the evidence in this case, finds claimant's claim should be reopened if and when claimant is admitted to the Pain Clinic for care and treatment until closed under ORS 656.278. Further, the Board finds claimant's thoracic outlet syndrome is related to her October 24, 1969 injury and its sequalae and remands it to the State Accident Insurance Fund for acceptance and payment of benefits under the Workers' Compensation Law until closed under ORS 656.278.

ORDER

Claimant's claim for an injury sustained on October 24, 1969 shall be reopened if and when claimant is admitted to the Pain Clinic for care and treatment until closed under ORS 656.278. Claimant's thoracic outlet syndrome is found to be related to her 1969 injury and is remanded to the Fund for acceptance and payment of compensation due claimant until closed under ORS 656.278.

Claimant's attorney is hereby granted as a reasonable attorney's fee a sum equal to $100 for prevailing on the thoracic outlet syndrome condition. Claimant's attorney is entitled to 25% of any compensation granted to claimant as a result of this order, payable out of said compensation as paid, not to exceed $3,000.

WCB CASE NO. 78-7286 April 7, 1980
WCB CASE NO. 79-3073

DAVID E. WILLIAMS, CLAIMANT
Carl M. Dutli, Claimant's Atty.
William W. Holmes, Defense Atty.
Request for Review by Employer

ISSUE ON REVIEW

The employer seeks Board review of the Referee's order which reversed its denial of claimant's claim, dated March 20, 1979; ordered claimant be granted an additional 64° for 20% unscheduled disability for his low back injury; and awarded an attorney's fee to claimant's attorney.

FACTS

Claimant has allegedly suffered three injuries. Claimant, a 32-year-old farm hand, sustained a compensable injury to his back on September 21, 1977 when while pulling an irrigation dam out of an irrigation canal, he slipped and injured his back. This injury was diagnosed as an acute low back strain. A Determination Order, dated December 6, 1977, awarded claimant temporary total disability compensation.

On January 9, 1978, claimant was lifting hay bales and injured his back. He was working for the same employer. On January 16, 1978, Dr. Ray Miller, after a myelogram had revealed a defect at the L5-S1 level on the left, performed a partial laminectomy with removal of an extruded disc.

Dr. Denison Thomas, on January 27, 1978, opined claimant's injury in January 1978 was an exacerbation of his injury on September 21, 1977.

Dr. Miller released claimant for regular work on April 15, 1978. On May 30, 1978, Dr. Miller opined claimant's condition was medically stationary and he should have no permanent impairment.

A Determination Order, dated August 14, 1978, awarded claimant additional temporary total disability compensation and compensation equal to 16° for 5% unscheduled disability for his low back injury.

On January 6, 1979, claimant alleges he injured his back while driving a tractor; he had muscle spasms in his back and drove the tractor into an irrigation canal. Dr. Thomas diagnosed this injury as a lumbar strain.

In February 1979, Dr. Miller reported claimant had been hospitalized because of muscle spasms, pain in his back, and bilateral buttock pain. On March 6, 1979, another myelogram revealed very minimal findings at the L5-S1 level on the left side.

On March 20, 1979, the employer's insurer denied claimant's claim for the alleged injury on January 6, 1979.

On March 21, 1979, Dr. Miller reported claimant's complaint of left leg pain had completely disappeared. Claimant continued to complain of low back pain. Dr. Miller indicated claimant was walking 2-3 miles per day and doing exercises to strengthen his back and abdominal muscles.

At the hearing, claimant testified he was currently working as a timber faller. Claimant said he does a lot of work on his knees to cut as close to the ground as possible. He indicates he cannot bend over repetitively because of pain in his back. Claimant testified he occasionally lays down to relieve his back pain. The back pain is increased with bending, lifting, stooping, and riding in a car for prolonged periods of time. He has restricted his social and sports activities. Claimant said he was not using any pain medication. He has an 11th grade education and has obtained a GED. Previously, he worked on ranches and in the woods.

The Referee set aside the denial of March 20, 1979 and remanded the claim to the employer for acceptance and payment of benefits to which claimant is entitled. The Referee awarded claimant's attorney a fee of $950 for overcoming the denial. Further, the Referee granted claimant an additional award of compensation equal to 64° for 20% unscheduled disability for his low back and awarded claimant's attorney a fee payable out of the increased compensation.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, modifies the Referee's order. The Board affirms the Referee setting aside of the March 20, 1979 denial and the award of attorney's fee for overcoming the denial.

The Board does not concur with the Referee's awarding of additional compensation for unscheduled disability. The preponderance of the medical and other evidence does not establish that claimant sustained such a large loss of wage earning capacity. Granted claimant had back surgery and continues to have low back pain. However, claimant now is employed as a timber faller. This is strenuous physical work. Considering this along with claimant's age, education and other relevant factors, the Board finds claimant is entitled to an award of compensation equal to 48° for 15% unscheduled disability for his low back injury. This is in lieu of all previous awards for unscheduled disability.

ORDER

The Referee's order, dated September 19, 1979, is modified.

Claimant is hereby granted an award of compensation equal to 48° for 15% unscheduled disability for his low back injury. This is in lieu of all previous awards for unscheduled disability. The remainder of the Referee's order is affirmed.

WCB CASE NO. 79-4571 April 7, 1980

ROBERT YATES, CLAIMANT
AAIF, Legal Services, Defense Atty.
Motion & Order To Dismiss

Appellant, Industrial Indemnity, move to dismiss the present request for review in the above matter.

IT IS SO ORDERED this 7th day of April, 1980.

WCB CASE NO. 79-4390 April 8, 1980

TONY ALFANO, CLAIMANT
Lang, Klein, Wolf, Smith, Griffith & Hallmark, Claimant's Attys.
Schwabe, Williamson, Wyatt, Moore & Roberts, Defense Attys.
Request for Review by Employer
Cross-appeal by Claimant

ISSUE ON REVIEW

The employer and claimant seek Board review of the Referee's order which: (1) awarded claimant compensation equal to 32° for 10% unscheduled disability, (2) awarded claimant's attorney a fee, and (3) ordered that the employer could credit payments for temporary total disability compensation paid after March 5, 1979 against the permanent partial disability award. The employer contends it should be given credit for temporary total disability compensation paid from November 27, 1978 through March 5, 1979.

Claimant contends this award of temporary total disability compensation granted by the Determination Order, dated April 2, 1979, was correct and he is entitled to an additional award of unscheduled disability. Further, claimant contends the Referee erred in not admitting proposed supplemental exhibits A and B.

FACTS

Claimant, a 25-year-old machine operator, on May 15, 1978, suffered a compensable injury to his back while pulling on a 500-pound steel plate. X-rays were normal. Dr. G. McGowan diagnosed this injury as an acute low back strain. On May 30, 1978, claimant was released for regular work. Claimant returned to work and worked two days before he had to stop because of back pain.

In June 1978, Dr. Paul Blaylock reported claimant had tried a second time to return to work, but was unable to do so. X-rays revealed minimal scoliosis and a defect at the S1 level. Dr. Blaylock felt claimant had suffered a moderate to severe myofascial injury and would benefit from conservative therapy. He did not feel claimant would suffer any permanent residuals. Claimant was hospitalized from June 27, 1978 to July 3, 1978 for conservative back care. Upon his discharge claimant was fitted with a back brace.

In August 1978, Dr. Blaylock reported claimant continued to have back and leg symptoms. He felt claimant had a moderate to severe mechanical back problem which was improving. He released claimant effective August 21, 1978 for modified work, not to include heavy lifting, "chronic" bending or stooping. Dr. Blaylock had indicated in July 1978 he felt claimant would be unable to return to his previous work of pulling heavy plates. Dr. Blaylock, in late August 1978, reported claimant had been unable to return to full time work and was having recurrent hip, leg, and back problems. He referred claimant to Dr. Calvin Kiest.

On September 6, 1978, Dr. Kiest examined claimant and felt claimant should have a myelogram. This was done on September 19, 1978 and no defects were found.

Also, in September 1978, Dr. F. P. Nash opined claimant should not return to his previous employment. He felt it was not in claimant's best interest to return to a heavy labor type of employment. Dr. Nash felt claimant should be referred for on-the-job training and vocational rehabilitation.

On November 27, 1978, Dr. Nash reported claimant continued to have low back and left hip pain. He noted positive neurological findings. Dr. Nash opined claimant's condition was medically stationary although not vocationally stationary.

Claimant attended the William Callahan Center from February 12, 1979 through March 5, 1979. Dr. Walter Kohlheim, a medical examiner, felt claimant had the residual of an acute sprain of the lumbar spine and possibly a "herniated fat pad of the lumbar fascia at the level of L3 on the left". He did not feel claimant would be able to do work as heavy as he had done previously. It was his opinion claimant had reached a maximum degree of improvement. Dr. Louis Loeb, a psychologist, reported claimant had a high school education.

Claimant reported he had worked in ship repair, in truck driving, in bartending and in managing restaurants. Claimant indicated he disliked this employer and would not return to work there. Dr. Loeb classified claimant as a "functional nonreader". Dr. Loeb felt claimant at that time was moderately severely emotionally disturbed and was a poor candidate for return to gainful employment.

A Determination Order, dated April 2, 1979, awarded claimant temporary total disability compensation from May 15, 1978 through March 5, 1979.

Claimant indicated to Field Services Division representative he had applied with the U.S. Post Office and City Park Department for jobs. He also expressed interest in light truck driving. The Field Services Division found claimant was not vocationally handicapped.

In May 1979, Dr. Nash reported claimant continued to have low back pain which radiated into the left leg. He felt claimant needed vocational rehabilitation. He did not release claimant to his previous level of employment.

On June 22, 1979, Dr. Theodore Pasquesi reported claimant complained of daily low back pain made worse by bending, stooping, or attempting to lift. The diagnosis made by Dr. Pasquesi was chronic lumbar instability. He felt claimant's condition was stationary and claimant could work in a predominantly sedentary job which did not require repetitive bending, stooping and twisting. Dr. Pasquesi opined claimant had 10% impairment based on chronic pain.

Claimant testified at the hearing he continues to have low back and left leg pain. This pain is made worse by lifting, standing or bending. Claimant said he has limited his activities. Claimant indicated he participated in an employer program for injured workers for half of a day, but was dissatisfied with this program and quit it. Also, claimant testified he voluntarily left the Callahan Center because he felt he was not benefiting from the treatment. Claimant stated he has placed several applications with different employers, but has not been hired.

The Referee, based on all the evidence, found: (1) claimant was entitled to an award of compensation equal to 32° for 10% unscheduled disability for his back injury; (2) awarded claimant's attorney a fee out of this increased compensation; and (3) allowed the employer to credit payments made for temporary total disability paid after March 5, 1979 against the permanent partial disability award granted by the Referee's order.

On September 25, 1979, the Hearings Division received a motion requesting reconsideration from the employer. Claimant also filed a motion for reconsideration and requested supplemental exhibits be admitted. The Referee denied all the motions.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, modifies the Referee's order. The Board finds the Referee correctly denied the claimant's request to have additional exhibits admitted in the record.

The Board finds the employer is entitled to credit payments made after November 27, 1978 through February 11, 1979 against any award of compensation for permanent partial disability compensation. Claimant's condition was found to be medically stationary on November 27, 1978 by Dr. Nash. Claimant has been overpaid temporary total disability compensation and the employer is entitled to offset such overpayment against an award of permanent partial disability compensation. However, claimant is entitled to temporary total disability compensation for the period of February 12, 1979 through March 5, 1979 because of his enrollment at the Callahan Center for treatment and evaluation.

Regarding the issue of extent of disability, the Board finds claimant is entitled to an additional award of compensation for permanent partial disability. Claimant is barred from returning to his previous occupation or similar work. He has some continuing difficulty with his low back and left leg. Dr. Pasquesi opined claimant could perform work of a sedentary nature which did not require repetitive bending, stooping and twisting. He felt claimant had a 10% impairment. Claimant is 26 years old and has a high school education, but has a reading deficiency. He has a varied work history. The Board finds based on all the evidence 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 all previous awards claimant has been granted for this injury.

ORDER

The Referee's orders, dated September 19, 1979, and dated October 31, 1979, are modified.

Claimant is hereby granted an award of compensation equal to 64° for 20% unscheduled disability. This is in lieu of any previous awards of unscheduled disability for this injury.

The employer is allowed to credit such sums of temporary total disability compensation it paid from November 27, 1978 through February 11, 1979 against the permanent partial disability awarded.

Claimant is granted compensation for temporary total disability compensation from February 12, 1979 through March 5, 1979.

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.

The remainder of the Referee's orders are affirmed.

WCB CASE NO. 79-5065 April 8, 1980

DAVID ALRICK, CLAIMANT
Gary D. Allen, Claimant's Atty.
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 a cervical condition and ordered it accepted as being related to his industrial accident of May 24, 1979, and awarded claimant's attorney a fee of $1,000. The Fund contends that the Referee disregarded the preponderance of the medical evidence in favor of the lay testimony in holding the alleged neck problems were compensable. It further contends that the award of attorney fees in the amount of $1,000 in this case was excessive.

FACTS

Claimant, a 28-year-old group life coordinator at MacLaren School, sustained an injury to his left eye and allegedly to his neck on June 27, 1978 when he was struck in the side of the face by a soccer ball while participating in a student activity. Dr. Sanford diagnosed this injury as a corneal abrasion.

Claimant continued to complain of tenderness in the left eye especially when he awoke in the morning. He indicated his eye felt like it was being scratched. On November 13, 1978, Dr. Thomas Stevens diagnosed keratitis without ulcer of the left eye. Dr. Stevens did not feel this would result in any permanent impairment.

On January 11, 1979, Dr. F. F. Schmidt, D.C., reported that claimant said since the time of the injury in June 1978 he had continued to experience cervical spinal pain, headache, loss of energy and postural vertigo. Dr. Schmidt found that all the cervical ranges of motion were normal. However, he did find some tenderness in the neck area.

On May 3, 1979, Dr. Kelley, D.C., reported that he had examined claimant. Claimant had a history of a previous back injury in March 1973 which resulted in an unscheduled disability award. Claimant denied any prior injuries to the neck. Claimant advised Dr. Kelley he had continued treatment for his low back condition on a maintenance basis. Claimant indicated he began to have more difficulty in the neck region late in December recalled that he was having "uncomfortable tense grating feelings in my neck, severe headaches, and radiating of pain down between my shoulder blades". Claimant continued to complain of occasional stiffness in the neck and on neck movement of hearing some type of noises in the neck. Dr. Kelley found it interesting that claimant had previously had x-rays of the cervical spine in 1975, 1976 and 1977. He found it somewhat difficult to understand why cervical x-rays were not taken shortly after claimant's injury in June 1977 considering claimant's history of an injury at that time. Claimant related that he had advised Dr. Schmidt of a new injury when he first saw him on June 29, 1978. It was Dr. Kelley's opinion that claimant did not require continued chiropractic treatment or medical treatment for the alleged injuries to the spinal segments. Claimant reported that he had, in the past, required treatment to the cervical spine as a result of his occupational low back injury in 1973. Based upon subjective and objective factors in this case, the history given by claimant, examination of and consultation with claimant, Dr. Kelley felt claimant's current treatment for cervical and upper mid thoracic complaints was related to the pre-existing condition and not related to the alleged injury of June 27, 1978.

Also, on May 3, 1979, Dr. R. Glenn Snodgrass, a neurologist, reported he found negative physical findings referrable to the neck and cervical nerves. He noted that x-rays and claimant's folder suggested to him that claimant had received treatment for his neck in 1975, 1976 and 1977. He suspected that claimant's symptoms since his injury of 1978 were simply more of the same. Further, Dr. Snodgrass strongly suspected that increased neck symptoms were due to the increased "fiddling around" of claimant's neck more than any

injury to his neck. Dr. Snodgrass did not feel that claimant would delay in filing a claim, because claimant had a history of increased neck symptoms following his industrial injury in June 1978 and demonstrated concern about his body. Therefore, he was rather doubtful about any actual neck injury relating to the event described in June 1978. Finally, Dr. Snodgrass opined that if claimant did, indeed, sustain a neck injury, he found no evidence of any persistent problem or continuing impairment and would consider claimant's condition medically stationary.

On May 24, 1979, the Fund denied claimant's claim.

At the hearing, claimant testified that he advised Dr. Schmidt within two to three days after the incident of an injury to his neck. However, Dr. Schmidt continued to bill the carrier for the 1973 injury. He stated that prior to January 2, 1979, Dr. Schmidt had always treated his low back and worked his way up to the neck. He said in January 1979, however, the doctor reversed the order of the treatment. After Dr. Schmidt began treating the neck, claimant testified he was treated as often as once a week but shortly before the accident the treatments were not so frequent.

Claimant's wife testified that claimant's neck problems came on gradually. She indicated that they began when claimant had been jogging and riding his motorcycle. Later in her testimony she stated the neck problem came on in a matter of weeks after the accident.

Mr. Leroy LaCoss, a co-worker, testified that claimant had never complained of any problems with his neck before the incident in June 1978. He stated that he had seen the accident. He said claimant was struck on the side of the head with a ball and he saw claimant's head jerk back to the right.

The Referee, after reviewing all of the evidence, found no evidence of the existence of a "pre-existing condition". The Referee found there was no evidence that claimant had prior treatment to his cervical spine in relation to a lumbar spine problem, but such treatment was merely consistent with chiropractic care in treating the whole spine in order to solve poor body dynamics in one limited location. Therefore, the Referee dismissed Dr. Kelley's opinion that claimant's current problems were related to a pre-existing problem. Further, the Referee discounted Dr. Snodgrass' opinion

because he based it upon a resolution of questions of credibility and the mechanics of th happening of the accident rather than purely on the basis of medical judgment. The Referee found that claimant and his witnesses were credible. The Referee concluded claimant had proved by a preponderance of the evidence that he sustained an injury to the cervical spine in the accident of June 27, 1978. Therefore, the Referee set aside the denial issued by the State Accident Insurance Fund and remanded the claim to it for acceptance and payment of compensation of benefits. He also awarded claimant's attorney a fee in the sum of $1,000.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, reverses the Referee's order. The Board finds there is insufficient evidence that claimant sustained any injury whatsoever to his neck as the result of the injury to his eye on June 27, 1978. Dr. Kelley opined that the treatment claimant was currently receiving to the cervical and upper and mid thoracic regions was related to a pre-existing condition and was not related to an occupational injury as alleged by claimant. Dr. Snodgrass opined that claimant's increased neck symptoms were more likely related to increased chiropractic manipulations of his neck than to any injury. Dr. Snodgrass opined that claimant had not sustained any actual neck injury in June 1978.

The facts of this case present a complicated medical question which requires claimant to present expert medical testimony to prove his contentions. The preponderance of the medical testimony in his case does not support claimant's contentions. Even if claimant had a pre-existing condition, the evidence does not establish that his work activity or conditions caused a worsening of his underlying disease resulting in an increase in his pain to the extent that it produced even a temporary disability or required medical services. Therefore, the Board finds that claimant has not proved by a preponderance of the medical evidence that he sustained any compensable injury to his cervical spine on June 27, 1978. Therefore, the Board reverses the Referee's order in its entirety.

ORDER

The Referee's order, dated December 3, 1979, is reversed in its entirety.

The State Accident Insurance Fund's denial, dated May 24, 1979, is ordered reinstated and affirmed.

SAIF CLAIM NO: HC 332331 April 8, 1980

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

On December 10, 1970, claimant injured his right knee. This claim was treated as a medical only. He reinjured this knee on October 14, 1971.

Dr. Robert McKillop reported in April 1972 that claimant had laxity of the medial joint capsule. He felt claimant's condition was stationary and that claimant had minimal damage to the medial meniscus. He did not feel surgery was needed. He felt claimant had a mild degree of permanent partial disability. The claim was closed by a Determination Order, dated May 16, 1972, which granted claimant an award of compensation equal to 10% loss of the right leg. Claimant's aggravation rights have expired.

Dr. Sirounian, in April 1975, examined claimant and found a posterior medical capsular and medial collateral ligament laxity of a mild to moderate degree. Claimant advised Dr. Sirounian that he wished to defer surgery even though Dr. Sirounian explained the possibility of traumatic arthritis occurring if he did not have the surgery.

On February 22, 1978, claimant was hospitalized by Dr. G. P. Adlhoch. Claimant complained of his knee "giving out" at times. Dr. Adlhoch diagnosed a probable internal derangement of the right knee; possible anterior cruciate ligament, lateral meniscus tear. In September 1978, claimant was rehospitalized and underwent an arthroscope and arthrotomy of the right knee, with excision of the lateral meniscus and the stump of the anterior cruciate ligament. Dr. Adlhoch diagnosed that claimant also had chondromalacia of the right patella. Dr. Adlhoch attributed the torn lateral meniscus with chondromalacia of the patella, partial avulsion of the right anterior cruciate ligament and early degenerative arthritis of the knee, and the need for surgery all to claimant's 1971 injury.

On July 11, 1979, the Board, under its own motion jurisdiction, ordered the reopening of claimant's claim as of September 15, 1978 until it was closed pursuant to the provisions of ORS 656.278.

Dr. John Hayhurst, in February 1980, reported that claimant had been doing "reasonably" well since the surgery. Claimant advised Dr. Hayhurst that he wore a Lenox-Hill brace whenever he participated in athletics. Claimant noted that he had had some popping with flexion extension of the lateral side of the knee, but no feeling of instability. X-rays revealed some loss of joint space medially with some lipping and irregularities of the patellar articular surface. There were also some degenerative changes. Dr. Hayhurst felt that claimant had some varus and valgus instability with incompetence of the anterior cruciate. He advised claimant to continue to use the brace while participating in sports.

On February 18, 1980, the Fund requested a determination of claimant's current disability. The Evaluation Division of the Workers' Compensation Department, on March 28, 1980, recommended that the claimant be granted an additional award of temporary total disability compensation from September 15, 1978 through October 12, 1978, and an additional award of compensation equal to 10% permanent partial disability for the right leg (knee). The Board concurs with this recommendation.

ORDER

Claimant is hereby granted compensation for temporary total disability compensation from September 15, 1978 through October 12, 1978, less time worked, and an award of compensation equal to 10% permanent partial disability for injury to the right leg. These awards are in addition to any previous awards claimant has been granted. The record indicates that the award for temporary total disability compensation has already been paid to claimant.

CLAIM NO. GB 66126 April 8, 1980

BARBARA J. FOSS, CLAIMANT
John M. Parkhurst, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

On June 22, 1964 claimant sustained an injury to her low back. A Determination Order, dated November 24, 1964, initially closed claimant's claim. Her aggravation rights have expired.

On September 22, 1977, Dr. Howard Cherry requested that claimant's claim be reopened. He indicated that he had performed surgery on claimant in 1967 for her back condition. He indicated after this surgery she had responded fairly well and worked until June 1, 1976. In January 1978, Dr. Cherry indicated that claimant had pain in both legs, pain in her entire back, and bad headaches. He noted that claimant's history did not include any new injuries. Claimant was hospitalized in late January 1978 and underwent a myelogram which revealed slight assymetry at the L5-S1 nerve roots.

In April 1978, Dr. Edward Colbach, a psychiatrist, reported he was impressed by the obvious secondary gain in claimant's illness. He felt that her back problems provided her with a mechanism whereby she can give in to her dependency needs and not feel guilty about this. He felt her back problems gave her a "honorable disability".

Also, in April 1978, the Orthopaedic Consultants diagnosed residuals secondary to a lumbar laminectomy, complaints of chronic lumbar pain and no objective neurological deficits and marked functional overlay. They opined claimant's condition was stationary. They thought claimant could return to the same occupation with limitations or some other occupation. In their opinion the previous award of permanent partial disability of 35% very adequately covered her present disability. Dr. Cherry disagreed with this report.

On January 5, 1979, Dr. Herbert Leonard indicated that he concurred with the Orthopaedic Consultants' report. He felt it was extremely important that claimant stop the cycle of seeing more and more doctors. It was his opinion that this would only tend to enhance the functional component of her problem.

Claimant worked from November 1978 to June 1979 at a part-time job.

In July 1979, claimant was rehospitalized by Dr. Cherry and underwent a myelogram which revealed nerve root entrapment at the L5-S1 level on the right side from a possible recurrent prolapsed intervertebral disc. The Board, on July 31, 1979, under its own motion jurisdiction, reopened claimant's claim effective the date she was hospitalized for the surgery recommended by Dr. Cherry. On August 15, 1979, claimant underwent a lumbar laminectomy and excision of the L5-S1 disc and decompression of the nerve root by Dr. Edward Berkeley.

In January 1980, the Orthopaedic Consultants opined that claimant's condition was stationary and that her claim could be closed at the end of six months post-surgical date. They diagnosed residuals secondary to two lumbosacral laminectomies, complaints of chronic lumbosacral pain, no objective neurological deficits and marked functional overlay. It was their opinion that claimant could return to employment which did not require heavy stooping, bending, and lifting. They rated the total loss of function of the lumbosacral spine as it existed at that time at 35%.

Dr. Berkeley, in February 1980, opined that claimant's condition would be medically stationary by March 1, 1980. He felt claimant would need vocational rehabilitation training and even after that, he felt that she would require progressive adaptation to a job. He did not feel that she would be able to be employed in a job that required bending, lifting, stooping, working in cramped positions, lifting weights more than 10 pounds, prolonged sitting and standing, or twisting of her back. He suggested that claimant not be required to commute to and from her work for prolonged periods of time because sitting in a car would certainly aggravate her present symptoms.

On February 14, 1980 the State Accident Insurance Fund requested a determination of claimant's current disability. The Evaluation Division of the Workers' Compensation Department, on March 25, 1980, recommended that claimant be granted additional temporary total disability compensation from June 3, 1979 through August 14, 1979 and from August 15, 1979 through March 1, 1980 and that she be granted no compensation for permanent partial disability in excess of that previously awarded.

The Board concurs with the recommendation of awarding additional temporary total disability compensation. However, the Board finds, based upon all the evidence in this case, that claimant is entitled to an additional award of unscheduled disability for her injury. Claimant has undergone additional surgery and now has additional limitations placed on her by the treating physicians. Therefore, the Board concludes that claimant is entitled to an award of compensation equal to 50% unscheduled disability for her back injury. This award is in lieu of all previous awards for her unscheduled disability.

ORDER

Claimant is hereby granted temporary total disability compensation from June 3, 1979 through August 14, 1979 and from August 15, 1979 through March 1, 1980, less time worked. Claimant is also granted an award of compensation equal to 50% unscheduled low back disability for her injury sustained in 1964. This award is in lieu of and not in addition to any previous awards for unscheduled back disability claimant has previously been awarded.

Claimant's attorney has already been granted a reasonable attorney's fee out of the award for temporary total disability by the Own Motion Order of July 31, 1979. Claimant's attorney is also entitled to a fee payable out of the increased award for permanent partial disability in an amount equal to 25% thereof, not to exceed $3,000.

WCB CASE NO. 79-862 April 8, 1980

ARCHIE GAINER, CLAIMANT
Pozzi, Wilson, Atchison, Kahn
& O'Leary, 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 found claimant's refusal of surgery was reasonable and awarded claimant additional compensation equal to 112° for 35% unscheduled disability for his low back injury and granted claimant's attorney a fee. A Determination Order had granted claimant an award of compensation equal to 32° for 10% unscheduled disability. The Fund contends that claimant's refusal to submit to surgery was unreasonable and that the Referee should have affirmed the Determination Order's award of 10% unscheduled disability.

FACTS

Claimant, a 42-year-old truck driver, sustained a compensable injury to his back on November 14, 1977 when he slipped and fell off of a front loader. Dr. Tyrus Hebert, D.C., diagnosed this injury as an acute lumbar subluxation with attendant lumbosacral strain. He released claimant for regular work on December 27, 1977.

On February 1, 1978, Dr. Hebert reported he had released claimant in December 1977 and told him to find a different type of employment which would be less stressful to claimant's back. Claimant found a sales job which required him to estimate cost and sales of re-insulating homes. Dr. Hebert indicated that in January 1978 clamant returned to him complaining of back pain. He instructed claimant to stop working on January 18, 1978 and begin therapy. Further, he felt claimant should obtain an opinion from an orthopedic surgeon.

On February 2, 1978, Dr. Calvin Kiest reported that claimant had an acute herniated intervertebral disc of the lower level, probably the L5 nerve root on the left side. He instructed the claimant to begin a trial period of absolute bed rest. If this was not successful, he felt claimant would have to be hospitalized and undergo a myelogram and probably a laminectomy. By March 17, 1978, Dr. Kiest reported claimant pretended he did not have difficulty with his back. He found that claimant still had a positive straight leg raising test and positive measured atrophy of the left calf. He felt claimant was trying to avoid any surgery. Dr. Kiest advised the claimant that even if he avoided surgery he would still have to obtain some other type of work.

Dr. Kiest, on June 28, 1978, indicated claimant's condition was worse than when he had last seen him in April 1978. Claimant continued to complain of severe pain in his left leg. Also claimant stated he was unable to be in one position for any length of time. Claimant was still extremely reluctant to consider surgical procedures even though the duration and severity of his symptoms would, in Dr. Kiest's mind, make surgery "an absolute foregone eventuality". Dr. Kiest felt claimant should undergo a period of evaluation at the Callahan Center. Dr. Kiest still felt that claimant was attempting to avoid any surgery.

On August 23, 1978, Dr. Lewis Van Osdel, medical examiner at the William A. Callahan Center, diagnosed an acute herniated nucleus pulposus at L5-S1. He found claimant had "gross weakness" of the muscles of the left ankle, weakness of the hip flexors, hamstrings and quadriceps and gastrocsoleus on the left. He also found that claimant had an antalgic scoliosis and antalgic gait. He felt that based on claimant's condition he was not a candidate for continued admission at the Center. Likewise, he felt claimant was trying to avoid surgery and that at points in the examination he actually tried to downplay his disability. Dr. Van Osdel advised claimant that it would be best if he had the surgery performed as soon as possible. Claimant told Dr. Van Osdel that he was reluctant to have surgery because he had not been promised he would be able to return to his previous work. Dr. Louis Loeb, a psychologist, reported claimant had had a fourth grade education, but had obtained a GED in the service. He found that claimant showed no evidence of anxiety or serious psychological problems at the time of his examination.

In September 1978, Dr. Anthony Gallo opined there was little doubt that claimant had nerve root compression involving primarily the S1 nerve root and almost certainly representing a herniated disc. He found that claimant was somewhat reluctant to have surgery, but felt from a pure medical point of view, claimant would be a good candidate for a myelogram and surgical decompression.

Also, in September, 1978, Dr. Van Osdel reported claimant had a vocational impairment at that time which was moderately severe to severe and extrinsic psychological disability that was moderate. He reported that claimant was unable to do any type of gainful employment at that time. He felt a job change would be necessary if and when claimant had successful surgery.

On October 17, 1978, Dr. Kiest reported that he was doing a "closing examination" of claimant. Dr. Kiest opined that claimant's condition was medically stationary. Claimant still did not desire surgical treatment and Dr. Kiest reported that claimant said he would have surgery if the symptoms persisted past January 1. Dr. Kiest found claimant still had persistent objective symptoms of severe left sciatic nerve irritation presumably due to a herniated intervertebral disc. He recommended claimant's claim be closed and that it should be reopened when claimant returned, as Dr. Kiest was sure he would, for additional treatment.

A Determination Order, dated November 7, 1978, awarded claimant temporary total disability compensation and compensation equal to 35% unscheduled disability for his low back injury. The order further recited since claimant had failed to follow medical advice and submit to treatment which he reasonably could have been expected to do to reduce his disability, the Department, pursuant to its rules, found his award of compensation should be reduced. Therefore, the Department ordered the insurance carrier to pay claimant an award of compensation equal to 10% unscheduled disability for his low back injury.

On January 16, 1979, Dr. Kiest reported that claimant had returned. Claimant continued to have major difficulty involving his back, left hip and left leg. He suggested that claimant's claim be reopened since claimant consented to having a myelogram and surgery. The myelogram was scheduled for March 6, 1979 and a probable laminectomy was scheduled for March 7, 1979. Claimant's claim was reopened effective March 5, 1979.

Claimant, on March 20, 1979, advised Dr. Kiest he had decided not to have surgery. He stated that the reasons for his decision were his financial condition and that he was afraid of the surgery. He said that he could now get around and was afraid if he had the surgery he might not be able to do what he now could do.

A Second Determination Order, dated April 17, 1979, awarded claimant additional temporary total disability compensation.

In September 1979, Dr. Kiest reported claimant returned and indicated that he had been driving a truck for about four months. He stated he drove a truck from sometime in March to August 31, 1979, and he had to stop driving because of severe leg pain. Claimant was again advised that he should have treatment of his disc problem.

At the hearing claimant testified that after talking to Dr. Kiest about the surgery he decided not to have it. Dr. Kiest explained to him what was involved in the surgery and the possible results. He said he knew from talking to others that he might be more disabled as a result of the surgery than he presently was. Additionally, claimant understood that the surgery might not be successful; he might require additional surgery. Therefore, claimant indicated he desired to return to work and attempt to work until he was unable.

The Referee found claimant's refusal to undergo additional surgery was not unreasonable. Further, the Referee found that the award of compensation claimant had been granted was insufficient and granted claimant an additional award of compensation equal to 112° for 35% unscheduled disability for his low back injury. The Referee allowed the Fund to credit time loss payments made from March 5, 1979 through March 7, 1979. The Referee also granted claimant's attorney a reasonable attorney's fee.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, modifies the Referee's order. The Court of Appeals, in the case of Clemons v. Roseburg Lumber Company, 34 Or App 135, _____ P2d _____ (1978), held that there were two items to look at in dealing with the affect upon compensation of unreasonable refusal to submit to medical treatment which might promote recovery and expedite reintegration into the labor market. The Court stated the first item to be looked at is the fact that the claimant has the burden of proof to establish his extent of disability. The Court held the refusal of a diagnostic procedure such as a myelogram is regarded as a weakness in claimant's proof. The second item to be looked at was the refusal of available treatment as a negative factor in determining the extent of compensable incapacity. The Court held: "The test for determining whether a permanent disability award should be adjusted because of the claimant's refusal to submit to a recommended treatment is whether the refusal is reasonable". The Court held the relevant inquiry is whether, if compensation were not an issue, an ordinarily prudent and reasonable person would submit to the recommended treatment. This determination must be based upon all relevant factors, including a workers' present physical and psychological condition, the degree of pain accompanying and following the treatment, the risk posed by the treatment and the likelihood that it would significantly reduce the worker's disability. The Court stated that the test of reasonableness must take into account the worker's perspective and may not be based upon medical opinion alone. The Board finds in this case that claimant's refusal to undergo the myelogram and probable back surgery was not unreasonable. However, the Board finds that claimant's refusal to undergo surgery results in a reduction of his award of unscheduled disability. The Board must assume that if the surgery was done, that it would have been successful and claimant would have returned to the work force. Therefore, the Board concludes that claimant's award of compensation for unscheduled disability must be reduced. The Board grants claimant an award of compensation equal to 112° for 35% unscheduled disability for his low back injury. This is in lieu of any previous awards for his unscheduled disability for this injury.

ORDER

The Referee's order, dated October 19, 1979, is modified.

Claimant is hereby awarded compensation equal to 112° for 35% unscheduled disability for his low back injury. This award is in lieu of any previous awards for unscheduled disability for this injury. The remainder of the Referee's order is affirmed.

CLAIM NO. A53-136685 April 8, 1980

JOHN B. RILEY, CLAIMANT
Blyth, Porcelli, Moomaw & Miller,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On March 10, 1980, claimant, by and through his attorney, requested the Board exercise its own motion jurisdiction and reopen his claim for an April 6, 1970 injury to his back. Claimant's claim was first closed by a Determination Order on April 16, 1970 and subsequently was reopened and closed on different occasions. Claimant has been awarded a total of compensation equal to 256° for 80% unscheduled disability for his back injury. Claimant's aggravation rights have expired.

In January 1979, Dr. J. Bruce Bell reported that claimant was taking a considerable amount of medication. He indicated claimant had low back pain for which he took medication. Also, in January 1979, Dr. Charles Dresher indicated he felt that it was unrealistic to expect claimant to go into the competitive labor market. He prescribed a back brace for claimant. He felt claimant should cut his narcotic intake down to a minimum. Dr. Dresher did not feel there was any evidence of radiculitis or any indication for further surgery.

Dr. Desher, in February 1979, indicated it was his opinion that claimant was probably unemployable due to longstanding back pain and prolonged period of disability. Also, in February 1979, Dr. Bell reported claimant had a severe amount of discomfort and pain in his low back. He indicated this had been rather "refractory" to any treatment or medication. Dr. Bell did not feel that claimant's pain would lessen in the future. He did not feel that claimant was capable of working because of his lumbosacral disc disease or back problems.

On May 17, 1979, the Orthopaedic Consultants diagnosed claimant's condition as being status post-operative, four spinal fusions, two laminectomies, chronic low back pain, tension headache, and drug dependency. It was their opinion that claimant's condition was not stationary at that time because of his problem of narcotic dependency. This condition had appeared since their examination two years previously. They felt claimant should be treated and evaluated by referral to the Pain Center. They did not make any further recommendations for further operative procedures to the low back or neurologically destructive procedures such as a rhizotomy or cordotomy for pain relief. They had no suggestions for a change of claimant's previously established disability rating. They indicated claimant remained severely limited in his physical activity such as lifting, and was unable to sit for prolonged periods of time. Dr. Bell concurred with them that there was nothing further that could be done for claimant from a surgical point of view and that claimant would probably continue to use analgesic medication and intermittent "infiltrations" into his back to give him temporary relief from the discomfort he was experiencing.

On March 20, 1980, the Board forwarded a copy of claimant's request to the carrier, Employers Insurance of Wausau (Wausau), and requested it to advise them of their position. Wausau, on March 27, 1980, advised the Board it opposed reopening of claimant's claim under the Board's own motion jurisdiction. It was Wausau's position that claimant's request for medical treatment could be covered under ORS 656.245 and that the medical reports did not support his other contentions.

The Board, after thoroughly reviewing the file and the evidence in this matter, concludes that the evidence is not sufficient to warrant a reopening under its own motion jurisdiction at this time. The request by claimant for own motion relief is denied.

IT IS SO ORDERED.

WCB CASE NO. 78-7851 April 9, 1980

LORAINE K. HARRIS, CLAIMANT
Robertson, Hilts & Huycke, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Claimant seeks Board review of the Referee's order which reversed the decision of the Field Services Division not to renew claimant's program of vocational rehabilitation and directed that claimant be re-enrolled effective August 15, 1978. The December 7, 1978 and January 5, 1979 Determination Orders were affirmed and claimant's attorney was granted an attorney's fee.

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

The Board feels it is performing a futile act at this time by rating permanent partial disability, but it is obligated to do so under the mandate of case law. When claimant's condition becomes medically stationary and she is vocationally stationary, her claim will be re-evaluated and another Determination Order issued, giving claimant appeal rights.

Further, the Board finds the evidence establishes claimant's vocational rehabilitation program was not terminated but was suspended for medical reasons. Her program would be reinstated when she again became medically stationary, unless there had been some change in her circumstances which would change her need for vocational rehabilitation.

ORDER

The order of the Referee, dated April 23, 1979, and republished September 20, 1979, is affirmed.

WCB CASE NO. 78-4711 April 11, 1980

PATRICIA A. ANDERSON, CLAIMANT
Ralf H. Erlandson, 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.

WCB CASE NO. 79-1201 April 11, 1980

JOE DELACRUZ, CLAIMANT
Robert J. Thorbeck, Claimant's Atty.
Schwabe, Williamson, Wyatt, Moore & Roberts, Employer'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. 79-6967 April 11, 1980

JACK LACEY, CLAIMANT
Peter O. Hansen, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Joint Petition & Order Of Bona Fide Dispute Settlement

Jack Lacey, while employed by POLK COUNTY FARMERS CO-OP, Rickreall, Oregon, allegedly suffered an injury to his back and hip during the period of his employment. Claim was made with the employer and benefits for his present condition were denied on May 21, 1979. Claimant subsequently requested a hearing before the Workers' Compensation Board, asserting that the denial was improper. The referee reversed the denial and the employer appealed. Bona fide dispute arose as to whether or not the alleged injury had arisen out of or occurred in the course of claimant's employement. Both parties had evidence sustaining their view. Since the hearing claimant has been diagnosed as having metastic carcinoma of the bone.

PETITION

Claimant, JACK LACEY, in the person and by attorney Peter O. Hansen, of Pozzi, Wilson, Atchison, Kahn & O'Leary, and employer-carrier acting by and through its representative, JOANN GIFFORD, now make this joint petition to the Board and state:

1. JACK LACEY AND POLK COUNTY FRAMERS CO-OP and its insurance carrier, SCOTT WETZEL SERVICES, have entered into an agreement to dispose of this claim for the total sum of $7,500, said sum to include all benefits with the exception of certain medical bills enumerated below, and attorneys fees.

2. The parties further agree that from the settlement proceeds, $1,200 shall be paid to the firm of Pozzi, Wilson, Atchison, Kahn & O'Leary, as a reasonable and porper attorneys fee.

3. The parties further agree that all medical expenses as a result of this claim have been paid by SCOTT WETZEL SERVICES on a diagnostic basis.

4. 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 respondent for injuries claimed, or their results, including attorneys fees, and all benefits under the Workers' Compensation Law, and that claimant will consider such payment as being final.

5. It is expressly understood and agreed by all parties that this is a settlement of a doubtful and disputed claim and is not an admission of liability on the part of respondent, by whom liability is expressly denied; that it is a settlement of any and all claims 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 sum set forth 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.

APPROVED AND ORDERED ON April 11, 1980.

WCB CASE NO. 79-3855 April 11, 1980

SHARON LAMBERT, CLAIMANT
Olson, Hittle, Gardner & Evans,
Claimant's Atty.
Marshall, Cheney, Defense Atty.
Order Denying Motion To Remand

A hearing in the above entitled matter was held on December 5, 1979. One of the issues raised at that hearing was the denial of claimant's aggravation claim by the insurer. The Referee, in his Opinion and Order, dated January 24, 1980, found claimant had sustained a "new injury" and affirmed the insurer's denial. Claimant requested Board review of this order. Claimant also filed a claim for a new injury and a hearing is pending on that claim (WCB Case No. 80-1836).

On March 19, 1980, claimant, by and through her attorney, requested the Board remand WCB Case No. 79-3855 to the Hearings Division to be set in tandem with WCB Case No. 80-1836.

The Board, after reviewing all the facts in this matter, denies claimant's motion. Under ORS 656.295(5), the Board can, if it determines that a case has been improperly, incompletely, or otherwise insufficiently developed or heard by the Referee, remand the case to the Referee for the taking of further evidence, correction, or other necessary action. In this case, the Board does not find the case has been improperly, incompletely or otherwise insufficiently developed or heard by the Referee. Therefore, the Board denies claimant's motion.

ORDER

Claimant's motion to remand, dated March 19, 1980, is denied.

WCB CASE NO. 78-7172 April 11, 1980

GILFORD LEWIS, CLAIMANT
Doblie, Bischoff & Murray, Claimant's Attys.
Schwabe, Williamson, Wyatt, Moore & Roberts,
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 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.

CLAIM NO. A53-135664 April 11, 1980

ALFRED J. MERRITT, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

On September 22, 1969, claimant sustained a compensable injury to his back. Claimant underwent a laminectomy and disc excision and finally a fusion. On September 21, 1973, a Determination Order granted claimant an award of temporary total disability compensation and compensation equal to 112° for 35% unscheduled low back disability. A stipulation, in March 1974, awarded claimant additional compensation equal to 96° for 30% unscheduled low back disability.

On January 25, 1975, Dr. R. D. Cook reported claimant had been having back pains for the last couple of months. On March 30, 1979, Dr. Cook stated that claimant's pain was disabling and he felt it was a continuation of claimant's previous back problems. Claimant requested that his claim be reopened.

On May 25, 1979, the Board issued an Own Motion Order reopening claimant's claim for his 1969 injury effective March 5, 1979 until the claim was closed pursuant to ORS 656.278.

An appointment was made on April 30, 1979 with the Orthopaedic Consultants by the carrier to have claimant examined by them on May 30, 1979. Claimant failed to keep this appointment. The carrier applied to the Workers' Compensation Department for permission to suspend claimant's compensation as of May 30, 1979 and continue until such time as claimant notified them of his agreement to be examined and, in fact, submit to an examination by the physician designated by the carrier.

In an order, dated October 9, 1979, the Board permitted the carrier to suspend payments of compensation for temporary total disability until claimant received a full examination by a physician designated by the carrier.

On November 16, 1979, claimant was examined by the Orthopaedic Consultants at the request of the carrier. In their report, dated November 30, 1979, the Orthopaedic Consultants opined that claimant's condition was medically stationary and his claim could be closed. They felt the impairment to claimant's lumbosacral spine as it existed at that time and due to his 1969 injury was moderately severe.

The record indicates that claimant was paid compensation from November 15, 1979 through February 28, 1980 and overpayment made previously was deducted.

The carrier, on March 13, 1980 requested a determination of claimant's current disability. The Evaluation Division of the Workers' Compensation Department, on March 26, 1980, recommended claimant be granted additional temporary total disability compensation from March 5, 1979 through July 17, 1979 and compensation for one day only on November 30, 1979 and that no permanent partial disability be granted in addition to that previously granted by the Determination Orders and the stipulation.

The Board, after reviewing all the evidence in this case, finds that claimant is entitled to an award of additional compensation for temporary total disability from March 5, 1979 through July 17, 1979 and from November 16, 1979 through November 30, 1979. Further, the Board finds that claimant is entitled to an additional award of compensation equal to 48° for 15% unscheduled low back disability. This award is based on the report of the Orthopaedic Consultants and the rating of claimant's current impairment. The carrier is entitled to offset any overpayments of temporary total disability compensation against this award of permanent partial disability. The Board also urges that the Field Services Division of the Workers' Compensation Department contact claimant and work with him and assist him in obtaining employment.

ORDER

Claimant is hereby granted temporary total disability compensation from March 5, 1979 through July 17, 1979 and from November 16, 1979 through November 30, 1979, less time worked. Claimant is also granted an additional award of compensation equal to 48° for 15% unscheduled disability for an injury to his low back. The carrier is entitled to offset any overpayments of temporary total disability against the award of permanent partial disability.

WCB CASE NO. 79-2579 April 11, 1980

ANNIE WESTENSEE, CLAIMANT
Bischoff, Murray & Strooband, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Order

On December 28, 1979 the State Accident Insurance Fund requested Board review of the Referee's order. The Board subsequently received a letter from claimant's attorney which it misconstrued to be a request for dismissal of the request for review. Based on that letter, the Board issued its Order of Dismissal. The Board has been advised of its error and hereby directs that the Order of Dismissal, dated April 1, 1980, be rescinded and held for naught. The Fund's request for review is hereby reinstated.

IT IS SO ORDERED.

SAIF CLAIM NO. WC 407537 April 14, 1980

RUSSELL M. ALLEN, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

On November 19, 1972, claimant sustained a compensable injury consisting of burns to his hands and face. His claim was initially closed by a Determination Order, dated September 28, 1973, which granted claimant an award of temporary total disability compensation and an awards of compensation equal to 127.5° for 85% loss of the right forearm and 90° for 60% loss of the left forearm. Claimant's aggravation rights have expired.

On November 19, 1979, Dr. John Jarrett reported that he had performed an amputation of the right ring and little fingers and left little finger at the PIP joints. He related the need for this surgery to claimant's 1972 injury.

By an Own Motion Order, dated December 27, 1979, the Board reopened this claim and remanded it to the State Accident Insurance Fund to be accepted for the payment of compensation commencing on the date claimant was hospitalized, November 19, 1979, and other benefits until this claim was closed pursuant to ORS 656.278.

Dr. Jarrett, on March 7, 1980, reported that all three amputated digits have healed with excellent stumps at the level of the PIP joints and had no signs of tenderness or unusual scar tissue. He had released claimant for regular work as of February 8, 1980.

On March 20, 1980, the State Accident Insurance Fund requested a determination of claimant's current disability. The Evaluation Division of the Workers' Compensation Department, on April 2, 1980, recommended that claimant be granted an additional award of temporary total disability compensation for the period of November 19, 1979 through February 7, 1980 and recommended that claimant not be awarded any additional permanent partial disability.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted temporary total disability compensation from November 19, 1979 through February 7, 1980, less time worked. The record indicates that this award has already been paid to claimant.

WCB CASE NO. 79-4497 April 14, 1980
WCB CASE NO. 79-6913

HAROLD BUCHMAN, CLAIMANT
Bruun, Green & Caruso, Claimant's Attys.
Lang, Klein, Wolf, Smith, Griffith & Hallmark, Employer's Attys.
SAIF, Legal Services, Defense Atty.
Order Denying Motion

On March 25, 1980, Greenwood Inn and Employee Benefits Insurance Company (EBI), through their attorney, moved the Board to strike that portion of the State Accident Insurance Fund's (Fund) brief, starting on line 11, page 4, captioned: "SAIF's Motion to Dismiss EBI's Appeal" and including all affidavits submitted in conjunction with that portion of the Fund's brief.

In January 1980, the Board denied the Fund's motion to dismiss EBI's request for Board review of an Opinion and Order, dated October 26, 1979, which had affirmed its denial of claimant's claim and remanded the claim to EBI for acceptance and payment of compensation. Attached to this motion was an affidavit from the attorney representing the Fund.

In February 1980, the Board denied the Fund's request to vacate its order and remand this case to a Referee to conduct a hearing concerning its motion.

The Board, after reviewing Greenwood Inn and EBI's motion, denies it. The Board has previously ruled that the request for Board review filed on their behalf was timely. The material offered by the Fund in its brief is of the same nature as that offered in its Motion to Dismiss. The Board finds that portion which Greenwood Inn and EBI moved against has been previously ruled on by the Board and its repetition is of no consequence at this time. However, the Board will allow said portion to remain as part of the record.

ORDER

Greenwood Inn and EBI's Motion to Strike, dated March 25, 1980, is denied.

CLAIM NO. B53-124467 April 14, 1980

PATSY CARPENTER MATHES, CLAIMANT
Frohnmayer & Deatherage, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

On July 17, 1968, claimant sustained a compensable injury to her low back while lifting watermelons. Claimant underwent surgery to her back on December 16, 1968 consisting of a spinal fusion from L5 to S1 and a laminectomy at the L4-L5 level. Her claim was initially closed by a Determination Order, dated October 27, 1969, which awarded claimant temporary total disability compensation and compensation equal to 64° for 20% unscheduled low back disability. Claimant's aggravation rights have expired.

On August 28, 1972, the fusion was repaired and claimant underwent a laminotomy. Her claim was reopened on the basis of an aggravation of her original condition. A Second Determination Order, dated December 24, 1973, awarded claimant additional temporary total disability compensation and additional compensation equal to 32° for 10% unscheduled disability for her low back injury.

On August 1, 1978, Dr. Donald Smith performed an exploratory lumbar laminectomy at the L4-5 level on the left, resected a scar, performed neurolysis of the spinal canal and removed extruding disc fragments at the L4-5 level.

The Orthopaedic Consultants, in May 1979, reported that claimant complained of left leg pain and low back pain. Claimant indicated that her major problem was left leg pain. They reported that it had been suggested that the L4 level be added to the previous existing fusion between the L5 and S1 levels. It was noted that this would be the fourth operation on the lumbar spine which, under usual circumstances, presented a rather poor prognosis. Claimant was anxious and willing to have the procedure done if it would help her.

On November 19, 1979, Employers Insurance of Wausau (hereinafter referred to as Wausau) advised the Board that based on the Orthopaedic Consultants' report it would not oppose an Own Motion Order reopening claimant's claim for her July 17, 1968 injury. Wausau further advised the Board that it was presently paying compensation for temporary total disability under another claim for an injury to claimant's cervical spine which also had been opened under an Own Motion Order. Wausau stated it would voluntarily pay compensation for temporary total disability under the July 17, 1968 claim. The Board, in an order dated January 9, 1980, reopened claimant's claim for the July 17, 1968 injury when and if she entered the hospital for the additional surgery as recommended by the Orthopaedic Consultants.

Dr. Donald Smith, in January 1980, reported that claimant's condition could be considered stationary as of January 15, 1980. Claimant advised him that she continued to have difficulty with her left lower extremity and with left back pain. Claimant stated she did not wish to proceed with the additional surgery since she felt her condition had improved in the last six to eight months. Dr. Smith felt that claimant had a marked physical impairment with respect to her ability to stand and walk extended periods of time, both with respect to her back and left lower extremity. He felt the condition could be considered stationary with a relatively high degree of physical impairment with respect to the back and left lower extremity.

On February 21, 1980, Wausau requested a determination of claimant's current disability. The Evaluation Division of the Workers' Compensation Department, on April 3, 1980, recommended that claimant be granted additional temporary total disability compensation from June 11, 1977 through January 11, 1980 and suggested that this award be less time worked and less amounts paid in Claim No. D53-122440. Further, the Evaluation Division recommended that claimant be granted an award equal to 15% loss of her left leg.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted temporary total disability compensation from June 11, 1977 through January 11, 1980, less time worked, and less amounts paid in Claim No. D53-122440. Claimant is also awarded compensation equal to 15% loss of the left leg. These awards are in addition to any previous awards claimant has been granted.

Claimant's attorney has already been granted a reasonable attorney's fee out of the temporary total disability compensation by the Own Motion Order of January 9, 1980. Claimant's attorney is also entitled to a fee equal to 25% of the increased compensation for permanent partial disability granted by this order, payable out of said compensation as paid, not to exceed $3,000.

WCB CASE NO. 79-7162 April 14, 1980

EDWARD V. MAUK, CLAIMANT
Evohl F. Malagon, Claimant's Atty.
J.W. McCracken, Jr., Employer's Atty.
Stipulation & Order of Dismissal

THIS MATTER came on regularly before the undersigned board member, the claimant appearing personally and by his attorney, Evohl F. Malagon, and the employer, Weyerhaeuser Company, appearing by its attorney, J. W. McCracken, Jr.; and it appearing that on or about March 2, 1978, the claimant sustained a compensable injury to his back while employed as a laborer in the employer's, Springfield, Oregon Branch; and it further appearing that on February 16, 1979, a determination order issued awarding the claimant compensation for temporary total disability inclusively from April 4, 1978 through September 13, 1978, less time worked, and temporary partial disability inclusively from September 14, 1978 through January 28, 1979; and it further appearing that on August 8, 1979, a second determination order issued awarding the claimant compensation for temporary total disability inclusively from April 25, 1979 through May 22, 1979; and it further appearing that neither the determination order nor the second determination order awarded the claimant any compensation for permanent partial disability; and it further appearing that a hearing was held on March 26, 1980 before Lyle R. Wolff, Referee, and that an opinion and order was entered on March 28, 1980 which contained the following order:

"IT IS HEREBY CONSIDERED AND ORDERED that:

(1) Claimant shall be paid time loss from April 4, 1978 through October 8, 1979, less time worked and less time loss paid previously, whether or not authorized by Evaluation, and claimant's counsel is granted twenty-five percent (25%) of this additional award of time loss, as and for a reasonable attorney's fee, not to exceed $500, payable out of this increased award of time loss; and,

(2) Claimant is awarded permanent partial (unscheduled) disability compensation equal to eighty degrees (80°) for twenty-five percent (25%) unscheduled back disability resulting from the March 2, 1978 job injury; and

(3) Claimant's counsel is awarded twenty-five percent (25%) of this award of permanent partial

partial disability compensation, as and for a reasonable attorney's fee, payable out of compensation as paid, not to exceed $2,000."

And it further appearing that the employer has requested a board review and the claimant has cross requested a board review; and it further appearing that this matter has been fully compromised by the parties,

IT IS ORDERED that the claimant's award of permanent partial disability be and the same hereby is modified and reduced to compensation equal to 48 degrees for 15 percent unscheduled back disability; and

IT IS FURTHER ORDERED that the order in the referee's opinion and order is affirmed in all other respects; and

IT IS FURTHER ORDERED that all compensation remaining payable to the claimant, and all attorney's fees remaining payable to the claimant's attorney, by reason of this award, shall be paid in lump sums; and

IT IS FURTHER ORDERED that the employer's request for review and the claimant's cross-request for review be and the same hereby are dismissed with prejudice.

IT IS SO STIPULATED this 14th day of April, 1980.

WCB CASE NO. 79-6618 April 14, 1980

RUSSELL D. RIGGS, CLAIMANT
SAIF, Legal Services, Defense Atty.
Stipulation

IT IS HEREBY STIPULATED AND AGREED by and between the above named claimant and International Paper Company that claimant's appeal from the Determinaiton Order made, entered and mailed on July 11, 1979, shall be compromised and settled, subject to the approval of the Workers' Compensation Board, by the claimant withdrawing his Request for Review and, in consideration thereof, accepting from the employer, and the employer awarding claimant increased compensation for permanent partial disability proximately resulting from claimant's injury of May 18, 1976, equal to 15° for 10% loss function of a leg, making a total of 50% loss function of a leg.

IT IS FURTHER STIPULATED that Roger B. Todd, claimant's attorney, be and he is hereby, awarded an attorney's fee equal to 20% of said 10% increased award of permanent partial disability, said fee to be a lien upon and payable out of said award.

CLAIM NO. A 613798 April 14, 1980

MILES SHAUL, CLAIMANT
Walter T. Aho, Claimant's Atty.
SAIF, Legal Services, Defense Atty.

On September 17, 1979, claimant, by and through his attorney, requested the Board reopen his claim under its own motion jurisdiction. Attached to this request were various medical reports. Claimant had originally injured his right knee on June 11, 1957 when a large beam fell across his leg at the knee. This claim was initially closed by a Determination Order, dated March 14, 1961, which awarded claimant periods of temporary total disability compensation and compensation equal to 35% loss of function of the right knee. Claimant's aggravation rights have expired.

In July 1979, Dr. Winfred Clarke reported that the problem in the knee was a continuation of degenerative changes "of 1960 along the natural progression". In October 1979, Dr. Clarke opined that the original arthritic problem was related to claimant's trauma in 1957 and that claimant's present problem was related to the original injury. While there had been a worsening of his condition along the lines of a progression of his arthritic changes, Dr. Clarke felt there was a "cause and effect" between the original injury and claimant's current problem. Dr. Clarke found there were considerable arthritic changes in the knee joint at that time with considerable limitation of motion.

On December 12, 1979, the Board advised the State Accident Insurance Fund of claimant's request and asked that it advise the Board of its position with respect thereto. The State Accident Insurance Fund, in January 1980, requested that claimant be examined by the Orthopaedic Consultants.

On February 28, 1980, the Orthopaedic Consultants opined that claimant's right knee condition had worsened. They indicated the present symptoms of the right knee arose in part out of the 1957 injury and in part were due to degenerative arthritis involving both knees which was more marked on the right because of the 1957 injury. They felt claimant could continue to work at his present job. At the present time, they felt that claimant's impairment due to the 1957 injury did not exceed that which had been previously documented.

The State Accident Insurance Fund, on March 26, 1980, advised the Board that it was opposed to an Own Motion Order reopening this claim. This is based on the Orthopaedic Consultants' report and other medicals which indicated that claimant's condition remained stationary and that there is no additional impairment over that which had been previously granted.

The Board, after thoroughly considering the evidence before it, finds that reopening of claimant's claim under its own motion jurisdiction is not warranted at this time and, therefore, denies claimant's request.

ORDER

Claimant's request that his claim for the June 11, 1957 industrial injury be reopened is hereby denied.

Pursuant to ORS 656.278(3) neither party has a right to a hearing, review or appeal.

CLAIM NO. DC 405769 April 14, 1980

RICHARD A. WARE, CLAIMANT
Ken Colley, Claimant's Atty.
Lang, Klein, Wolf, Smith, Griffith & Hallmark, Employer's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On September 28, 1978, the Board referred claimant's request for own motion reopening of his claim for his November 3, 1972 injury to the Hearings Division to be consolidated with a hearing on a claim for a new injury. The issue to be decided was whether claimant's current condition was the result of his 1972 injury, at which time the State Accident Insurance Fund (Fund) provided workers' compensation insurance coverage, or of a new injury and the responsibility of Employee Benefits Insurance Company (EBI).

A hearing was held on February 20, 1980 to resolve this issue. The Referee found claimant's present low back condition was related to his 1972 injury. The Referee also found claimant had sustained a new injury to his thoracolumbar spine. In a separate Opinion and Order, the Referee remanded claimant's claim for a new injury to EBI for acceptance and payment of appropriate workers' compensation benefits.

The Board, after reviewing the transcript and all the evidence, affirms and adopts as its own the recommendation of the Referee, a copy of which is attached hereto. The Board concludes that claimant's request for own motion reopening of his claim for the 1972 low back injury is warranted. The Board remands that claim to the Fund for acceptance and payment of benefits relating to the low back and not covered by or provided for by EBI, until the low back claim is closed pursuant to ORS 656.278.

IT IS SO ORDERED.

ADVISORY OPINION, FINDINGS AND RECOMMENDATIONS

A hearing was held in this matter on February 20, 1980, consolidated with the hearing in WCB Case No. 79-7722, at Salem, Oregon before Harold M. Daron, Referee. This hearing was conducted pursuant to the Own Motion Order Referring for Consolidated Hearing entered by the Workers' Compensation Board in this matter on September 28, 1979. Claimant was present and represented at the hearing by Ken Colley, attorney. The employer involved in this claim, Astoria Office Supply, Inc., was represented through the State Accident Insurance Fund by Quintin B. Estell, attorney.

On August 21, 1979 claimant, by and through his attorney, requested the Board to exercise its own motion jurisdiction and reopen his request for an injury sustained on November 3, 1972 to his low back. Claimant's claim was initially closed on June 11, 1973 and his aggravation rights have expired. Claimant has been awarded, as to the present time, compensation equal to 55% unscheduled low back disability. Claimant feels his present condition is either the result of his 1972 industrial injury, at which time the State Accident Insurance Fund was the carrier, or of a new injury sustained for a different employer and the responsibility of that employer's carrier, Employee Benefits Insurance Company. Claimant has submitted a claim to EBI, which was denied, and the request for hearing was the subject of WCB Case No. 79-7722, consolidated with this case for hearing. Claimant desires to have determined who is responsible for his present conditions; he believes he is entitled to continuing benefits. The Board, after considering what evidence had been submitted to it, concluded that it would be in the best interest of the party to remand the matter to the Hearings Division for determination whether claimant had suffered a new injury or an aggravation of his 1972 industrial injury.

When the hearing session was concluded, the hearing was continued until a transcript had been prepared. The transcript was received and the hearing was closed on March 10, 1980. The exhibits which were submitted at the hearing were completely admitted into evidence in both cases. In order that the Board will be completely advised as to my decision concerning the issues presented in this hearing, I am attaching a copy of my Opinion and Order in WCB Case No. 79-7722, marked Appendix "A", entered this same date.

Based upon the evidence presented in this hearing, the Referee makes the following

FINDINGS

Claimant sustained a compensable injury to his low back on November 3, 1972 when he suddenly developed acute low back pain while working with business machines and lifting various equipment. Treatment was provided for this injury by the State Accident Insurance Fund, on behalf of his employer at the time, Astoria Office Supply, Inc., at least until his claim was closed once again on September 12, 1977. The record does not specifically indicate when the State Accident Insurance Fund actually declined to provide further treatment to claimant but the actual cessation of providing medical services is not terribly important to the issues actually involved in these two cases. During the course of treatment which was provided claimant underwent two major surgeries. A laminectomy and removal of the disc between L4, L5 vertebrae was performed on November 14, 1972. For a time thereafter, his condition improved, during which he commenced a vocational rehabilitation retraining program, but he continued to have persistent low back pain. His condition eventually began to worsen once again in 1975 and 1976, which led to the second surgery, a lumbosacral fusion involving the L4, L5 and S1 vertebrae, on May 24, 1976.

Although the fusion surgery significantly improved his lumbosacral condition, he continued to have low back pain of varying degree, dependent upon the nature and extent of his activities, whether working or not working which continued even after he terminated his employment at Oregon State University in March, 1979. These symptoms were all associated with his lumbosacral condition. His lumbosacral condition did seem to be relatively stable while he was working at Oregon State University except that he noticed increased pain after he had been sitting for long periods of time.

Claimant began working for Jones Drilling Co. in March, 1979. His employment was mainly clerical but sometimes he would assist in loading swimming pools, which would weigh up to approximately 100 pounds, onto trucks and pickups. Usually he and one other person would lift these pools. In May, 1979 he began to notice increasing pain in his back after lifting activities which was identified by his treating physician, Dr. Thomas

Martens, as increasing pain in his low back at the thoraco-lumbar junction, which was above his low back surgery (Ex. 23, p. 22 & Ex. 80, p. 8, lines 8 & 9). Dr. Martens diagnosed this condition as a thoracolumbar spine strain (Ex. 23, p. 22 and Ex. 63). In between May 16, 1979, when claimant first reported this area of pain to Dr. Martens, and June 15, 1979 claimant had medical treatment from Dr. Martens and physical therapy. On June 15, 1979 claimant was hospitalized for bed rest and pelvic traction related to the recurrent thoracolumbar pain (Ex. 23, p. 23 and Ex. 63).

Following that hospitalization he continued to have both low back and upper-lower back pain with occasional episodes of radiating pain into the left leg. The limited medical examinations and treatment which claimant received after that time were for all of claimant's complaints and symptoms. He continued to receive medication without distinction as to the locality origin of symptoms or complaints, the medication merely being for back pain and other complaints associated with that pain.

In July, 1979 his employment with Jones Drilling Co. was terminated. There is conflicting evidence as to the primary reason for this termination but it was, at least in part, due to the difficulty claimant encountered when assisting lifting the swimming pools.

In August, 1979, claimant underwent initial examination and conference at the Northwest Pain Center on referral of Dr. Martens. Acceptance of claimant into the program was approved by the Northwest Pain Center but the State Accident Insurance Fund did not approve the referral and did not provide claimant with a reason why it (the Fund) would not be responsible for the pain clinic services.

On August 20, 1979 claimant filed a workers' notice of injury with the employer, Jones Drilling Co., for workers' compensation benefits for an injury occurring on or about June 15, 16 and 17, 1979 to the lower and middle back. This claim was denied by Employees Benefits Insurance Co., on behalf of employer Jones Drilling Co., on Septmeber 10, 1979.

On August 21, 1979 claimant filed a petition to the workers' compensation board to reopen his claim for the November 3, 1972 injury under the Board's Own Motion authority.

On cross examination by deposition, Dr. Martens indicated that while it was possible for the pain at the thoracolumbar junction to be a residual of the lumbosacral fusion, it was unusual. Further, Dr. Martens, after being advised of the lifting activities of claimant at Jones Drilling Co., indicated that those lifting activities would be a material contributing factor to the thoracolumbar junction strain and the onset of pain at that level.

Based upon the foregoing Findings, the Referee makes the following

RECOMMENDATIONS

In the Board's Order Referring the Own Motion case for Hearing, the Board directed the undersigned Referee as follows:

> "Upon conclusion of the hearing, the Referee shall cause a transcript of the proceedings to be prepared and submitted to the Board. If he finds that claimant's present condition is the result of his 1972 injury and represents a worsening thereof he shall so recommend to the Board, and enter an order denying claimant's 1979 claim. Otherwise, he shall recommend to the Board that the request for own motion relief be denied and enter an Opinion and Order remanding claimant's new injury claim to the carrier for acceptance and payment of compensation."

Under the circumstances presented in this own motion proceeding and in WCB Case No. 79-7722, I do not feel I can strictly comply with those specific directions.

It is my opinion, based upon the evidence presented, that claimant has continuing symptoms of pain resulting from worsened conditions of his lumbosacral injury which occurred in 1972 and these conditions have been caused to become worse by the activities in which he engaged while working for Jones Drilling Co; that this increase in worsened conditions does not constitute a new injury but is an aggravation of the previous injury under the decision of the Court of Appeals in Calder v. Hughes & Ladd, 23 Or App 66, which is applicable to the instant case by the similarity of factual circumstances.

It is also my opinion that claimant has additionally sustained a new injury while working for Jones Drilling Co. from the lifting activities in which he participated. That injury was a different injury at a new anatomical site, a thoracolumbar spine strain, as diagnosed by Dr. Martens; the medical relationship between claimant's employment activities and the injury has been established by the testimony of Dr. Martens. However, the after effects of the two injury conditions are interrelated. I would exclude, however, from that interrelationship the specific medical treatment which claimant received between May 16, 1979 and June 17, 1979 which was specifically provided for the thoracolumbar strain and would be the responsibility solely of the employer, Jones Drilling Co., and its carrier, Employee Benefits Insurance Co.

The interrelationships of the after effects of the two injuries concerns both medical services and claimant's ability to work. Since June 17, 1979 any medical treatment which claimant has received has actually been for both conditions as claimant continues to have distress from both anatomical injury sites. Additionally, whatever degree of impact claimant's medical condition contributed to the termination of his job at Jones Drilling Co., it was associated with both injurious conditions as the problem for both conditions stemmed from the lifting activities while working at Jones Drilling Co. and it is this lifting activity that he is required to avoid. Consequently I can not simply recommend that claimant's November, 1972 claim be reopened and order that the claim against Jones Drilling Co. be denied, nor can I simply reverse those positions.

I can only recommend to the Board that my findings and conclusions be considered, because it is impossible to tell at this juncture and from the medical evidence which has been supplied, whether the thoracolumbar strain injury is of temporary nature only or whether it will have longer lasting consequences. The Board might consider some division of responsibility or apportionment of compensation in its consideration.

As you will note in Appendix "A", I have concluded that claimant sustained a new injury and have remanded the claim against Jones Drilling Co. to Employee Benefits Insurance Company for acceptance of the claim and payment of appropriate workers' compensation benefits.

WCB CASE NO. 79-949 Aptil 15, 1980

ALFONSO ARANDA, CLAIMANT
Dick Ginsburg, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

ISSUE ON REVIEW

Claimant seeks Board review of the Referee's order which granted him an award of compensation equal to 32° for 10% unscheduled disability for his low back injury. Claimant contends this award does not correctly reflect his loss of wage earning capacity.

FACTS

Claimant, a 38-year-old construction laborer, on February 13, 1978, sustained a compensable injury to his back while lifting heavy objects. Dr. Vernon Hall, D. O., diagnosed a lumbosacral strain, left sacroiliac strain and possible radicular neuritis. Claimant was treated conservatively and released for restricted work on June 21, 1978 by Dr. Hall. Dr. Hall listed the restriction placed on claimant as no lifting over 30 pounds.

In July 1978, Dr. Richard Borman, D. O., reported that claimant should begin a program of exercise to strengthen his muscles. He doubted if claimant would have any significant permanent residuals as a result of his injury of February 13, 1978.

Dr. Theodore Pasquesi, in August 1978, reported that claimant continued to complain of pain in his low back which was present every day. Claimant also indicated that he occasionally had radiating pain into the upper back and sharp pains in his leg. Dr. Pasquesi diagnosed chronic lumbar instability. It was his opinion that claimant's condition was probably stationary. He felt it would be best for claimant to engage in work not requiring repetitive bending, stooping, twisting or lifting more than 30 pounds. On the basis of chronic pain, Dr. Pasquesi felt that claimant had an impairment equivalent to 10% of the whole man. Dr. Hall concurred in this report.

A Determination Order, dated September 27, 1978, awarded claimant temporary total disability compensation.

In October 1978, the claimant was advised that he was not referred for vocational assistance. The employment specialist with Field Services Division indicated the basis of this decision was the fact that claimant had been released to return to work in August 1978 and had no permanent residuals and, therefore, should be able to return to his regular or related employment.

Dr. Louis Fry, in November 1978, reported that claimant continued to have evidence of mechanical low back strain. Claimant continued to complain of back pain. Dr. Fry indicated claimant had no future plans regarding employment. He said claimant had no knowledge of how to return to some gainful employment. In February 1979, Dr. Fry felt that claimant should be assisted by a state agency either with retraining or some other form of support. He noted Dr. Pasquesi had given claimant a rating of 10% impairment of the whole man which he agreed with and recommended referral to the Callahan Center.

On October 11, 1979, Dr. Gregory Mecklem diagnosed chronic lumbosacral strain and localized osteoarthritis between the 4th and 5th lumbar vertebra. He suggested that claimant begin a program of exercises to strengthen his abdominal muscles and advised claimant against lifting anything over 20 pounds or engaging in any lifting jobs. Dr. Mecklem felt claimant's condition was stationary and agreed with Dr. Pasquesi's rating of 10% impairment. He further agreed that further treatment was palliative rather than curative. He felt specialized care and vocational rehabilitation were in order.

At the hearing, claimant testified he has obtained a 4th grade education in Mexico. He is a native Spanish speaker and is not fluent in English. He indicated that he had worked throughout his life as a farmer and laborer. Claimant is not fluent in the English language. Claimant, however, does have a driver's license.

The Referee, based on all the evidence in this case, granted claimant an award of compensation equal to 32° for 10% unscheduled disability for claimant's low back injury. The Referee authorized the State Accident Insurance Fund to set off against this award time loss paid in excess of the Determination Order award of September 27, 1978.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, modifies the Referee's order. The Board finds, based on all the evidence in this case, claimant is entitled to an award of compensation equal to 80° for 25% unscheduled disability for his low back injury. The limitations placed on claimant by the medical doctors consist of no repetitive bending, lifting, stooping, twisting or lifting of more than 30 pounds. Dr. Pasquesi opines claimant has an impairment equivalent to 10% of the whole man. The Board finds, based on this evidence, as well as claimant's age, education, prior work experience and other relavent factors, that the award granted by it is supported by the evidence.

The Board feels that this award for unscheduled disability should qualify claimant for Field Services Division vocational assistance. Therefore, the Board strongly recommends the Field Services Division contact claimant and that someone assist claimant or work with claimant. The Board feels that someone who is fluent in Spanish in the Field Services Division should contact claimant and make intensive effort to place claimant in a suitable form of employment.

ORDER

The Referee's order, dated November 7, 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 all previous awards of unscheduled disability for this injury.

The remainder of the Referee's order is affirmed.

SAIF CLAIM NO. C 384145 April 15, 1980

ROBERT T. BULLIS, CLAIMANT
SAIF, Legal Services, Defense Atty.
Amended Own Motion Determination

On February 29, 1980, the Board entered its Own Motion Determination granting claimant compensation for temporary total disability from December 5, 1979 through January 3, 1980, less time worked, and compensation for 50% loss of the right small toe. On April 9, 1980, the Board received a medical report of Dr. Thomas Harding which indicated claimant's wife had called him about the discrepancy in the date claimant was released for work. Dr. Harding stated that claimant had originally been released for work on January 4, 1980 but this was extended due to "granulation of the right little toe" to January 14, 1980. The Board hereby amends its February 29, 1980 Own Motion Determination to grant claimant temporary total disability compensation from December 5, 1979 through January 13, 1980, less time worked. The remainder of the order is affirmed.

IT IS SO ORDERED.

WCB CASE NO. 79-4192 April 15, 1980

JOHN GAREE, CLAIMANT
David R. Vandenburg, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

ISSUE ON REVIEW

The State Accident Insurance Fund (hereinafter referred to as the Fund) seeks Board review of the Referee's order which granted claimant an additional award of compensation equal to 37.5° for 25% scheduled disability for loss of his left leg. This award was in addition to an award made by a Determination Order, dated May 1, 1979, which granted claimant compensation equal to 15° for 10% loss of his left leg. The Fund contends this award is excessive.

FACTS

Claimant, a 32-year-old logger, sustained an injury on November 1, 1977 to his left knee. Claimant was bumping knots off of logs when the end of a log struck his left knee. X-rays revealed two "fractures proximal left leg involving a tibia and fibula, and probably involving insertion of lateral collateral ligament".

On November 2, Dr. Benjamin Balme diagnosed: "Avulsion, head of the fibual. 2) Rupture of the iliotibial band. 3) Rupture of the popliteus tendon. 4) Rupture of the anterior and posterior capsule, the lateral knee with a complete varus instability, left knee". This was surgically repaired. By March 1978, Dr. Balme reported that claimant was doing quite well with reasonably good stability considering the extensive nature of his ligament disruption. He found the range of motion of the knee was approximately 20 to 90 degrees. He advised claimant to continue physical therapy. He felt that claimant might possibly return to work around the 1st of July if he was able to return to vigorous logging activities at all. In June 1978, Dr. Balme reported that claimant continued to complain of pain in the knee while performing vigorous activities. He found the range of motion was approximately from 5 to 120 degrees. He noted claimant had a mild varus instability.

Claimant reported that he returned to work on September 14, 1978 as a fire watcher with his employer. However, Dr. Balme continued to report that claimant continued to complain of swelling in his knee and difficulty standing on it for any length of time.

On February 3, 1979, Dr. Balme advised the Fund that he referred claimant to Dr. Kenneth Singer. He noted that claimant apparently was performing ranch work; he was not sure what exactly claimant had been doing on his ranch.

Dr. Kenneth Singer, in February 1979, reported that the ligament repair had healed and was extremely stable. Claimant complained that his knee symptoms were intermittent. His symptoms consisted of an occasional sharp pain and swelling. Claimant notice the swelling developed after he engaged in any significant activity. Claimant told Dr. Singer that he had a small farm which he was able to do some of the normal ranching activities on, but he was unable to return to prolonged standing, walking or climbing because of his knee. Dr. Singer did not feel the symptoms complained of by claimant represented any instability in the knee. He interpreted x-rays as revealing a small osteophyte in the anterior portion of the tibial plateau.

On May 5, 1979, Dr. Singer performed an arthroscope of the left knee. This examination was apparently normal.

Dr. Balme, on April 4, 1979, reported that claimant continued to complain of difficulty going up and down stairs, running, and squatting. Dr. Balme found that claimant still had a slight ligamentous laxity to varus stress. The range of motion of claimant's knee was full. Dr. Balme opined that claimant would be unable to return to his previous job of bumping knots in the wood. He felt that claimant should be able to pursue his farm work, which would allow him to be on and off his feet throughout the day with intermittent heavy lifting, but did not require squatting or rapid agile changing of directions, or running or walking for any prolonged period of time over irregular terrain. Dr. Balme opined that claimant's condition was medically stationary.

A Determination Order, dated May 1, 1979, awarded claimant temporary total disability compensation and temporary partial disability compensation and compensation equal to 15° for 10% loss of his left leg.

On September 20, 1979, Dr. Robert Bomengen indicated that claimant developed difficulty over the weekend in his left knee. Claimant reported that he was operating a tractor which had a loader on it and required him to use a clutch. Claimant indicated the use of a clutch aggravated his knee condition. Claimant further stated that he was still unable to squat down or kneel on his knee at all due to the pain. Further, claimant indicated that he had difficulty walking on uneven ground because of an insecure feeling in his knee. Dr. Bomengen felt that claimant had some mild arthritic changes of the left knee which would be aggravated with excessive use or standing in one position.

At the hearing, claimant indicated he still has difficulty with soreness and swelling in his left knee. He stated that while he could straighten out his leg forward in a sitting position, he was unable to bend it backwards. He said that he has difficulty walking up and down stairs, noting more difficulty in walking down stairs than in walking up stairs. According to claimant he feels he has less swelling now and his condition has been relatively stable for the last six months. He indicated that while he could run and sometimes trot, he noticed a greater propensity for fatigue in his left leg. Claimant also testified that he has done some fairly strenuous work on the ranch in the last six to eight months. Claimant currently runs a sheep ranch. He indicates that he has plowed approximately 70 acres of ground. He also raises hay which he sells. Claimant stated that his ranch consists of approximately 330 acres. He indicated that this was fenced and that he was required almost daily repairing of the fence. He stated that he used a three-wheel motorcycle to ride the fence to check for holes in it. He said he currently was raising approximately 450 sheep and that he had had as high as 900 sheep on his ranch. Claimant testified that he performed as much of the work around his ranch such as lambing, handling hay, and feeding his sheep.

The Referee, after reviewing all the evidence, concluded that claimant was entitled to an increased award of compensation for his left leg injury over that which he had previously awarded. Therefore, the Referee stated that the degree of impairment while primarily a medical question must be determined by looking at credible lay testimony as well. The Referee noted that while a lack of medical clarification for some of claimant's complaints and disability weakened his claim, it did not defeat his claim. Therefore, the Referee found that claimant was entitled to an additional award of compensation equal to 37.5° for 25% scheduled disability, for loss of his left leg, in addition to that which he had been previously awarded. The Referee further awarded claimant's attorney a fee out of this increased compensation.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, modifies the Referee's order. The loss of use, when evaluating a scheduled injury, does not necessarily correlate to the extent of a mechanical impairment as determined by the medical evidence. The Board finds, based on all the evidence in this case, that the award granted by the Referee was excessive. The Board finds claimant is entitled to an award of compensation equal to 30° for 20% loss of his left leg. This award is in lieu of any previous awards of scheduled disability.

ORDER

The Referee's order, dated November 1, 1979, is modified.

Claimant is hereby granted an award of compensation equal to 30° for 20% loss of his left leg. This award is in lieu of any previous awards for permanent partial disability that claimant had been granted for his left leg injury.

The remainder of the Referee's order is affirmed.

WCB CASE NO. 79-5133 April 15, 1980

PHYLLIS HAM, CLAIMANT
Wade P. Bettis, Jr., Claimant's Atty.
Lawrence L. Paulson, Employer's Atty.
Amended Stipulation

Claimant, acting by and through her attorney, Wade P. Bettis, Jr., and the insurance carrier, Chubb Pacific, acting by and through their attorney, Lawrence L. Paulson, hereby enter into the following proposed amended stipulation:

1. Claimant shall receive her compensation award in a lump sum settlement.

2. All other conditions of stipulation dated March 21, 1980 shall remain the same.

IT IS SO ORDERED and the amended stipulation is approved, and all aspects of the previous stipulation are also approved.

WCB CASE NO. 79-872 April 15, 1980

DOLORES M. HENRY, CLAIMANT
Bump, Young & Walker, Claimant's Attys.
Schwabe, Williamson, Wyatt, Moore & Roberts, Employer's Attys.
Request for Review by the Claimant

ISSUE ON REVIEW

The claimant seeks Board review of the Referee's order which affirmed the Determination Order, dated August 22, 1978, which awarded claimant compensation equal to 48° for 15% unscheduled disability for a back injury. Claimant contends that she is permanently and totally disabled.

FACTS

Claimant, a 46-year-old cleaning lady with Hank's Thriftway, sustained an injury to her back on October 31, 1974 while mopping a floor. Claimant indicated that she went to straighten up and she experienced pain in her back. Dr. James Garland diagnosed a probable herniated disc.

On October 3, 1975, Dr. Garland reported that claimant's condition was medically stationary as of January 25, 1975. He indicated that on that date claimant told him that she did not have any pain in her left leg, but the leg at times would give out. Dr. Garland, in January 1976, indicated that he released claimant for modified work on January 6, 1975 and regular work on January 20, 1975 and reported her condition was stationary as of March 15, 1975.

In March 1976, Dr. Garland reported that claimant attempted to work four hours on March 15, 1976, but had been unable to tolerate the work because of pain.

On May 7, 1976, Dr. Franci. Nash indicated that claimant complained of low back pain, lc gluteal pain, left posterior thigh and calf pain to the ankle level, and intermittent weakness in the left leg. X-rays revealed that claimant had a sixth lumbar vertebra and sacralization of the "sixth" lumbar vertebra on the left side. Dr. Nash performed a myelogram which revealed a defect at the L5-S1 level. On June 4, 1976, he performed a decompressive laminectomy at the L5-L6 level and a discectomy at the L5-L6 level. By September 1976, Dr. Nash indicated claimant was making a satisfactory recovery from surgery, but still complained of cramps in the left leg and inability to do her back exercises because of a flare-up with a bowel problem. It was his opinion that claimant would be unable to return to her previous type of work and that claimant would benefit, in his opinion, from vocational rehabilitation. In November 1976, Dr. Nash noted that claimant complained of intermittent cramping in the left leg and low back fatigue with prolonged standing. He opined that claimant could begin a vocational rehabilitation program with a vocational goal of obtaining a job which did not require prolonged periods of standing, or lifting, or forward flexion, etc.

On November 16, 1976, claimant applied for vocational assistance. Claimant was referred to Mr. Richard King, a private rehabilitation specialist.

Claimant continued to complain of muscle spasm at the lumbosacral level with left gluteal, thigh, and calf radiation of pain. Dr. Nash performed a second myelogram in May 1977, which revealed some defects at the cervical level and no evidence of abnormalities in the lumbar area with the exception of failure of filling of the nerve root at L5-S1 level on the right.

On July 25, 1977, Dr. Nash opined that based upon claimant's medical history, upon the fact that claimant had been rejected for vocational rehabilitation, he did not feel that claimant was capable of returning to productive employment. He did not foresee any additional surgery unless claimant's condition worsened. His final diagnosis was:

"1) Status post-lumbar laminectomy with continuing signs of neuropathy L5, left
2) Status post-median nerve entrapment, right carpal level.
3) Multiple level cervical spondylolysis.

4) History of multiple al[illegible]gies
5) Emphysema
6) Bowel resections x 2 per Drs. Garland and Awe".

Dr. Nash opined that claimant had "on-going permanent partial disability".

Mr. King, in October 1977, reported claimant had a 10th grade education and had worked in a nursery, poultry processing plant, as a fruit picker, doing waitress work, and various jobs in different canneries previously to her job with Thriftway. Claimant did not have any vocational goal. Mr. King began trying to work with claimant to reintegrate her into the labor force.

On December 7, 1977, Dr. Orville Jones indicated he did not feel claimant could return to her former job. He felt she should have limitations on her bending and lifting. It was his opinion that claimant was magnifying her subjective complaints over her objective findings. He felt claimant was not permanently and totally disabled and that with proper treatment, claimant could be expected to return to the labor market in a limited way. Dr. Jones felt that claimant was capable of performing fairly sedentary work. Dr. Jones rated a total loss of function of claimant's back, as existing at the time of his examination and due to her injury, in the upper range of moderate, that is "approaching 60%". He felt claimant should be referred to the Portland Pain Clinic for evaluation and treatment. His diagnosis was status post-operative lumbar laminectomy, chronic residual lumbosacral strain, residual left sciatica without marked radiculopathy, and functional overlay.

In January 1978, Dr. Nash indicated he was in complete agreement with Dr. Jones' diagnosis and current status evaluation. However, he felt claimant's inability to be rehabilitated was not based solely upon her problems as listed by Dr. Jones, but on the associated problems of cervical spondylosis and particularly emphysema as well as ongoing abdominal problems. Dr. Nash did not feel that claimant would benefit from evaluation in the Pain Clinic.

On April 5, 1978, Dr. Peter DeCourcy, a psychologist, reported that he classified claimant as an extremely dependent woman who had a remarkably poor self-concept and who had a chronic high level of tension and anxiety which was associated with insecurity, social isolation and chronic feelings of

unhappiness. It was his opinion that she was preoccupied with her bodily functions and physical symptoms; she continually complained of pain and discomfort, and her physical discomfort was grossly exacerbated under conditions of internal or external stress. He observed claimant had several physical problems during his interview with her. Claimant, in his opinion, viewed herself as unemployable and had no interest in considering employment. It was his opinion that claimant's functional and organic problems were sufficiently severe to combine to make her virtually unemployable. Further, he felt that the only occupations in which claimant could possibly succeed were those in which she could change positions frequently and alternate sitting and standing. He stated she could not be expected to use her hands, arms or fingers in any sustained activity, and could not be expected to work at a conventional table or height. Dr. DeCourcy felt claimant would qualify for work as a security guard, a telephone answering service operator or an information clerk. He noted that there were other jobs claimant could possibly fill which were all of a light sedentary nature. He felt claimant's motivation was so poor that she would require a great deal of encouragement if she were to attempt employment even on a trial basis. He observed that claimant had good hand-eye coordination and that she was unable to sit or stand for brief periods of time without changing positions, unable to bend, stoop, squat, kneel, unable to work with her hands at table level while sitting, unable to work at a table while standing and unable to use her hands or fingers at physical activities, had poor hand and finger dexterity, and impairment of mobility of her arms and shoulders.

On April 20, 1978, Mr. King felt that the rehabilitation efforts should be closed because of the severity of claimant's disability.

In June 1978, Mr. King reported that he asked claimant about the possibility of working in an electronics firm. Claimant stated she could not work there because of a smell of plastics. Mr. King indicated that he could not smell plastics, but claimant said she would be unable to work in that environment because it would bother her. Claimant stated she could neither drive, sit or stand nor do her housework and was unable to do any work at all. Mr. King reported claimant continued to show no motivation to return to work. He had also discussed a possible workshop evaluation at St. Vincent de Paul to determine what claimant's restrictions were. Claimant declined to enter this program saying it was too far for her drive. Mr. King stated that claimant seemed to have "an answer" for every suggestion that he had regarding employment which he felt was within her restrictions.

On July 10, 1978, the rehabilitation services Mr. King was employed by closed their file on claimant. This was based on her lack of cooperation with them.

A Determination Order, dated August 22, 1978, awarded claimant temporary total disability compensation from November 1, 1974 through January 5, 1975, less time worked, further temporary total disability compensation from March 15, 1975 through July 25, 1978, and temporary partial disability compensation from January 6, 1975 through February 14, 1975 and compensation equal to 48° for 15% unscheduled disability for her back injury.

On January 11, 1979, Dr. Nash opined that claimant was permanently incapacitated from a regular form of gainful employment. He based this medical opinion upon claimant's multiple diagnosis he had listed in his June 25, 1977 report which he felt prevented her from engaging in employment for which she had been trained. He estimated that the permanent impairment that claimant had as a result of her work-related injury was approximately "60-70% disability of her back function". He felt claimant's condition had achieved maximal medical benefit when she was discharged from the hospital in May 1977. He noted that claimant's continuing pain affected her living and affected her ability to travel, limited her ability to sit, stand or walk for prolonged periods of time.

The Orthopaedic Consultants, in April 1979, reported claimant complained of constant muscle spasm in the low back and left leg which were brought on by prolonged activity of any type. Claimant indicated these were relieved by heat or by walking. She also indicated her left leg occasionally gave out. It was their opinion that claimant's condition was medically stationary. They did not believe that claimant could return to her same occupation even with limitations, but did feel that she could do light or sedentary work. They did feel claimant needed further vocational assistance, psychological or psychiatric examination or referral to the Pain Center. It was their opinion that claimant did not appear to be well motivated to return to work. They estimated the total loss of function of the lumbosacral spine as it existed at the time of their examination was moderate and this loss of function was due to her injury in October 1974.

At the hearing claimant testified that she could sit for 10 to 15 minutes, could not get on her hands and knees, could stand for only 15 minutes, walk one block, and could not perform restaurant work. She further testified that she was unable to do anything outdoors except look at her garden and pick plums off a tree while standing on the ground.

Mr. Kenneth Gale, an investigator, took surveillance films of the claimant. He testified he saw the claimant shake rugs, do some yard work, including the use of a wheelbarrow, observed her drive around, mop and do other various activities over a two day period. He said that he did not observe claimant having any physical difficulty. Films show claimant carrying what appeared to be heavy packages, shaking rugs, raising her arms overhead using a wash line, sweeping with a broom, cleaning with a mop and on several occasions bending forward from the waist while working in the yard. The films also showed her ability to duck under tree branches and work vigorously rearranging throw rugs on a wash line. The films show her shoveling sawdust, kicking at dirt, manipulating a wheelbarrow, carrying a lawn chair, bending, checking her porch construction, stepping high over a porch construction forms, getting into a pickup, slamming the door with apparently no problem and walking easily on rough ground. During the entire length of the films claimant was not observed to be evidencing any pain.

The Referee, after reviewing all the evidence in this case, found that an additional award of compensation was not warranted and affirmed the Determination Order of August 22, 1978.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, would modify the Referee's order. Based on all the medical evidence in this case, the Board finds that the award of unscheduled disability was not adequate. The Board does not find that claimant was permanently and totally disabled. She has shown no evidence of motivation to return to work and has not sought or looked for work since her injury. Further, she has not cooperated with the rehabilitation people in attempting to find her work or in obtaining new skills. The greater weight of the medical evidence indicates that claimant has a moderate impairment only and that she is not permanently and totally disabled. Therefore, the Board concludes that, based on all the evidence, claimant is entitled to an award of compensation equal to 160° for 50% unscheduled disability. This award is in lieu of any previous awards for unscheduled disability claimant had been granted.

ORDER

The Referee's order, dated September 14, 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 all previous awards for unscheduled disability for this injury.

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. 78-873 April 15, 1980

HARRY H. INKLEY, CLAIMANT
Willner, Bennett, Riggs & Bobbitt,
Claimant's Attys.
Lang, Klein, Wolf, Smith, Griffith
& Hallmark, Employer's Attys.
Order On Remand

On January 29, 1979, the Board entered its Order on Review which reversed the Referee's order. In its order, the Board held, under the "last injurious exposure" rule, that claimant had not been exposed to any kind of noise which would be likely to cause a hearing loss after April 1, 1976. The Employee Benefits Insurance Company (EBI) furnished the employer's workers' compensation coverage after April 1, 1976. The State Accident Insurance Fund (Fund) provided workers' compensation insurance coverage for the employer prior to that date. The Board concluded that neither EBI nor the Fund were responsible to provide benefits to claimant for his hearing loss. This order was timely appealed to the Court of Appeals which affirmed the Board's order and then to the Supreme Court.

The Supreme Court, in Inkley v. Forest Fiber Products Company, et.al., 288 Or 337, _____ P2d _____ (1980) held under the last injurious exposure rule claimant need only prove that the employment environment could have contributed to the hearing loss. The Court felt that the Referee had correctly applied this rule, but that the Board had not. Therefore, the case was remanded to the Board to determine whether the employment environment from April 1976 to claimant's retirement could have contributed to his hearing loss. Also, the Court held that the Fund had been correctly joined as a party to these proceedings.

On January 22, 1980, the Supreme Court entered a Judgment and Mandate remanding this case through the Court of Appeals to the Board for further proceedings in conformity with its opinion.

The Board, after receiving the Judgment and Mandate and after de novo review, finds that claimant's employment environment from April 1, 1976 to his retirement could have contributed to his hearing loss. The Board notes in this case that the employer remodeled its shop which resulted in a reduction of the noise level. The Board further notes that the claimant worked in the shop area and in the plant area. Claimant was provided ear protection which he wore, except at certain times when welding. The welding was done in the shop and in the plant area. The work environment in the plant could contribute to hearing loss in this claimant and to the extent that he performed welding tasks without ear protection while working in that environment his hearing could have been affected.

This case deals with one employer that had secured workers' compensation coverage from two successive insurance carriers. The evidence is uncontradicted that the claimant's hearing loss is noise-related and the injurious exposure occurred at Forest Fiber Products Company. Under the last injurious exposure rule, the carrier providing the workers' compensation insurance coverage for the employer at the time the last injurious exposure occurs must assume responsibility for the hearing loss. Under the rule enuciated in Inkley (supra.) the testimony in this case establishes EBI as the responsible carrier. The Board finds claimant's work from April 1, 1976 to his retirement could have contributed to his hearing loss and therefore remands claimant's claim to EBI for acceptance and payment of compensation and other benefits as provided by law. Claimant's attorney is hereby granted a fee of $1,100 for his representation of claimant at both the hearing and Board level.

ORDER

EBI's denial, dated January 5, 1978, is set aside and claimant's claim is remanded to it for acceptance and payment of compensation and benefits as provided by the Workers' Compensation law for his hearing loss.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services both at the hearing and at the Board level in the amount of $1,100, payable by EBI.

WCB CASE NO. 79-924 April 15, 1980

BILL E. JONES, CLAIMANT
Richardson, Murphy & Nelson, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant
Cross-request by the SAIF

ISSUE ON REVIEW

Claimant and the State Accident Insurance Fund (Fund) seek Board review of the Referee's order which granted claimant additional compensation equal to 160° for 50% unscheduled disability and awarded an attorney fee to his attorney. Claimant contends he is permanently and totally disabled. The Fund contends this award is excessive.

FACTS

Claimant, a 42-year-old truck driver for Thomas Oil Company, injured his back on December 2, 1976 when he fell while getting off of his truck. X-rays revealed an old rheumatoid spondylitis of the lumbosacral spine and a solid fusion of the lumbar vertebrae and sacroiliac joints. Dr. James Baldwin diagnosed claimant's injury as an ankylosing spondylolitis and acute lumbosacral sprain.

In April 1977, Dr. H. Freeman Fitch reported claimant had had an ankylosing spondylitis since 1951. Claimant had recurring pain from this condition. X-rays revealed a "bamboo solid spine" with some probable motion through the lumbosacral region. Dr. Fitch felt claimant should continue to be treated conservatively.

The Orthopaedic Consultants, in August 1977, indicated claimant was "surprisingly" free of complaints. Their diagnosis was: "1. Marie-Strumpell spondylitis anklopoetica involving the entire spine and shoulders; 2. Chronic lumbar strain, secondary to trauma". It was their opinion claimant's condition was stationary and claimant could return to his previous occupation with limitations. They felt the overall "disability" to claimant's back was severe, but due to the December 2, 1976 injury only mildly moderate.

Claimant attended the William Callahan Center from October 28, 1977 through December 7, 1977. Dr. Monty Johnson, a psychologist and team chairman of the vocational team, reported claimant cooperated with the personnel at the Center and participated in the programs at the Center. Claimant was discharged to Vocational Rehabilitation Division for "general plan development".

In March 1978, Drs. Michael Fleming and Norman Hickman reported claimant was using biofeedback. A report from the Callahan Center had indicated claimant was moderately tense and moderately overfocused on his physical problems. Drs. Fleming and Hickman noted claimant was a person who demanded a lot of himself and pushed himself to meet his own expectations. Further, they reported claimant had been unable to continue to work as a truck driver and his uncertainty about his new vocational program added to claimant's feelings of anxiety and tension. It was their opinion that claimant needed psychological assistance.

Also, in March 1978, claimant was found eligible for vocational rehabilitation. The limitations placed on claimant were: no lifting over 25 pounds, no continuous bending or squatting, and no constant standing. Claimant's work history consisted of 20 years of truck driving and some clerking work. He stated he had an 11th grade education and a GED. Through vocational rehabilitation in March 1978 claimant began a program with a vocational goal of becoming an accountant.

At the hearing, claimant testified while in the vocational rehabilitation program he experienced low back pain and headaches which increased in intensity and frequency the longer he participated in the program.

Dr. Guy Parvaresh, a psychiatrist, in August 1978, diagnosed: "1) Anxiety neurosis - psychophysiological musculoskeletal disorder. 2) Personality disorder - passive dependent in nature". He felt claimant could perform, psychologically, any job and felt the only limitations placed on claimant should be based on the "orthopedic limitation". Dr. Parvaresh did not find a causal relationship between claimant's injury and his present psychopathology.

In January 1979, Dr. Thomas Reardon, who had been treating claimant, opined he was in all probability permanently disabled. He did not feel claimant was a candidate for rehabilitation. Dr. Reardon commented he had known claimant a number of years prior to his December 1976 injury and claimant had made every effort to be self-sufficent despite his ankylosing spondylitis.

A Determination Order, dated January 25, 1979, awarded claimant temporary total disability compensation and compensation equal to 32° for 10% unscheduled disability for his low back injury.

In April 1979, Ms. Elsie McFarland and Dr. Paul Metzger, a psychologist, reported claimant had continued to receive psychotherapy. Claimant felt "physically a wreck" and "terribly incapacitated by his rheumatoid arthritis". They characterized claimant as one of the "quietly-agonized individual" who continued to apologize for complaining, for appearing upset, or for causing anyone problems.

Claimant also developed a problem with his right knee. This condition was not related to his injury.

Claimant has not sought other employment since his injury.

The Referee, based on all the evidence, concluded claimant was not permanently and totally disabled. However, the Referee increased claimant's award of compensation by 160° for 50% additional unscheduled disability and granted claimant's attorney a fee.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, remands this case to the Referee. The record in this case was not adequately developed. The Board remands this case to Referee Lou Williams, under ORS 656.295, for the parties to develop evidence on claimant's vocational potential, his trainability, employability and his vocational aptitude. The Board orders the claim reopened as of the date of the hearing and claimant is entitled to temporary total disability from that date until the case is again closed by the Referee's issuance of an Opinion and Order.

ORDER

Claimant's claim is hereby remanded to its Hearings Division to be set for an expedited hearing before Referee Lou Williams for the taking of evidence on claimant's vocational potential, trainability, employability and vocational aptitude. Claimant's claim is to be reopened as of the date of the hearing and until it is again closed pursuant to the issuance of the Referee's order.

WCB CASE NO. 79-4368 April 15, 1980

CLIFTON REYNOLDS, CLAIMANT
Dennis Henninger, Claimant's Atty.
Lang, Klein, Wolf, Smith, Griffith & Hallmark, Employer's Attys.
Request for Review by Employer

ISSUE ON REVIEW

The employer-carrier seeks Board review of the Referee's order which set aside its denial, dated May 11, 1979, and remanded claimant's claim to it for acceptance and payment of benefits until the claim was closed pursuant to ORS 656.268, awarded claimant, as a penalty, 25% of all interim compensation due from May 11, 1979 to the date of his order (September 26, 1979), and awarded claimant's attorney a fee of $750. The employer-carrier contends the Referee erred in so doing.

FACTS

Claimant, employed as a "renderer" with this employer, injured his back on October 13, 1978 when he slipped and fell. Dr. F. C. Nachtigal diagnosed this injury as an acute lumbar strain. Claimant returned to work for this employer on November 13, 1978.

On December 6, 1978 claimant sustained a second injury to his back and neck when he fell off the side of a dump truck. Dr. F. C. Nachtigal diagnosed this injury as a lumbar strain. He indicated that this injury would not cause any permanent impairment.

On January 5, 1979, claimant was terminated by this employer for alleged poor work performance.

A Determination Order on the October 13, 1978 injury, dated January 15, 1979, awarded claimant temporary total disability compensation from November 3, 1978 through November 10, 1978.

On February 16, 1979, Dr. Steven J. Thomas reported claimant complained of continuing back pain which had worsened since his discharge by this employer. Dr. Thomas felt claimant was unable to work because of chronic back pain and felt claimant's claim should be reopened. Dr. Thomas started claimant on a program of physical therapy and anti-inflammatory medication.

On February 28, 1979, claimant was hospitalized by Dr. Thomas for a trial period of traction and physical therapy. Dr. Thomas indicated his original diagnosis was moderately severe lumbar and mild cervical strain, that treatment of claimant as an outpatient had failed and that claimant's symptoms had continued to increase. His diagnosis was a lumbar strain. He found no evidence of nerve root impingement.

Dr. Thomas, in March 1979, reported that claimant continued to have pain and was unable to resume his previous occupation. He noted claimant was still under active treatment with physical therapy, and anti-inflammatory medication. He felt it was questionable whether claimant would be able to return to his regular occupation since it involved a lot of heavy lifting. He referred claimant to vocational rehabilitation for training for a light-duty job. He opined that claimant's condition was still not medically stationary.

On May 11, 1979, the carrier denied claimant's claim. The basis of this denial was the fact that their investigation and the current medical reports in their files indicated that claimant's current condition was not a continuation of his October 13, 1978 back injury.

At the hearing, claimant testified that his work at the rendering company was vigorous physical work. He indicated he had lost two weeks from work in November due to his first injury. Claimant further testified that when he returned to work he was having some physical problems with his back and it progressively got worse over the weeks after he was terminated by this employer.

The evidence introduced by the carrier indicated that benefits were paid up to the date of their denial, May 11, 1979.

The Referee stated that the medical reports from Dr. Thomas were sufficient to establish that claimant's condition had worsened since the last award of compensation. The Referee noted that claimant's symptoms were greater and that Dr. Thomas had begun a progressive course of curative treatment, including bed rest, traction, physical therapy, exercises, and medication. Further, Dr. Thomas questioned whether claimant could return to his previous occupation. The Referee noted that Dr. Thomas was aware claimant intially suffered a back sprain and indicated that the current condition was the result of the industrial injury. Dr. Thomas requested the claim be reopened. The Referee found the unrebutted medical evidence was that the condition was related to the injury and there had been a worsening of claimant's condition since the last award or arrangement of compensation. Therefore, the Referee set aside the carrier's denial.

Claimant's request for penalties and attorney's fees for the unreasonable refusal to pay compensation was granted. The Referee's found that the evidence indicated that at the time the denial was made, there was no supporting medical evidence or probative lay evidence to justify the denial. Therefore, the Referee concluded the denial was unreasonable and assessed a penalty and attorney's fee.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, modifies the Referee's order. The Board agrees with the Referee's setting aside of the employer-carrier's denial and remanding the claim back to it for payment of benefits until the claim was closed pursuant to ORS 656.268 and awarding claimant's attorney a fee of $750. The Board, however, does not find that the acts by the carrier in this case were unreasonable. At the time the denial was made, the carrier had, in its possession, the report of Dr. Thomas which reflected only subjective complaints by the claimant. The Board does not find that the carrier's denial issued in May 1979 based on the evidence it had before it at the time it was entered, was unreasonable. The carrier continued to pay all benefits which claimant was entitled to up to the date of its denial. Therefore, the Board, based on all the evidence, finds that the denial issued by the carrier was not unreasonable requiring the awarding of penalties and attorney fees in this particular case. The Board modifies the Referee's order by reversing that portion of the Referee's order which awarded a penalty equal to 25% of all the interim compensation due from May 11, 1979 the date of the carrier's denial, to September 26, 1979, the date of the Referee's order.

ORDER

The Referee's order, dated September 26, 1979, is modified.

That portion of the Referee's order which awarded a penalty equal to 25% of all interim compensation due from May 11, 1979 to the date of his order is reversed. 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 carrier.

WCB CASE NO. 79-1795 April 15, 1980

THOMAS R. WARREN, CLAIMANT
Colombo & Scanlon, 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 State Accident Insurance Fund's (hereinafter referred to as the Fund) denial of his claim for a November 28, 1978 alleged back injury.

FACTS

Claimant, 32 years old, was employed by Pacific Coast Services as a carpet-cleaner manager. He was required to clean carpets and also to sell the service to customers. Claimant testified that in 1976 he had developed upper back and shoulder problems from lifting and moving heavy furniture. He received some treatment for this injury. In October 1977, while moving a piano he again injured his back. He received medical treatment for this injury, but missed no time from work.

In February 1978, Dr. Jacob Wilson treated claimant for back pain and headaches. Claimant told Dr. Wilson he had hurt his back in January 1978 lifting a heavy rug cleaning machine. Claimant also said he had injured his back in November lifting a couch.

Claimant alleges that on November 28, 1978 he injured his back while moving a couch for a customer before cleaning her carpet. Claimant said he completed the job and returned to his office. He notified a co-worker, Linda Doty, about his back and asked her for an insurance form. She gave claimant a sealed envelope with his name on it. Inside the envelope was a notification from claimant's supervisor that he had been laid off. After this, claimant called and made an appointment to see Dr. Phillip Hanna, D.C.

Dr. Hanna diagnosed claimant's injury as a lumbosacral sprain with attendant thoraco-cervical myofascitis. Dr. Hanna found low back muscle spasm in the mid-thoracic and cervical areas. Claimant told Dr. Hanna he had gotten a sharp pain in his low back lifting a couch.

The Fund denied this claim on January 26, 1979 because it was unable to substantiate any on-the-job accident or incident on November 28, 1978 while claimant was employed by Pacific Coast Carpet Cleaning Services.

Dr. Hanna reported claimant had been last seen on May 14, 1979 and it was his opinion claimant's condition was medically stationary. Dr. Hanna stated claimant did not mention any previous back injury or surgery.

At the hearing, Linda Doty testified claimant returned to the office and she handed him the sealed envelope. She said claimant went into his office, without mentioning any back injury. Later, according to Ms. Doty, claimant came out of his office and asked for an insurance form. At that time, claimant said he had hurt his back.

Mr. Lewis Busby, the owner of this business, testified claimant told him he was in need of oral surgery, which claimant thought would be performed in December 1978. Claimant told Mr. Busby he had financial difficulties and wanted to be laid off so he could draw unemployment benefits during his recuperation from his surgery.

Claimant declared bankruptcy in December 1978.

The Referee affirmed the Fund's denial. The Referee did not find that claimant had carried his burden of proof. After noting the fact claimant had failed to advise Dr. Hanna of his previous back problems, the Referee was unable to find that there was a probable material relationship between claimant's work on November 27, 1978 and the back problems claimant demonstrated on that date.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, affirms the Referee's order. Claimant has the burden of proving by the preponderance of the evidence his contentions. In this case, after considering all the evidence, the Board cannot find claimant has met his burden of proof.

ORDER

The Referee's order, dated September 14, 1979, is affirmed.

WCB CASE NO. 78-4115 April 15, 1980

MARY L. WILKE, CLAIMANT
Olson, Hittle, Gardner & Evans,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

ISSUE ON REVIEW

The State Accident Insurance Fund (hereinafter referred to as the Fund) seeks Board review of the Referee's order which found that claimant was permanently and totally disabled as of November 5, 1979. The Fund contends claimant failed to sustain her burden of proving permanent total disability.

FACTS

Claimant, a 49-year-old unit manager with the Salem Rehabilitation facility, on July 25, 1974, sustained an injury to her back when she tripped on some carpeting while going up a set of stairs and fell. Dr. W. Don Craske diagnosed this injury as an acute low back strain.

In October 1974, Dr. J. N. Fax reported claimant had undergone two radical mastectomies in the last two months for breast carcinoma. Claimant stated her back hurt when she rode in a car "a long ways" or if she sat for prolonged periods of time. She indicated that strenuous activity such as mopping or pushing a vacuum cleaner also bothered her back. Dr. Fax interpreted x-rays of claimant's lumbosacral spine, as showing what appeared to be six lumbar vertebrae with sacralization of L-6 on the left. Dr. Fax diagnosed an attempted sacralization of L-6 on the left and chronic lumbosacral strain. He found little objective evidence of nerve root irritation other than claimant's complaint of numbness in her right leg.

Dr. Craske, in November 1974, reported claimant had been fitted with a lumbosacral corset and had returned to work.

On May 5, 1975, Dr. George Harwood, medical examiner for the Fund, noted that claimant had subjective complaints of pain in the right sacroiliac joint area which consisted of a pulling sensation and tightening sensation. He noted that claimant returned to her job on October 21, 1974 without any reported difficulty. He opined that claimant's condition was medically stationary and her claim could be closed.

A Determination Order, dated June 16, 1975, awarded claimant temporary total disability compensation from August 2, 1974 through October 20, 1974.

Dr. Mohammed Hoda, in November 1975, reported that claimant continued to complain of back pain. Claimant advised Dr. Hoda that she had fallen two-and-a-half years previously and landed on her buttocks. She indicated she had back pain for quite a while, but her condition had improved until July 1974 when she fell again at work. She indicated her back had bothered her on and off ever since that time. Dr. Hoda diagnosed a transitional vertebra S1, with degenerative changes in the S1-S2 joint on the left side.

On December 10, 1975, Dr. Craske requested that claimant's claim be reopened.

In February 1976, Dr. Hoda prescribed a rigid lumbosacral brace for claimant which had reduced her complaints of back pain. He felt a fusion would probably improve claimant's condition.

On February 17, 1976, claimant underwent a myelogram which revealed bulging disc at the L4 and L5 levels. On February 18, 1976, Dr. Hoda performed a "LAMINECTOMY L-4 L-5 AND L-5 S-1 DISKECTOMY L-4 L-5 AND L-5 S-1 AND DECOMPRESSION OF L-5 AND S-1 NERVE ROOT ON THE RIGHT SIDE BY EXCISION OF HYPERTROPHIC LIGAMENTUM FLAVUM". Claimant's claim was reopened on February 16, 1976 by the Fund.

After her back surgery, claimant attempted to return to work. In July 1976, Dr. Hoda reported that claimant was progressing fairly well except that her back got sore when she returned "from work". He reported that at work she had to do a considerable amount of climbing of steps and at the end of the day her back was quite painful. In October 1976, Dr. Hoda indicated claimant still continued to get an aching pain down her left thigh to the knee. Claimant advised him that she occasionally had to miss work because of this condition. Claimant related this pain to the climbing of stairs or steps at work. Dr. Hoda prescribed physical therapy for claimant which did not improve her condition. In November 1976, Dr. Hoda reported that an EMG revealed a radiculopathy at S1-S2 more on the right than the left. He suggested that claimant start using a transcutaneous dorsum stimulator, which she did. However, this did not reduce claimant's pain.

On December 14, 1976, Dr. Hoda reported that claimant had undergone another myelogram. His final diagnosis was a recurrent "herniation of L4-L5 and L5-S1 disk affecting the left L5 and S1 Nerve Roots". He felt since claimant had undergone several surgical procedures in the very recent past, she probably was not mentally ready for additional surgical treatment at that time. He suggested claimant take time off from work and if that did not help claimant's condition or if the neurological findings increased, claimant should consider additional surgical treatment.

Dr. Hoda, in February 1977, suggested claimant attend a Northwest Pain Center. On March 24, 1977, he opined that claimant was presently and probably permanently disabled from returning to any gainful occupation, however, he felt that there was a slight chance that she would be able to do some part-time light work if her present condition could be "relieved".

On April 12, 1977, claimant was admitted to the Northwest Pain Center. Dr. John Painter, a psychologist, reported that claimant was an intelligent woman who had had a history of hard work and had had an optimistic attitude towards life. However, since her mastectomies and her injuries, he felt claimant had become "acutely sensitized to her bodily state" and her optimism had been replaced by a somewhat "embittered pessimism about the future". He reported that claimant had gradually reduced her physical activities to almost nothing and her social contacts had been reduced dramatically. He felt she was becoming progressively more depressed and if she were left "to her own devices", the prognosis of her recovery would be very poor. Dr. Richard Newman, a psychologist, reported that claimant's participation in the program was relatively good. He noted that claimant was convinced that she was dying of cancer and had approximately two years left to live. He also noted that claimant had never adjusted to the disfigurement of her bilateral breast removal. He felt claimant needed: "substantial amount of desensitization to her disfigurement to her continued feminine role in terms of increasing the communication aspects of her marital relationship and assistance in her depression which has convinced her that she is terminally ill".

Dr. Hoda reported in July that he had injected claimant with a steriod substance. Claimant indicated this relieved some of her pain.

In December 1977, claimant complained of pain in her left shoulder, neck and left arm, sometimes stating her lost her grips on objects with her left hand. In January 1978, Dr. Hoda reported she had definite hypesthesia and distribution of the median nerve on the left hand. An EMG and nerve conduction studies showed a very mild compromise of the left median nerve at the carpal tunnel. By February 1978, claimant indicated that her left hand symptoms had cleared up and she had no numbness in the left hand, but some soreness over the medial aspect of the elbow had persisted. Dr. Hoda reported that as far as her back was concerned, flexion was almost complete, but all of her other motions including extension, lateral bending, and rotation were limited to about 50% of normal. He noted all motions were painful except for flexion. He did not find any change in her neurological condition.

On February 28, 1978, Dr. Hoda opined that claimant's condition was stationary and that since even the normal activities in her house aggravated her back, he did not feel that she would ever be able to return to regular employment. He recommended her claim be closed with an appropriate award of permanent disability.

A Determination Order, dated May 12, 1978, awarded claimant additional temporary total disability from November 10, 1975 through February 28, 1978 and compensation equal to 64° for 20% unscheduled disability resulting from her low back disability.

From June 1978 through September 1978 claimant reported to Dr. Hoda that her level of pain increased. She indicated she was able to drive about a mile and a half in one day. Claimant also indicated her left elbow condition had worsened.

Dr. Norman Hickman, a psychologist, in October 1978, diagnosed severe depressive reaction, severe anxiety tension, severe psychophysiological musculoskeletal reaction, and a personality decompensation with incipient psychotic developments. He classified her psychologically as a five. He felt the prognosis for restoration and rehabilitation was very poor as far as psychological factors were concerned. Dr. Hickman opined that the claimant was unemployable at that time and doubted very much that she would ever return to full time, gainful employment. He noted that although her regular job was not physically demanding, claimant apparently was not able to tolerate a regular work schedule and was no longer able to deal with the stresses of life which she was experiencing. Further, he did not feel that claimant was a suitable candidate for vocational rehabilitation. Dr. Hickman opined that the psychopathology was significantly and materially related to the claimant's industrial accident, to her surgeries, to her general vocational predicament, and to other health problems. He felt claimant would have continued to work except for her industrial injury and because she had made several attempts to return to work, in his opinion, she would currently be working if she were able to do so.

Mr. Byron McNaught, a vocational rehabilitation counselor, on November 29, 1978, reported that claimant stated she was in constant pain to the point that even normal activities aggravated her condition. He stated claimant appeared in distress from pain and also appeared to be very depressed. Based on the medical and psychological reports provided him, he felt claimant was disabled. He did not feel claimant could return to any of her former occupations. Additionally, he noted that direct job placement would have to be ruled out due to her physical and emotional conditions. It was his opinion that claimant could not handle any training program in her present state.

Dr. Painter, in February 1979, stated it was quite difficult to determine the causal relationship between claimant's industrial injury and her current psychological state. He noted that claimant had returned to work following her mastectomies. It was his opinion that she did reasonably well with this through the use of repression and denial. He stated that her industrial injury served as the "straw that broke the camel's back. Thus, once on a course of increasing withdrawal, loss of self-esteem, and loss of productivity, the patient only continued to deteriorate further." Dr. Painter opined that claimant's injury to her back is the proximal cause of her disability although it by no means was the most significant factor in terms of her psychological make-up. He felt that because of her psychological state, the likelihood of her returning to gainful employment was extremely remote. He did not feel that claimant was malingering.

A Third Determination Order, dated August 2, [illegible], awarded claimant additional temporary total disability compensation from February 13, 1979 through June 7, 1979 and compensation equal to 30° for 20% loss of her left forearm. These awards were in addition to those previously granted.

At the hearing, claimant testified to almost constant low back and left hip pain. Claimant indicated that this is aggravated by activity and that she was not able to walk over about one block, sit for over a few minutes at a time, lift over five pounds, bend, reach, twist, etc. She stated that 90% of her housework was done by others with her being able to manage some light duties like vacuuming. Claimant estimated that she will sit or otherwise remain inactive for about 80% of the day.

The Referee, based on all the evidence, found that claimant was permanently and totally disabled as of November 5, 1979.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, affirms the Referee's order. Claimant has both severe physical disabilities and also psychological disabilities. Claimant has undergone back surgery in February 1976. Dr. Hoda, in March 1977, opined that claimant was probably permanently disabled from returning to any gainful occupation, however, he felt that there was a slight chance that she would be able to do some part-time light work if her present condition could be relieved. This did not occur. In March 1978, Dr. Hoda advised the Fund that because of claimant's back condition, he did not believe that she would ever be able to return to regular work. Dr. Hoda found that claimant had recurrent herniated disc, nerve root compression, causally related to her industrial injury. It appears to be the consensus of the medical doctors that surgical intervention is not feasible in this case. This forces claimant to live with this condition.

The Board notes Dr. Hick[illegible] diagnosed severe depressive reaction, severe anxiety tension reaction, severe psychophysiological musculoskeletal reaction, and personality decompensation with incipient psychotic developments which he related to her industrial accident and resulting surgeries, to her general vocational predicament and to her other health problems. He felt that claimant was unemployable and doubted that she would ever be able to return to full-time gainful employment. He also noted that claimant certainly would still be working except for her accident. Further, he felt claimant had made several attempts to return to work and he opined that she would be working if she were able to do so. Dr. Painter opined that claimant's injury to her back served as the "straw that broke the camel's back". He noted that once on a course of increasing withdrawal, loss of self-esteem, and loss of productivity, claimant's condition would continue to deteriorate further. He noted that it appeared to him that claimant's injury to her back was the proximal cause of her disability.

The Board finds that based on the medical evidence alone describing claimant's physical condition that this renders her permanently and totally disabled.

ORDER

The order of the Referee, dated November 5, 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. 79-3258 April 16, 1980

ARYE NELL COLBERT, CLAIMANT
Bloom, Reuben, Marandas & Sly,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

ISSUE ON REVIEW

The claimant seeks Board review of the Referee's order which granted her an additional 22.5° for 15% loss of the left leg making a total permanent disability award to date of 40% loss of the left leg. Claimant further contends she is entitled to temporary total disability compensation from June 12, 1978 through September 26, 1978.

FACTS:

Claimant, 34 years of age, was employed as a bus driver for Tri-Met and on January 28, 1975 injured her left leg while trying to locate her bus on the employer's premises when she stepped in a hole.

Claimant has other injury claims; a back injury on the job which occurred on February 8, 1975 and a right wrist injury occurring in June 1977 or 1978.

On the case before us, Dr. Soot diagnosed patellar subluxation.

On June 10, 1975, a Determination Order granted claimant no compensation for temporary total disability nor permanent partial disability. On April 15, 1977, a stipulation of the parties granted claimant 30° for 20% loss of the left leg.

On November 30, 1977, Dr. Soot reported that claimant had fallen at home from leg instability and required home assistance for a while, but she was now stable. Claimant still had complaints of neck and low back pain. In January 1978, claimant was hospitalized for neck pain. In February 1978, Dr. Soot indicated that claimant was having multiple falls which aggravated her knee and her back conditions. On February 15, 1978, Dr. Soot diagnosed vertebro-genic pain syndrome with significant functional overlay and recurrent subluxation of the left patella. He felt claimant could possibly return to bus driving if she followed the exercise program which he had set out for her.

On May 14, 1978 claimant was examined by the Orthopaedic Consultants who reported that claimant was working as a bus driver and complained that prolonged sitting made her leg stiff. At the time of claimant's injury, she was 5'7" and weighed 165 pounds and now weighed 210 pounds. Their diagnosis was congenital slipping patella of the left knee, obesity and a healed neck and low back strain. Her left knee had very definite disability, secondary to sprain. The left knee disability was rated as mild, but corrective surgery was recommended which claimant didn't want.

On June 12, 1978, claimant quit her employment with Tri-Met.

On July 19, 1978, Dr. Soot reported that claimant remained disabled from pain in her neck and back. Vocational rehabilitation was recommended. Dr. Soot concurred with the findings of the Orthopaedic Consultants regarding claimant's neck and back conditions. In another report of the same date, Dr. Soot indicated that claimant's left knee was still unstable, but had not been the primary cause of claimant's disability in the past.

On August 21, 1978, a Second Determination Order granted claimant temporary total disability compensation through February 26, 1978 and no award of permanent partial disability.

On August 25, 1978, Dr. Soot reported claimant was under his care for pain of the right hand and left knee and was unable to work from June 12, 1978 through July 19, 1978.

On September 1, 1978, claimant was released for work, but not as a bus driver. On September 18, 1978, Dr. Duff reported that claimant had recurrent dislocating patella and he recommended surgery. On September 26, 1978, Dr. Duff performed a patellar tendon transfer and release.

On October 23, 1978, Dr. Duff reported claimant had been under his care since July 28, 1978 and was unable to work due to right wrist and left knee conditions.

Temporary total disability was commenced by the State Accident Insurance Fund (Fund) voluntarily on September 26, 1978. In August 1978, claimant had had wrist surgery.

Claimant was re-examined by the Orthopaedic Consultants on February 23, 1979. They found claimant's condition was medically stationary and she needed to continue her exercises and start a weight reduction program. They felt claimant could return to bus driving as she does not use her left leg on that job. Claimant wished to return to that occupation. Claimant's impairment to the left leg was rated by them as mildly moderate.

On March 22, 1979, Dr. Duff also found her condition to be medically stationary.

On March 30, 1979, a Third Determination Order granted claimant time loss to February 23, 1979 and also an award of 7.5° for 5% loss of the left leg.

On July 6, 1979, Dr. Duff reported that claimant was still having left leg problems of weakness of the quadriceps and giving out with patellar femoral grating due to excessive chondromalacia.

Claimant was paid compensation for temporary total disability from June 12, 1978 through July 19, 1978 but this payment was offset by the Fund as an overpayment against the 5% awarded by the Third Determination Order.

Claimant testified her problems are her left knee locks and she loses her balance and falls. She has difficulty going up and down stairs. She has weakness; she cannot sit or stand for long periods of time; she cannot run. She can only walk one block, and if she walks over that her leg locks and swells. She has constant pain, some numbness and takes pain medication.

The Referee found that claimant failed to prove any further entitlement to temporary total disability compensation but felt that she was entitled to an award of 40% loss of the left leg for her mildly moderate impairment.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, modifies the Referee's order. Dr. Soot reported claimant was unable to work from June 12, 1978 through July 19, 1978 because of right hand and left knee pain. Dr. Duff reported claimant was unable to work since July 28, 1978 due to her right wrist and left knee conditions. Based on these medical reports, the Board finds claimant is entitled to temporary total disability compensation from June 12, 1978 through July 19, 1978 and from July 28, 1978 through September 26, 1978 when the Fund voluntarily commenced payment of temporary total disability compensation.

The Fund had originally paid claimant temporary total disability compensation for the period from June 12, 1978 through July 19, 1978, but offset this payment as an overpayment against the permanent partial disability award granted by the Third Determination Order. This was not an overpayment and the Fund is not entitled to offset it against the permanent partial disability award.

ORDER

The Referee's order, dated September 26, 1979, is modified.

Claimant is hereby granted an award of temporary total disability compensation from June 12, 1978 through July 19, 1978 and from July 28, 1978 through September 26, 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 $750.

JANET D. CLIFTON, CLAIMANT
Pozzi, Wilson, Atchison, Kahn
& O'Leary, Claimant's Attys.
Schwabe, Williamson, Wyatt, Moore
& Roberts, Employer's Attys.
Request for Review by Claimant

ISSUE ON REVIEW

Claimant seeks Board review of the Referee's order which did not allow any award of the permanent partial disability. Claimant contends she has a lifting restriction that precludes her from certain kinds of employment that she previously had performed.

FACTS

Claimant, a 34-year-old school bus driver, sustained a compensable injury to her tailbone and lower back on September 20, 1977 when she slipped off the side of a loading ramp. She fell backwards off the ramp approximately 2-1/2 feet and landed on her tailbone. Dr. T. Michael Norris diagnosed this injury as a muscle strain based on his findings of "tender sacrum and back muscles".

Dr. Frank Bennett reported, on January 3, 1978, that claimant had returned to work on October 4, 1977. However, in December 1977, she returned to him and complained of back pain. Lumbar spine x-rays were negative. Claimant was admitted to the hospital on January 13, 1978 and February 16, 1978 when she was put in traction and underwent an EMG, myelogram, and a discogram which were all negative.

The doctors from the Pain Clinic reported on May 18, 1978 their diagnosis was hysterical conversion reaction and compensation neurosis. They felt claimant had fair motivation for pain rehabilitation, but poor motivation for return to employment. It was their opinion claimant was medically stationary on July 18, 1978, but they recommended she avoid all forms of heavy work. They felt claimant had the residual capacity for light to moderate work. While at the Pain Clinic, it was reported claimant had poor posture and her right leg was shorter than the left leg. Drs. Seres and Newman felt claimant's condition was medically stationary as of June 23, 1978.

A Determination Order, dated August 17, 1978, awarded temporary total disability from September 21, 1977 through June 23, 1978.

Claimant attended the William Callahan Center from January 7, 1979 through January 31, 1979. Dr. Louis Van Osdel opined claimant's physical impairment was mild. He felt claimant could return to light work, but was not motivated to do so. The following limitations were placed on claimant by Dr. Van Osdel: no lifting over 20 pounds, no repetitive lifting of 10 pounds, and no repetitive bending, stooping or twisting. The prognosis for return to work was guarded. In his final report, Dr. Van Osdel opined claimant would not return to gainful employment without prolonged counseling which included her husband.

Dr. David Rollins, a vocational consultant, reported, on January 8, 1979, that he had attempted for four months to establish employment re-entry training for claimant. Claimant made it quite clear to him she would not consider returning to work again until after her hearing.

Dr. Stephen Taylor, in March 1979, stated claimant's physical therapy at the Callahan Center increased her back pain. In June 1979, he reported claimant had minimal orthopedic findings.

Claimant has a high school education. Her prior work experience consists of general office work and bus driving. Claimant denies any previous back problem or injury. Claimant testified she has low back, right hip and right leg pain. She has difficulty walking, ascending and descending stairs, and sitting (limited to about 15 minutes). She feels she could lift 10 pounds from table height but no more. She can drive an automobile about 20 miles before she has to get out of the vehicle and stretch. Her sleep is interupted by cramps in her leg. Since her injury, claimant says she limits her recreational activities and is unable to bend and stoop to do her housework. She wears a transcutaneous stimulator and uses aspirin.

The Referee found that the records failed to establish that claimant was suffering a compensable disability at the time of the hearing; although she probably does suffer some discomfort relating to her posture and as a result one of her legs being shorter than the other. The Referee affirmed the Determination Order, dated August 17, 1978, which granted no compensation for permanent partial disability.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, modifies the Referee's order. The doctors at the Pain Clinic and the Callahan Center recommended claimant avoid all forms of heavy work and placed restrictions on her. They felt she had the ability to perform light to moderate work. Before this injury, claimant had no such limitation. The Board finds, based on all the evidence, claimant is entitled to an award of compensation equal to 32° for 10% unscheduled disability representing her loss of wage earning capacity due to this injury.

As to the other issues raised by claimant, the Board affirms the Referee's decision.

ORDER

The Referee's order, dated September 6, 1979, is modified.

Claimant is hereby granted compensation equal to 32° for 10% unscheduled disability for injury to her low back.

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. 79-4154 April 16, 1980

FORREST R. FISHBAUGH, CLAIMANT
Charles Paulson, Claimant's Atty.
Cosgrave, Buckle, Crowe, Gidley & Lageson, Employer's Attys.
Request for Review by Employer

ISSUE ON REVIEW

The employer seeks review by the Board of the Referee's order which granted claimant an additional 7.5° for 5% impairment of his right leg.

FACTS

The claimant, 60 years of age, was and is presently employed as a slab burner by Oregon Steel Mills and on June 22, 1974 he sustained a compensable right ankle injury when he was between two cars, the slab broke and threw him out of the building and pinned him between a slab and a car.

Claimant was hospitalized after this injury. Dr. David Long diagnosed this injury as a compound subtalar fracture dislocation of the right foot. Claimant had surgery and his leg and foot was casted.

When claimant was a small boy, he had injured his right knee and as a consequence of this his right leg was three inches shorter than his left.

Claimant returned to his regular job in February 1975.

A Determination Order of March 25, 1976 granted claimant 45° for 30% loss of the right leg. Claimant appealed and after a hearing, by an Opinion and Order, the Referee granted claimant 75° for 50% loss of his right leg.

In November 1977, claimant elected to have a triple arthrodesis to reduce pain in his right leg. On January 20, 1978, Dr. Long reported that at surgery, traumatic arthritis was found and claimant's condition was not medically stationary. On September 5, 1978, Dr. Long released claimant for work. On March 29, 1979, Dr. Long reported that claimant's injury was extremely severe. In January 1979, claimant's ankle motion was normal and claimant was considered to be medically stationary.

On April 20, 1979, a Second Determination Order granted claimant compensation for time loss only.

On August 30, 1979, Dr. Long rated claimant's impairment at 50% loss of the whole leg.

Claimant testified he is back to work full time. His job entails setting up a machine according to the size of the slab wanted and he sets and lights torches and then he sits down to run the machine which is automatic.

Claimant testified the surgery didn't stop the pain and it lessened his ankle motion. Claimant now cannot walk on the side of a hill and because of this he sold his home. In the winter his ankle swells. He testified his pain was the same now as before the surgery and he has worse mobility. He takes no pain medication.

Claimant's foreman testified that claimant walks a lot on the job and he has seen no changes in claimant at work from before to after the surgery.

The Referee found that claimant's nocturnal leg spasms indicate that he has a further loss of reserve and he, therefore, granted him an additional 5% for a total award of 55% loss of the right leg.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, reverses the Referee's award of increased compensation. Dr. Long, in January 1979, found claimant's range of motion in his right ankle was normal. In August 1979, Dr. Long opined claimant's permanent impairment was 50% loss of the whole right leg. Claimant has been granted awards of compensation equal to 50% loss of his right leg. The Board realizes that in determining the extent of scheduled disability, the degree of permanent impairment is one thing which is considered along with other evidence which shows loss of function. In this case, the Board, based on all the evidence, does not find that claimant is entitled to the additional compensation awarded by the Referee. Therefore, the Board reverses the Referee's order in its entirety.

ORDER

The Referee's order, dated October 11, 1978, is reversed.

The Determination Order, dated April 20, 1979, is affirmed.

WCB CASE NO. 78-2194 April 16, 1980

MONIQUE SCAREOROUGH, CLAIMANT
Galton, Popick & Scott, Claimant's Attys.
Lang, Klein, Wolf, Smith, Griffith & Hallmark, Employer's Attys.
Order Abating Order On Review

On March 28, 1980, the Board issued its Order on Review in the above entitled matter. On April 9, 1980, the employer, by and through its attorney, requested that the Board reconsider its order. The Board, after thorough consideration of the arguments presented by Mr. Meyers, concludes that the matter should be reconsidered. The Board hereby abates its March 28, 1980 Order on Review until such time as it can fully consider the questions raised by Mr. Meyers in his letter request. After this review, the Board will again enter an appealable order.

IT IS SO ORDERED.

WCB CASE NO. 79-644 April 18, 1980

LARRY CRANE, CLAIMANT
McInturff, Thom & Collver, Claimant's Attys.
David O. Horne, Employer's Atty.
Request for Review by Employer

ISSUE ON REVIEW

The employer seeks review by the Board of the Referee's order which granted claimant 35% unscheduled disability for his contact dermatitis condition.

FACTS

Claimant was employed by Menasha Corporation and developed a rash on his hands and feet and his whole body began to itch.

Dr. Gregory Raugi, a dermatologist at the University of Oregon Health Sciences Center, examined claimant. He reported on May 6, 1977 that he suspected that claimant's boots were involved in his dermatitis. Dr. Raugi diagnosed claimant's condition as allergic contact dermatitis.

Dr. Edgar Maeyens, who had been treating claimant since April 1977, released claimant for regular work on August 16, 1977.

On December 5, 1978, Dr. Morgan reported that claimant had not worked at the mill for a couple of months and his rash had completely cleared on his hands, his neck and upper chest. Claimant also had a rash on his feet, but the exact nature of that rash and the dermatitis was not clear. Dr. Morgan indicated this rash was still present in spite of the fact claimant had had no contact with paper products for two-and-a-half weeks. Dr. Morgan felt claimant's condition was medically stable. He advised claimant that if he returned to work in the paper industry his problem would recur.

On January 15, 1979, a Determination Order granted claimant temporary total disability compensation, less time worked.

On April 17, 1979, Dr. Morgan reported that he was suspicious of the fact that claimant still had problems after being removed from the mill environment. By May 1979 the only rash left was on claimant's feet. Dr. Morgan sent claimant directly to the mill and when claimant returned to his office he told the doctor that within 30 minutes his hands, face and neck had begun to itch.

On June 11, 1979, Dr. Morgan opined that claimant was 100% disabled from his former position and the disability was permanent. On the other hand, he felt claimant had "essentially no degree of disability for a line of work which does not involve contact with the offending paper products".

Dr. Morgan was deposed. He testified that claimant's hands and face were affected the worst. He felt this kind of industrial exposure was lifelong and that claimant's job had caused his sensitivity.

Claimant testified he is presently employed driving truck for one-half of the salary he was earning at his previous job. Claimant has a high school education and has attended two colleges majoring in engineering and forestry, but did not complete either course to receive a degree. Claimant's past work experience has been mostly in the woods, but he has also been a "cat" operator, a maitre d, a cook, a bartender and a bus driver.

On May 26, 1978, Dr. Joseph Morgan reported that claimant had had a positive skin test for autogenous dust from the mill. Desensitization with that material was begun by Dr. Morgan.

Claimant filed his claim on June 10, 1978 for hands and feet conditions.

The Referee found claimant to be a credible witness and motivated towards working and improving himself, using whatever skills he had obtained from his education and work experience. The Referee felt, based on all the evidence, that the claimant's contact dermatitis condition, which now precluded him from mill occupations, entitled claimant to an award of 35% unscheduled disability for his loss of wage earning capacity.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, modifies the Referee's order. The evidence indicates claimant has various skills and training which would enable him to obtain a number of jobs. Claimant is 37 years old and has a high school education with some college training. While there is no doubt claimant is unable to return to his previous line of work because of dermatitis, the Board, based on all the evidence, finds claimant is entitled to compensation equal to 80° for 25% unscheduled disability, representing his loss of wage earning capacity due to this condition. Accordingly, the Board modifies the Referee's order.

ORDER

The Referee's order, dated August 9, 1979, is modified.

Claimant is hereby granted an award of compensation equal to 80° for 25% unscheduled disability for his contact dermatitis condition. This award is in lieu of all previous awards for unscheduled disability for this condition.

The remainder of the Referee's order is affirmed.

WCB CASE NO. 79-429 April 8, 1980

VIRGINIA COMBS DOCKSTRADER, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Order of Dismissal

On February 26, 1980, the Referee entered her Opinion and Order in the above entitled matter. The State Accident Insurance Fund requested that the order be reconsidered and on February 28, 1980 the Referee entered an order reopening the matter for reconsideration.

On March 12, 1980, the Board received a request for review from the claimant. The Board concludes that as a result of the Referee's February 28, 1980 order, it has no jurisdiction to review the matter at this time. The request for review should be dismissed.

IT IS SO ORDERED.

WCB CASE NO. 78-7162 April 18, 1980

KENNETH JOHNSON, CLAIMANT
Galton, Popick & Scott, Claimant's Attys.
Lang, Klein, Wolf, Smith, Griffith & Hallmark, Employer's Attys.
Request for Review by Employer

ISSUE ON REVIEW

The employer 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 an injury to his chest. The employer contends that this was in error.

FACTS

Claimant, a 30-year-old forklift driver, on January 25, 1977, sustained an injury to his chest when, while carrying a case of frozen beef, he slipped and fell landing on the case of beef and injured his chest. Dr. Martha Gail, on March 8, 1977, reported claimant should perform only light work with no lifting. Claimant indicated that after his injury he worked until February 1, 1977 and then was off work until February 21, 1977.

On March 22, 1977, Dr. Edward Heusch, D.O., diagnosed a possible chronic subluxating costosternal joint. Claimant advised him that approximately five years previously he had injured his chest when he was swimming. Claimant said that he hit the bottom of the pool and another individual dove off the diving board feet first striking him in the chest with his feet. Claimant stated that since that time he had noted a constant dull ache in the chest. Also, claimant indicated that he had fallen two years previously, striking his chest and again experienced a similar pain in his chest. At the time he was examined by Dr. Heusch claimant was complaining of a constant dull ache in the chest area. Dr.

Heusch felt this condition was not amenable to any type of surgical intervention and recommended that claimant return to full occupational duties. He anticipated that claimant would occasionally experience some exacerbation of the symptomatology because of the contusion type injury to the chest. Dr. Heusch released claimant for regular work as of March 22, 1977. It was his opinion that claimant would suffer no permanent impairment as a result of this injury.

Dr. John Harder, in April 1977, reported that claimant had had pain in his rib cage for the last three years. Claimant advised him that he had fallen on a dock and injured himself. Claimant complained that he had pain in his chest and had weakness "because of pain in pushing anything or pulling anything with his arms". Dr. Harder diagnosed a probable imflammation of the sternal costal rib junction.

Also, in April 1977, Dr. Gail reported that claimant had been released for regular work as of March 23, 1977. She indicated that claimant had been off work from February 2, 1977 through February 21, 1977 and from March 3, 1977 through March 23, 1977.

In May 1977, Dr. Robert Post reported that claimant advised him he had two injuries to the right ribs, both of which occurred on the job. Dr. Post felt the prognosis for claimant's recovery was good and that no treatment was indicated for claimant at that time. In September 1977, Dr. Post reported he had last seen claimant in June 1977 and that he felt that the type of problem which claimant had was not likely to lead to any permanent impairment. He felt that the claim could be closed without any permanent impairment award. Also, Dr. Post indicated that claimant continued to have pain at the junction between the manubrium and the xyphoid process of the sternum. Claimant indicated this was aggravated by physical activity, particularly anything requiring the placing of the pectoralis major muscle "on strain". Dr. Post indicated it was not related to running, climbing stairs or cardiovascular exertion. Dr. Post noted that this problem was "self-limiting" and found no significant permanent impairment.

On October 19, 1977, Dr. John Bigelow indicated that claimant continued to complain of chest pain. He felt claimant had injured the cartilanginous attachments in the area of the fourth and fifth costochrondral junctions and this was exacerbated by the physical nature of his job and his outside activities. He indicated this pain was not related to any heart disease. Claimant reported that while playing softball and otherwise exercising vigorously he occasionally was completely free of pain and other times he had sudden exacerbations of pain during such activity. Dr. Bigelow prescribed that claimant decrease his activity and begin using aspirin.

A Determination Order, dated December 20, 1977, awarded claimant temporary total disability compensation from February 2, 1977 through March 22, 1977.

On January 19, 1978, Dr. John Bigelow performed removal of the xyphoid and exuberant areas of cartilage in the third and fourth costal-sternal junctions. Claimant was hospitalized until the 21st of January for this surgery. The claim was reopened by the carrier.

By April 1978, Dr. Bigelow reported that claimant had returned to work on April 10 which he felt was too early and advised claimant to return to work on April 25, 1978.

In June 1978, Dr. Bigelow reported that claimant continued to miss work because of continuing pain with his chest. He prescribed Empirin Compound #3 to be used sparingly to assist claimant with his discomfort which seemed to isolate in the area of the incision.

A Second Determination Order, dated August 14, 1978, awarded claimant additional temporary total disability compensation from September 27, 1977 through November 11, 1977, less time worked, and further from January 17, 1978 through June 15, 1978, less time worked.

Claimant also missed work on June 22 and 23 and July 26, 1978 because of continuing pain at the excision site.

On January 4, 1979, Dr. Bigelow indicated that claimant had steadily improved after the surgery. He indicated that occasionally lifting caused brief periods of the return of severe pain sufficient that claimant had to miss work. He indicated at that time claimant had been working steadily without time off for approximately five months. Claimant indicated he did have pain with heavy lifting and was aware that this condition improved, but that the chest pain had not disappeared. Dr. Bigelow anticipated that the occurrences of pain would disappear during the next six months.

At the hearing, claimant testified that he has no scheduled appointments to see any medical doctor in the near future regarding his chest condition and that he was taking no prescription pain medication. He stated that he had returned to warehouse work on a full time basis and was working an eight-hour shift and occasionally overtime as well. His job duties included unloading box cars with a forklift or by hand. Claimant stated he continues to play softball and golf. Claimant has an 11th grade education and has obtained a GED. Further, he has attended a computer programing course, however, terminated this program three weeks prior to graduation. His prior work experience has been as a truck driver, warehouseman, and order filler. In August 1978 he was transferred from working in the freezer to the "rail docks" because this work was lighter. After repetitive lifting he says he experiences severe pain in his chest.

The Referee found, based on all the evidence, claimant was entitled to an award of compensation equal to 64° for 20% unscheduled disability for his injury to his chest.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, reverses that portion of the Referee's order which awarded claimant compensation equal to 64° for 20% unscheduled disability for injury to his chest. There is no evidence in this case that claimant's continued pain in the chest area is disabling. Likewise, there is no showing of any loss of wage earning capacity as a result of this injury. Dr. Bigelow has indicated that he expects claimant will eventually recover fully from his surgery. The evidence further indicates that claimant currently is engaged in a very physical type of employment similar to that which he was engaged in prior to this injury. Drs. Heusch, Post and Bigelow all opine that claimant would not experience permanent impairment as a result of this industrial injury. While permanent impairment is one element to be considered in determining loss of wage earning capacity, the Board finds that the other evidence does not establish that claimant has suffered any loss of wage earning capacity because of this injury to his chest. Therefore, the Board concludes that the Referee's award of unscheduled disability must be reversed.

ORDER

The Referee's order, dated August 15, 1979, is modified.

That portion of the Referee's order which granted claimant an award of compensation equal to 64° for 20% unscheduled disability for the injury to his chest is reversed.

The remainder of the Referee's order is affirmed.

WCB CASE NO. 78-4735 April 18, 1980

JAMES J. JONES, CLAIMANT
Ackerman & DeWenter, Claimant's Attys.
Lang, Klein, Wolf, Smith, Griffith
& Hallmark, Employer's Attys.
Order Abating Order On Review

On March 20, 1980, the Board entered its Order on Review in the above entitled matter. On March 24, 1980, the employer, by and through its attorney, requested that the Board reconsider its order. The Board misplaced this request and, subsequently, the appeal rights have almost completely run. The Board concludes that its March 20, 1980 Order on Review should be abated until such time as it can reconsider the matter and again enter an appealable order.

IT IS SO ORDERED.

WCB CASE NO. 78-3863 April 18, 1980

EDWARD SEKERMESTROVICH, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Attys.
Lang, Klein, Wolf, Smith, Griffith
& Hallmark, Employer's Attys.
Request for Review by Employer

ISSUE ON REVIEW

The employer seeks Board review of the Referee's order which granted claimant compensation for permanent total disability. The employer contends this award is excessive.

FACTS

Claimant, then a 58-year-old millwright, injured his back and left knee on March 4, 1976 when he slipped off a fender of a truck and struck the wheel of the truck. Dr. Holm Neumann diagnosed a possible internal derangement of the left knee and recommended arthrogram studies. The arthrogram indicated a ruptured Baker's cyst without other definable internal derangement. Dr. Neumann released claimant for regular work on April 19, 1976 and found his condition was medically stationary as of April 12, 1976.

A Determination Order, dated May 21, 1976, awarded claimant temporary total disability compensation.

On October 14, 1976, Dr. Neumann reported he had performed an arthrotomy, medical meniscectomy, and exploration of the popliteal fossa on claimant's left knee. A degenerative medial meniscus was noted and removed.

The Orthopaedic Consultants examined claimant on June 24, 1977. They reported that claimant was not stationary and that he might benefit from re-exploration of his knee for loose bodies or evaluation of the catching of the patella. A return to work evaluation form indicated that claimant could stand/walk 1-4 hours per day out of 8 hours, sit 5-8 hours out of 8 hours, occasionally lift up to 10 pounds, couldn't use his feet to operate foot control and couldn't bend, squat or climb.

Dr. Neumann reported claimant, on October 6, 1977, had re-exploratory surgery on the left knee. He diagnosed: "(1) Degenerative arthritis medial femoral condyle, and tibial plateau, (2) calcific mass, medial retinaculum, left knee, (3) cartilaginous loose body left knee."

Dr. J. Kent Llewellyn, D.C., opined in October 1977 claimant had a chronic lumbosacral sprain with attendant myofascitis and L5-S1 disc degeneration. He felt claimant's condition was severely aggravated by his guarded and impaired gait and all the other activities related to the mechanical integrity of his left leg and low back. He related claimant's low back condition to his left knee injury. Dr. Llewellyn felt claimant would require treatment for at least six months to one year.

In November 1977, Dr. Neumann opined claimant would be unable to return to his work as a millwright. He felt claimant should avoid work requiring prolonged standing, standing on concrete, walking over uneven ground, climbing ladders and stressing his knee, including bending the knees while lifting heavy objects. Dr. Neumann reported that claimant was referred for physical therapy three times per week for two weeks.

On December 28, 1977, Dr. Neumann opined that claimant would have severe permanent partial disability bordering on total disability.

A Determination Order, dated May 18, 1978, granted claimant additional temporary total disability compensation and compensation equal to 48° for 15% unscheduled disability for his low back injury and compensation equal to 60° for 40% loss of his left leg.

Dr. Llewellyn reported on June 8, 1978 that claimant reinjured his low back after he reached down to pick something up off the floor. He diagnosed severe muscle spasm of L4-L5 with severe swelling noted on the lateral L5. He could find no reason why the Workers' Compensation Board had found claimant's condition medically stationary. He indicated claimant was continuing to receive treatment.

On September 6, 1978, Dr. Neumann reported claimant could be considered medically stationary. He felt claimant could be considered totally disabled.

Mr. Mark Remas, a rehabilitation specialist, reported on October 24, 1978 that the Rehabilitation Center had recommended closure because claimant clearly expressed his desire not to participate. Claimant's work history consisted of mill work. Claimant stated he was going to retire in nine months. Mr. Remas felt if claimant was motivated to re-enter the job market there were certain jobs he could qualify for.

The Orthopaedic Consultants' report of October 31, 1978 stated that claimant's knee problem had aggravated his back. They recommended sedentary work with restrictions. It was their opinion that the total loss of function of claimant's back was mild and the total loss of function of his left knee was moderate. They felt claimant's condition was stationary. The Orthopaedic Consultants re-examined claimant in June 1979. They felt at that time that the loss of function of the back due to the injury was mild and the loss of function of the knee was still moderate.

The Referee found that claimant was not highly motivated to work and made no effort to seek employment. However, the Referee found claimant has established permanent total disability by a preponderance of the evidence. The Referee felt claimant's attitude was realistic considering his age, education and limitations imposed by his back, leg and right hand. Therefore, the Referee awarded claimant permanent total disability effective the date of the hearing, September 25, 1979.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, modifies the Referee's order. The Board finds claimant is not permanently and totally disabled. The medical evidence alone does not establish claimant is permanently and totally disabled. Claimant has not attempted to work or looked for work since his injury. Further, he has not cooperated in any attempt to rehabilitate him. After considering all the evidence in this case, along with other relevant factors, such as claimant's age, education, training, aptitude, the condition of the labor market, adaptation to non-physical and emotional condition, the Board does not find claimant is permanently

and totally disabled. However, based on this same evidence, the Board finds claimant is entitled to an award of compensation equal to 192° for 60% unscheduled disability for his back injury representing his loss of wage earning capacity. The Board would affirm the Determination Order award of 60% for 40° loss of function of the left leg.

ORDER

The Referee's order, dated October 24, 1979, is modified.

Claimant is hereby granted an award of compensation equal to 192° for 60% unscheduled disability for his back injury. This award is in lieu of all previous awards of unscheduled disability for this injury. The award of compensation equal to 60° for 40% loss of the left leg is affirmed.

The remainder of the Referee's order is affirmed.

WCB CASE NO. 79-1641 April 18, 1980

RICHARD L. WINE, CLAIMANT
Jerry Gastineau, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

The State Accident Insurance Fund (hereinafter referred to as the Fund) seeks Board review of the Referee's order which set aside its denial of claimant's aggravation claim; remanded the claim to it for acceptance; and awarded claimant's attorney a fee of $750. The Fund contends this was in error.

FACTS

Claimant, a 29-year-old truck driver, on April 13, 1977, injured his back when while untarping a truck trailer, he fell off the back end of the trailer. Dr. Ian Charles saw claimant on April 14, 1977 and reported that x-rays revealed a defect "L-pars". He diagnosed a "fracture L-pars" and noted that it could have been an old pars defect which had been aggravated by claimant's accident rather than an actual fracture.

On April 20, 1977, Dr. William Matthews indicated claimant had told him that on March 30, 1977 while claimant was helping put a tarpaulin on a truck, another man fell off the truck and onto him. Dr. Matthews diagnosed a chronic low back strain. He felt there was some evidence of nerve root impairment in the left lower extremity. He interpreted the x-rays as revealing evidence of an abnormal facet alignment at the lumbosacral joint.

Dr. Charles, in May 1977, stated that after consultation with Drs. Matthews/Lynch, it had been decided that the pars defect was congenital. Therefore, Dr. Charles changed his original diagnosis from a "fracture L-pars" to a severe lumbosacral strain and sprain.

In June 1977, Dr. Edward Geller reported claimant had told him that on March 2, 1977 another driver had fallen off his trailer and landed on claimant injuring his back. Claimant said on March 13, 1977 he fell off his trailer. Dr. Geller diagnosed a chronic lumbar sprain syndrome.

On August 12, 1977, Dr. Geller reported claimant was asymptomatic and his condition was medically stationary. He stated he was not in need of any further treatment at that time. Dr. Geller had released claimant for regular work as of July 22, 1977. Claimant had advised Dr. Geller he had been working at a modified job since May 4, 1977.

A Determination Order, dated October 3, 1977, awarded claimant temporary total disability compensation from April 14, 1977 through May 3, 1977 and temporary partial disability compensation from May 4, 1977 through June 14, 1977.

On January 29, 1979, the Fund denied the payment of a medical bill. The basis of the denial was that it appeared the treatment was necessitated by a subsequent injury or activity.

Dr. William Sammons, on February 12, 1979, stated claimant had been injured in April 1978 when he fell 12 feet off a truck, landing on his buttocks and experiencing immediate low back pain. The physical findings indicated a sciatic nerve involvment on the right side. Dr. Sammons opined, based on the history given, that in all reasonable medical probability the pain claimant was having was related to the injury. Claimant told him, he had no new injuries or any incidents other pain which brought claimant to see him in October 1978.

At the hearing, claimant testified he had given his employer a two-week notice that he was going to quit before his injury of April 13, 1977. Claimant stated he began working on May 15, 1977 at Camp Dove. Since the injury, claimant said he has fished, ridden a snowmobile (in the winter of 1978), operated a caterpillar, built a sled run,

built concrete forms for a 15,000 square foot building and dug out the foundation area with a pick and shovel. Claimant testified that in November 1978 he "hurt my back again". He indicated he was operating a "cat" and he got down off it and could hardly walk and went to Dr. Sammons.

The Referee, after reviewing all the evidence, found that claimant had carried his burden of proof and had proven that an aggravation had occurred. Therefore, the Referee remanded the claim to the Fund for acceptance as an aggravation of the accepted claim of April 13, 1977, effective November 8, 1978 and awarded claimant's attorney a fee of $750.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, reverses the Referee's order. In August 1977, Dr. Geller reported claimant was asymptomatic and his condition was medically stationary. In February 1979, Dr. Sammons indicated he had been given a history of claimant being injured in April 1978 when he fell backwards 12 feet off a trailer. His opinion of claimant's complaints of pain is based on the history he was given. It is obvious from the other evidence that the history Dr. Sammons relied on is incorrect. Claimant did not sustain any injury falling backwards off of a truck in April 1978. Apparently, in October or November 1978, claimant experienced back pain when he got off the caterpillar. The Board, based on all the evidence, finds that claimant has not met his burden of proof that his condition has worsened since his last award or arrangement of compensation in October 1977. Therefore, the Board approves the denial of claimant's aggravation claim and reverses the Referee's order in its entirety.

ORDER

The Referee's order, dated August 3, 1979, is reversed in its entirety.

The State Accident Insurance Fund's denial of January 29, 1979 is reinstated and affirmed.

WCB CASE NO. 79-388 April 21, 1980

THOMAS BAILEY, CLAIMANT
Flaxel, Todd & Nylander, Claimant's Attys.
Lang, Klein, Wolf, Smith, Griffith
& Hallmark, Employer's Attys.
Order Denying Third Party Claim

On March 20, 1980, claimant, by and through his attorney, petitioned the Board to approve a third party settlement and authorize the settlement of the third party claim. The General Accident Group, the compensation carrier for claimant's employer, refused to approve the proposed settlement.

The Board, after reviewing this matter and considering the positions of the parties, denies claimant's request that it approve the proposed third party settlement. ORS 656.587 provides that any compromise by a worker of any cause of action against an employer or third party is void unless it is made with the approval of the paying agency or in the event of a dispute between the parties by order of the Board. ORS 656.593(3) provides that a claimant may settle a third party claim with the approval of the paying agency. The Oregon Administrative Rules of the Board provide a maximum fee an attorney can receive in third party claim matters. OAR 438-47-095. The Board finds the proposal of the paying agency in this case is more equitable. The Board will not approve a third party claim settlement in this case until the parties can resolve their areas of disagreement.

ORDER

Claimant's petition for settlement of a third party claim is denied.

WCB CASE NO. 79-10,348 April 21, 1980

DARL BURKS, CLAIMANT
Melvin T. Rollema, Claimant's Atty.
Samuel R. Blair, Employer's Atty.
Order of Dismissal

On March 31, 1980, the employer requested Board review of the order of the Referee which denied the employer's Motion to Dismiss Request for Hearing.

The Board finds that the Referee'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 210898 April 21, 1980

ROLAND E, GERLITZ, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On March 18, 1969, claimant sustained a compensable injury to his left knee. The injury was diagnosed as a torn medial meniscus which was surgically repaired. The claim was initially closed by a Determination Order, dated May 5, 1970, which awarded claimant temporary total disability compensation and compensation equal to 15° loss of the left leg. Claimant's aggravation rights have expired.

Claimant continued to have difficulty with his left knee and his claim was reopened and closed on two more occasions. On each occasion claimant was granted additional temporary total disability compensation and additional compensation equal to 15° partial loss of the left leg. In addition, the claim was reopened under the Board's own motion jurisdiction and resulted in claimant receiving additional compensation equal to 15° loss of the left leg.

In December 1979, Dr. Donald Slocum reported that claimant was complaining of pain in the left knee area. On January 23, 1980, Dr. Slocum performed an arthroscope, high tibial osteotomy, left, lateral closing wedge, and Maquet procedure.

On March 25, 1980, the State Accident Insurance Fund advised the Board that it would not oppose an own motion order reopening this claim for the surgery that was performed on January 23, 1980.

The Board, after considering all the evidence in this matter, including the past medical reports, concludes that claimant's claim should be reopened as of the date claimant was hospitalized for the surgery performed by Dr. Slocum on January 23, 1980 and until his claim is closed pursuant to the provisions of ORS 656.278.

IT IS SO ORDERED.

WCB CASE NO. 78-7623 April 21, 1980

MARIE GILBERT, CLAIMANT
Samuel Hall, Jr., Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

ISSUE ON REVIEW

Claimant seeks review of the Referee's order which affirmed the State Accident Insurance Fund's (Fund) denial of her aggravation claim for a September 21, 1976 low back injury.

FACTS

Claimant, a 50-year-old motel maid, sustained an injury to her low back on September 21, 1976 when taking fireplace wood out of a room. Dr. K. Elam diagnosed this injury as a lumbosacral strain.

On November 5, 1976, Dr. John Kearns diagnosed an acute low back strain. He doubted the presence of any herniated disc at that time and felt claimant should continue with her "decreased activities" avoiding lifting over five pounds, avoiding overhead work, vacuuming, sweeping, or any other vigorous activities. He felt this should continue for at least three to six weeks. Claimant was also instructed to return to physical therapy for instructions on Williams flexion exercises as well as short wave diathermy. In December 1976, Dr. Kearns reported claimant continued to have difficulty with her low back and that his treatment had not been of assistance to her. He prescribed Butazolidin and pain medication. Claimant began a period of bedrest and Dr. Kearns felt that if she did not improve she may need to be hospitalized for inpatient treatment. In February 1977, Dr. Kearns reported that claimant stated she was having increasing pain in her low back. He elected to admit the claimant to the hospital for treatment and evaluation. Claimant was hospitalized for treatment including bedrest and pelvic traction. Dr. Kearns also evaluated other possible etiologies for claimant's back pain.

Dr. Michael Mason, a neurosurgeon, in April 1977, opined that claimant's back pain was related to a mechanical problem with the low back without nerve root irritation. He reported that claimant's low back pain did not radiate into either the lower extremity or the hip.

On April 13, 1977, claimant underwent a myelogram examination which was normal.

Dr. Mason, in May 1977, reported that claimant had been hospitalized in April for a trial period of conservative treatment for her back pain. Claimant reported this only partially relieved the pain. He made arrangements for claimant to receive therapy on an outpatient basis. Dr. Mason opined there was no indication of any need for any operative procedure at that time.

On September 19, 1977, Dr. J. Tysel reported that he released claimant for restricted work and no heavy lifting or bending. He opined that claimant's condition was stationary as of September 1977. It was his opinion that claimant did have some permanent impairment as a result of her injury.

In December 1977, Dr. William Robertson, after examining the claimant, opined that she had a chronic low back strain and longstanding spondylolisthesis without slippage. He noted that claimant was quite depressed. X-rays of the lumbar spine were normal except for a spondylolisthesis; grade I, with bilateral pars interarticularis defect. Dr. Robertson felt that claimant should be able to return to light work.

On February 15, 1978, the Orthopaedic Consultants reported that claimant complained of pain in the lumbosacral area of the spine which was aggravated by any stooping, bending, lifting, walking over a block, or riding in a car for more than 30 minutes. Claimant indicated this radiated down the right leg towards the knee. They diagnosed a chronic sprain of the lumbosacral spine, superimposed upon a pre-existing congenital defect of the pars of the 5th lumbar vertebra and anxiety neurosis with functional overlay due to social and marital problems. It was their opinion that claimant's condition was stationary and she was in need of no additional treatment. They opined that claimant would not be able to carry out her past activities which required heavy stooping, bending, and carrying. They felt claimant could perform a job which would be less strenuous in nature. It was their opinion that the total loss of function as it existed at that time and as related to this injury was mild.

A Determination Order, dated March 24, 1978, awarded claimant compensation for temporary total disability and compensation for 48° for 15% unscheduled disability for her back injury.

Claimant continued to have difficulty with low back pain. In April 1978, Dr. William Wiltse, after examining the claimant, diagnosed: "old lumbosacral strain; possible L5 disk".

A Stipulation, dated June 21, 1978, awarded claimant an additional award of compensation equal to 48° for 15% unscheduled disability for her low back injury.

Claimant continued to have difficulty with low back pain. She was seen in August 1978 by Dr. F. Schnibbe who diagnosed chronic low back strain with acute exacerbation. Claimant was hospitalized by him and his final diagnosis was chronic low back strain, right trochanteric bursitis and spondylolisthesis of the lower lumbar spine. Dr. Schnibbe felt that claimant's spondylolisthesis might be a contributing factor to the continuance of her pain and he felt she should be seen by an orthopedist.

In October 1978, Dr. W. Vaughn Smith, an orthopedist, indicated that he felt the underlying congenital problem of spondylolysis made her back vulnerable to overlying soft tissue straining symptoms which appeared to be what claimant had experienced. He did not see the need for any additional or continuing treatment. He felt she would continue to have difficulty with chronic back pain. He felt the low back strain symptoms were superimposed upon an unstable spine. He indicated that he expected the affects of the sprain some two years ago would have been abated. The x-rays were interpreted as indicating a congenital defect of spondylosis and not an actual spondylolisthesis.

On December 18, 1978, the Fund denied claimant's aggravation claim. Part of the denial recited the fact that the Fund no longer accepted responsibility for this claim.

Dr. Schnibbe, in January 1979, reported that claimant had continuous pain in the low back with pain radiating down into the right leg, with periods of severe aggravation and pain. He felt that because of claimant's chronic pain that she was an ideal candidate for the pain clinic. He noted that this pain was of the same type and the same location as that which had occurred right after her injury in 1976.

At the hearing, claimant testified that she has not worked since this injury. She indicated that she had done seasonal work in canneries and motels up until the time of this injury. She did not have any prior disabling back problems. She indicated she currently has pain in her low back, right hip and right leg. She testified she is unable to do heavy housework, such as vacuuming, mopping, sweeping, and that she currently uses pain medication.

The Referee found that the evidence did not indicate that there had been a significant worsening of the underlying condition, but only increase of symptoms caused by the congenital spondylosis condition and not by the specific injury on which the industrial injury claim had been based. Therefore, the Referee affirmed the denial of the aggravation claim.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, would modify the Referee's order. The Board concurs with the Referee's finding that claimant has not established that her condition has worsened since the last award or arrangement of compensation and, therefore, affirms that portion of the order which affirmed the denial issued by the Fund. However, the Board finds the denial issued by the Fund also apparently denied continuing medical care and treatment as authorized under ORS 656.245. The Board finds that claimant is entitled to continuing medical care and treatment as provided under ORS 656.245 for permanent residuals from this injury.

ORDER

The order of the Referee, dated August 16, 1979, is modified.

That portion of the Referee's order which affirmed the denial of claimant's aggravation claim is affirmed. It is further ordered that that portion of the denial which denied any continuing medical care and treatment as provided under ORS 656.245 is reversed and it is hereby ordered that claimant is entitled to continuing medical care and treatment as provided under that statute for the permanent residuals resulting from her industrial injury.

WCB CASE NO. 78-9058 April 21, 1980

KENNETH HOLLIN, CLAIMANT
Winslow & Alway, Claimant's Attys.
Bruce A. Bottini, Employer's Atty.
Order On Remand

On September 25, 1979, the Board entered an order reversing the Referee's finding that claimant's claim was compensable. This was timely appealed to the Court of Appeals.

The Court of Appeals, in an opinion filed March 3, 1980, reversed the Board and instructed it to reinstate the order of the Referee. On March 10, 1980, the Judgment and Mandate in this case was issued and remanded this case to the Board.

Therefore, in compliance with the Court of Appeals' instructions, the Board issues the following order:

The Opinion and Order of the Referee, dated May 3, 1979, which ordered that the denial was disapproved and that the claim was to be accepted and compensation paid as provided by law and that claimant's attorney be paid an attorney's fee of $1,000 in addition to and not out of the compensation, is reinstated.

IT IS SO ORDERED.

WCB CASE NO. 79-1531 April 21, 1980

MOLLIE A. PENNINGTON, CLAIMANT
Olson, Hittle, Gardner & Evans,
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. 77-3033 April 21, 1980

DARLENE PYBURN, CLAIMANT
Louise Jayne, Claimant's Atty.
Schwabe, Williamson, Wyatt, Moore & Roberts, 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. C 420014 April 21, 1980

RICHARD L. WILSON, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On January 29, 1973, claimant sustained a compensable injury to his neck. This claim was closed by a Determination Order which granted him an award of compensation equal to 32° for 10% unscheduled disability. Claimant's aggravation rights have expired.

On January 18, 1980, claimant, by and through his attorney, requested the Board exercise its own motion jurisdiction and reopen his claim. Attached to his request was a June 21, 1979 report from Dr. Jacob Wilson who felt claimant's claim should be reopened for further evaluation, including a cervical myelogram and possible cervical laminectomy.

A myelogram performed on July 2, 1979 was interpreted as showing a defect at the C6-7 level on the right. On July 3, 1979, a cervical laminectomy was performed. During this operation, a neuro-fibroma was found and removed. Dr. Wilson performed this surgery and related the need for it to claimant's 1973 injury.

On March 7, 1980, the Board advised the State Accident Insurance Fund (Fund) of claimant's request and asked it to advise the Board of its position in regard thereto.

The Fund, in April 1980, indicated it would not oppose an Own Motion Order reopening this claim for the surgery claimant had, but it denied responsibility for the neurofibroma.

The Board, after reviewing the file, finds the evidence is sufficient to reopen claimant's claim effective the date he was hospitalized by Dr. Wilson and remands it to the Fund for acceptance and payment of benefits as required under the Oregon Workers' Compensation Law, until the claim is closed pursuant to ORS 656.278. The Board does not find that the Fund is responsible for the neurofibroma.

ORDER

Claimant's claim is hereby reopened and remanded to the State Accident Insurance Fund for acceptance and payment of compensation and other benefits as required by law effective the date claimant was hospitalized by Dr. Wilson in July 1979 until it is 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 temporary total disability compensation granted by this order, payable out of said compensation as paid, not to exceed $750.

WCB CASE NO. 77-18 April 22, 1980

CARLOS DUFFY, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Order ON Remand

The above entitled matter was appealed to the Court of Appeals which reversed that portion of the Board's Order on Review which granted claimant compensation equal to 160° for 50% unscheduled angina disability. The Board has received the Judgment and Mandate from the Court of Appeals and issues the following order in compliance therewith:

ORDER

That portion of the Board's order which granted claimant compensation for 160° unscheduled disability is reversed and the March 2, 1977 Determination Order is affirmed.

The respondent-cross-petitioner is to recover from the petitioner costs and disbursements in the amount of $100, as directed by the Court.

WCB CASE NO. 77-6272 April 22, 1980

ARLIE L. KILGORE, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Order On Remand

The above entitled matter was appealed to the Court of Appeals which reversed the Board's Order on Review. The Board has received the Judgment and Mandate from the Court of Appeals and issues the following order in compliance therewith:

ORDER

Claimant is hereby granted compensation for permanent total disability commencing April 25, 1977 as a result of the March 13, 1972 industrial injury.

Claimant's attorney is awarded a fee of $1,000 to be paid out of the increased compensation and claimant is to recover from the respondent costs and disbursements in the amount of $163.60, as directed by the Court.

WCB CASE NO. 79-10,379 April 23, 1980

RICHARD T. BOATRIGHT, CLAIMANT
Harold W. Adams, Claimant's Atty.
Lang, Klein, Wolf, Smith, Griffith
& Hallmark, Employer's Attys.
Request for Review by Claimant

Claimant seeks review by the Board of the Referee's order which ordered the employer to pay compensation for temporary total disability from November 8, 1979 until closure pursuant to ORS 656.268. Claimant's appeal is a request that the Board issue a mandate requiring the employer to make immediate payment of past due temporary total disability compensation to claimant. The employer cross-appeals contending that claimant is not entitled to temporary total disability compensation.

FACTS

Claimant, 30 years of age, was employed by the City of Salem as a custodian. On January 6, 1979 he slipped and fell down some stairs. Claimant testified that in this fall he injured his back, shoulders, neck and arms.

Claimant came under the care of Dr. Paul Peachey who commenced a session of physical therapy with claimant and released him for work as of April 30, 1979 and found his condition was medically stationary.

On June 6, 1979, Dr. L. R. Langston examined claimant and diagnosed musculoligamentous strain, lumbar and cervical spine by history. He felt that claimant's impairment was minimal and that claimant was not in need of vocational rehabilitation. On June 28, 1979, Dr. Peachy reported that claimant was released for modified work as of June 25, 1979 and did not object to the report of Dr. Langston.

On July 23, 1979, Dr. Peachy noted that claimant's work caused increased pain and claimant's trial of work failed so claimant was in need of temporary total disability effective July 20, 1979. He also recommended that claimant be seen at the Callahan Center.

On August 14, 1979, claimant was enrolled at the Callahan Center. Dr. Louis Van Osdel, medical examiner at the Callahan Center, diagnosed strain of the cervical thoracic lumbar muscles and ligaments aggravated by a tight low back and no nerve root compression. Claimant said he had been nervous all of his life, had hypertensive cardiovascular disease, and obesity in excess of 100 pounds. Claimant was interested in being a truck driver. Dr. Susan Means, a psychologist, found moderate severe emotional disturbance or situational depression. Dr. Van Osdel concluded that claimant's vocational impairment due to intrinsic physical impairment was minimal. However, due to extrinsic psychological impairment he felt it was moderately severe. He opined claimant was capable of medium work with no lifting over 50 pounds or repetitive lifting over 25 pounds or repetitive bending, crawling, stooping, twisting, walking over rough terrain or reaching overhead. Dr. Van Osdel felt a job change was not necessary.

By a report of November 13, 1979, Dr. Peachy indicated that claimant has pain, but a lot of this had a psychological origin. He advised claimant to return to work on November 5, 1979 despite the discomfort because he felt a lot of this must be "worked out".

Mr. Ron Hutchinson, who is the risk manager for the employer, testified at the hearing that he advised the carrier that claimant was released to return to work as he had called Dr. Peachy's office, for some reason he couldn't recall, and was advised by the receptionist that after the doctor's October 29 examination of claimant, the doctor released claimant for work as of November 5. Therefore, the carrier unilaterally terminated compensation for temporary total disability.

Claimant testified about one week before Thanksgiving he spied some furniture in a vacant field and went to check it out. He climbed over a two-foot wire, got hung up and fell onto his left leg, causing an injury.

Claimant's attorney sent claimant to a psychologist, Dr. James Cheatham, who testified at the hearing that claimant was suffering from stress because he had no income. He was treating the claimant. Claimant said he felt harrassed and antagonistic toward the emloyer. The doctor indicated the biggest reason claimant should have temporary total disability was because his greatest problem was having no money. He testified he wrote the report, which is in evidence, to get claimant money and later a job for him. He indicated his treatment was palliative and not curative.

Claimant further testified at the hearing he had a severe pain when he returned to work in July 1979 and was "harrassed" by his supervisor. Claimant said the supervisor watched him all the time which increased his pain. Claimant has sought absolutely no employment since his attempt to return to work. At the time of the injury claimant weighed 335 pounds and while enrolled at the Callahan Center, 370 pounds.

The Referee found that under the Workers' Compensation Law an employer has the obligation to make payments for temporary total disability until he is relieved of this responsibility by the issuance of a Determination Order. The employer may request a hearing to seek an order for termination of payments under ORS 656.283(1). However, in this case the employer unilaterally suspended payments without authorization from the Evaluation Division or requesting a hearing.

Therefore, the Referee found that the employer unreasonably terminated temporary total disability payments and ordered the employer to pay temporary total disability benefits from the date of their discontinuance on November 8, 1979 until the claim is closed pursuant to ORS 656.268.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, reverses the Referee's order. The Board finds Dr. Peachey to be more persuasive in this matter than Dr. Cheatham. Mr. Hutchison had called Dr. Peachey's office and was advised claimant had been released for regular employment on November 5, 1979. Dr. Peachey, in a report dated November 13, 1979, stated he had told claimant to return to work on "11/5/79" despite discomfort because it must be "worked out". The Board finds, after reviewing all the evidence in this case, that the employer correctly terminated temporary total disability when claimant was released for work by Dr. Peachey. Therefore, the Board reverses the Referee's order in its entirety.

ORDER

The Referee's order, dated January 31, 1979, is reversed in its entirety.

CLAIM NO. RC 388724 April 23, 1980

GARY T. CHRISTENSEN, CLAIMANT
Pozzi, Wilson, Atchison, Kahn
& O'Leary, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On March 31, 1980, claimant, by and through his attorney, requested the Board exercise its own motion jurisdiction and reopen his claim for his August 16, 1972 low back injury. The claim was initially closed by a Determination Order, dated July 26, 1973, which awarded claimant temporary total disability compensation and compensation equal to 16° for 5% unscheduled disability. Claimant's aggravation rights have expired. A stipulation, dated August 31, 1977, increased claimant's unscheduled disability by 32° for 10% unscheduled disability.

On January 23, 1979, Dr. William Duff reported claimant was complaining of severe and worsening low back pain over the last two to three weeks. He stated he had hospitalized claimant on January 22, 1979 for a further work-up and traction. He requested claimant's claim be reopened.

Claimant was discharged from the hospital on February 2, 1979, after receiving conservative care. On February 14, 1979, Dr. Duff indicated claimant continued to have a moderate level of back pain, but his condition had improved and he was released for work as of February 15, 1979.

On April 7, 1980, the State Accident Insurance Fund (Fund) indicated it opposed claimant's request. Its opposition was based on medical reports from Drs. Andrew Lynch and Duff. Dr. Lynch examined claimant in April 1977 and reported claimant's symptoms had not varied over the last "couple of years". He felt claimant's condition was stationary. In his December 1978 report, Dr. Duff stated claimant has had no new injury or particular change "over the long run" in his condition. The Fund contends claimant has failed to establish his condition changed between December 1978 and January 1979.

The Board, after reviewing all the reports provided, finds claimant is entitled to have his claim opened for the period he was hospitalized from January 22, 1979 to February 2, 1979 and to have any medical bills or expenses paid for by the Fund. The Board does not find claimant is entitled to any additional award of permanent partial disability.

ORDER

Claimant is hereby awarded additional temporary total disability compensation from January 22, 1979 through February 2, 1979. Further the State Accident Insurance Fund is ordered to pay any and all medical expenses related to claimant's hospitalization during this period of time.

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

WCB CASE NO. 79-8015 April 23, 1980

RICHARD CUNDELL, CLAIMANT
Welch, Bruun & Green, 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. HD 140764 April 23, 1980

KENNETH S. LAWSON, CLAIMANT
Tom Hanlon, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On February 29, 1980, the Board issued an Own Motion Order which reopened this claim as of November 29, 1979 for further treatment and temporary total disability compensation. The Board, on December 10, 1979, had issued an Own Motion Determination which granted claimant additional temporary total disability compensation from March 13, 1978 through September 18, 1979.

Claimant, by and through his attorney, on March 18, 1980, requested the Board reconsider its February 1980 order and award claimant temporary total disability for the period of September 18, 1979 through November 29, 1979.

The Board requested the State Accident Insurance Fund (Fund) to advise it of its position with respect to claimant's request. On April 2, 1980, the Fund indicated it felt the Board's order was correct.

The Board, after reviewing the medical reports in this case and considering the contentions of the parties, affirms its order, dated February 29, 1980. The Board does not find that the evidence supports the awarding of temporary total disability through November 29, 1979.

ORDER

The Board's Own Motion Order, dated February 29, 1980, is affirmed.

CLAIM NO. 05X-020005 April 23, 1980

KARL M. NUSE, CLAIMANT
Malagon & Yates, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On March 21, 1980, claimant, by and through his attorney, requested the Board reopen his claim for his July 31, 1973 left leg and low back injury under its own motion jurisdiction. This claim was initially closed by a Determination Order, dated March 13, 1974. Claimant, to date, had received compensation equal to 45% unscheduled disability for his low back injury and 15% loss of function of his left leg. Claimant's aggravation rights have expired. Attached to claimant's request were three medical reports from Dr. Maurice Renaud.

On February 1, 1980, Dr. Renaud reported claimant had been at home watching television and felt his muscles tighten and felt an "electric" shock through his back when he got up. The diagnosis was a herniated nucleus pulposus at the L5 level on the left. On February 19 and March 11, 1980, Dr. Renaud reported claimant had improved and released him for work.

On March 25, 1980, the Board advised the insurance carrier of claimant's request and requested it advise the Board of its position in regard thereto.

The insurance carrier, on April 4, 1980, advised the Board it opposed claimant's request for own motion relief. It indicated the employer would continue to provide medical care and treatment, drugs, mileage, and transportation and other benefits under ORS 656.245. It pointed out claimant was not working at the time of this incident.

The Board, after reviewing the reports provided to it, concluded the claim should not be reopened at this time under its own motion jurisdiction. There is no medical support relating claimant current condition to the original injury. Therefore, the Board denies claimant's request for own motion relief.

IT IS SO ORDERED.

WCB CASE NO. 79-7349 April 23, 1980

LESLIE C. ROGERS, CLAIMANT
Pozzi, Wilson, Atchison, Kahn
& O' Leary, 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. C 13425 April 24, 1980

IRVEN BOORMAN, CLAIMANT
Ackerman & DeWenter, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Order

In October 1969, the Court of Appeals found claimant was permanently and totally disabled. On September 13, 1979, the State Accident Insurance Fund requested that the Board re-evaluate this award.

The Board referred this case to the Evaluation Division of the Workers' Compensation Department and requested that it furnish the Board with an advisory opinion as to the extent of claimant's current disability. On April 16, 1980, the Evaluation Division advised the Board it found no change in claimant's condition to warrant reduction of the permanent total disability award.

The Board, after reviewing all the evidence in the file, finds no reason to change claimant's award of permanent total disability.

ORDER

Claimant's award of permanent total disability is affirmed.

Claimant's attorney is hereby granted as a reasonable attorney's fee a sum equal to $250, payable by the Fund.

CLAIM NO. B830 C 407793 April 24, 1980

GORDON COVEY, CLAIMANT
Malagon & Yates, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On March 24, 1980, claimant, by and through his attorney, requested the Board reopen his claim for the October 28, 1973 back injury under its own motion jurisdiction. Attached to this request was a February 21, 1980 report from Dr. Donald Smith. In that report Dr. Smith indicated claimant complained of continuing severe pain in the left costovertebral-flank area. He felt this complaint of continuing low back pain was related to claimant's October 1973 injury. Dr. Smith requested the claim be reopened for further evaluation, to include a myelogram and "CT scan".

On March 27, 1980, the Board advised the insurer of this request and asked it to advise the Board of its position in regard thereto. The insurer, on April 15, 1980, advised the Board it did not oppose claimant's request.

The Board, after reviewing the material in this case, finds it is sufficient to reopen claimant's claim for his October 28, 1973 injury if and when he is hospitalized for evaluation as suggested by Dr. Smith. Claimant's attorney is entitled to a fee equal to 25% of the temporary total disability compensation claimant may receive as a result of this order, payable out of such compensation as paid, not to exceed $750.

IT IS SO ORDERED.

WCB CASE NO. 77-4695 April 24, 1980

RUSSELL LEWIS, CLAIMANT
Galton, Popick & Scott, Claimant's Attys.
Rankin, McMurry, Osburn, Gallagher & VavRosky, Employer's Attys.
Request for Review by Employer

The employer seeks Board review of the Referee's order which remanded the claim to the employer/carrier for the payment of additional compensation for temporary total disability from June 2, 1977 through August 16, 1977; ordered it to pay a penalty for unreasonable delay of compensation in an amount equal to 25% of the temporary total disability compensation payable to claimant from January 17, 1977 through June 1, 1977, and a like penalty for unreasonable refusal to the payment of compensation for the period from June 2, 1977 through August 15, 1977; and granted claimant's attorney a fee of $500 for his efforts in this matter.

FACTS

On April 12, 1968, claimant sustained a compensable injury to his left leg. The claim was originally closed on April 15, 1969 and thereafter there were various other reopenings and closures resulting in claimant being granted an award of compensation equal to 100% loss of use of the left leg.

On March 16, 1977, the Board received a request from claimant that his claim for this injury be reopened under its own motion jurisdiction. After considering all the evidence before it, including the briefs of the parties, on June 2, 1977 the Board ordered that claimant's claim be remanded to the employer and its carrier to be accepted and for the payment of compensation commencing on January 17, 1977, the date claimant had been hospitalized for additional surgery and until his claim was closed pursuant to the provisions of ORS 656.278. Further, it provided that the carrier should pay all medical bills and expenses incurred by claimant as a result of his hospitalization and surgery and granted claimant's attorney a fee.

An Own Motion Determination, dated August 16, 1977, granted claimant additional temporary total disability compensation from January 17, 1977 through June 1, 1977.

On June 30, 1977, the carrier advised claimant's attorney that it had received the Own Motion Order, dated June 2, 1977, in which as they interpreted it granted claimant temporary total disability compensation from the date of his surgery, January 17, 1977, until the claimant was considered stationary. They indicated that in checking with Dr. Langston's office, he advised them that as of June 1, 1977 claimant was considered medically stationary.

On July 11, 1977, Dr. Langston advised the carrier that claimant was last examined on June 1, 1977, claimant was able to walk without the aid of an artificial device such as a brace or crutch. It was Dr. Langston's opinion that claimant's condition was stationary and that his claim could be closed. He felt that claimant's disability was not greater than that which he had prior to the beginning of his treatment. Dr. Langston felt that claimant's condition had improved over that which it had been previously.

Ms. Virginia Anderson, claim representative for the insurer, testified that the Own Motion Order was received in her office on June 6, 1977. She stated that on June 10, 1977 she contacted Dr. Langston's office to determine if claimant was medically stationary. She indicated that his office had advised her that claimant was stationary. She testified that the check for the time loss was not issued until June 30, 1977 because its amount exceeded her authority, making it necessary to requisition it from the carrier's home office in Los Angeles.

Claimant testified that during this period of time he was temporarily and totally disabled and was without any outside income.

The Referee found that unreasonable delay of initial payment under subsequent orders or determinations fall under the purvue of ORS 656.262(8). The Referee found that insurer's 24-day delay between its receipt of the Own Motion Order and its payment constituted unreasonable delay of payment of compensation.

The Referee further determined that claimant was entitled to additional temporary total disability compensation from June 2, 1977 through August 16, 1977, the date of the Board's Own Motion Determination. The Referee construed the Own Motion Order to mean compensation was payable until the Board issued its determination order closing the claim. He felt that the order did not allow the insurer to unilaterally terminate payment as of the date claimant became medically stationary.

Therefore, the Referee remanded this claim to the employer and its carrier for the payment of additional compensation for temporary total disability from June 2, 1977 through August 16, 1977; awarded penalties equal to 25% of the temporary total disability compensation payable to claimant from January 17, 1977 through June 1, 1977 and a like penalty for unreasonable refusal to the payment of compensation for the period from June 2, 1977 through August 15, 1977; granted claimant's attorney a fee of $500.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, modifies the Referee's order. The Board concurs with the findings and conclusions of the Referee except it does not find, based on the evidence in this case, that the carrier should be penalized the maximum amount for its actions. The Board finds the facts in this case indicate there was some uncertainty in the carrier's mind at the time it received its Own Motion Order. However, insurance carriers must make a reasonable and timely payment of compensation in a case opened under an Own Motion Order as in any other case. The same rules apply to both types of cases. The Board disapproves of the requirement which this carrier had of going out of state to get an authorization for payment of sums over a certain limit. However, in this case, the Board finds there are certain extenuating circumstances which excuse the carrier's acts in this case, but the Board finds that the carrier still must be assessed a penalty for its unreasonable acts. Therefore, the Board would modify the Referee's order and reduce the amount of the penalty from 25% to 10% of the compensation for the periods indicated by the Referee.

ORDER

The Referee's order, dated October 8, 1979, is modified.

That portion of the Referee's order which awarded additional compensation for a penalty for unreasonable delay in payment of compensation in an amount equal to 25% of the temporary total disability compensation payable to claimant from January 17, 1977 through June 1, 1977, and a like penalty for unreasonable refusal to the payment of compensation for the period from June 2, 1977 through August 15, 1977 is modified. The employer and its carrier is hereby ordered to pay claimant as additional compensation for a penalty for unreasonable delay of payment of compensation an amount equal to 10% of the temporary total disability compensation payable to the claimant for the above mentioned time period.

The remainder of the Referee's order is affirmed.

CLAIM NO. 143956 April 24, 1980

ROBERT J. MARSHALL, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

On August 26, 1968, claimant sustained a compensable injury to his back when he slipped and fell from a line guard. The claim was initially closed in September 1969 and claimant's aggravation rights have expired.

In August 1979, Dr. Robert Fry reported claimant had had a "recent episode of aggravation of his back". Claimant has a second degree spondylolisthesis at the lumbosacral joint. In September 1979, Dr. Fry reported claimant was able to perform his regular work.

On February 22, 1980, the Orthopaedic Consultants reported claimant had returned to work after his injury. Dr. Fry, in October 1968, had diagnosed first degree spondylolisthesis. Dr. Fry prescribed a lumbosacral brace to be used as needed by claimant. In August 1979, claimant went to Dr. Fry complaining of back pain and was told to begin wearing his brace again. Claimant said he returned to a modified job, avoiding heavy pushing, pulling, or lifting and eventually returned to regular work. The Orthopaedic Consultants opined claimant's condition was medically stationary and felt he had minimal loss of function of the back related to the injury. They felt claimant's current condition was related to the August 26, 1968 injury inasmuch as the congenital condition was asymptomatic prior to it. Dr. Fry agreed with this report.

On March 21, 1980, the Fund requested a determination of claimant's current disability. The Evaluation Division of the Workers' Compensation Department, on April 14, 1980, recommended this claim be closed with no award of compensation for temporary total disability compensation or permanent partial disability.

The Board concurs with this recommendation.

ORDER

Claimant's claim for an injury sustained on August 26, 1968 is hereby closed with no additional award of compensation.

CLAIM NO. C273344 April 24, 1980

DENNIS W. PADGETT, CLAIMANT
Thomas J. Flaherty, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On December 7, 1979, claimant, by and through his attorney, requested the Board reopen his claim for the October 21, 1970 low back injury. Attached to this request was a report, dated November 13, 1979, from Dr. Thomas Fagan. In that report, Dr. Fagan indicated claimant had increasing low back pain for the last two months. He felt claimant's symptoms had been aggravated and asked the claim be reopened. Claimant's aggravation rights have expired.

The Board requested the State Accident Insurance Fund (Fund) advise it of its position in regard to claimant's request. The Fund requested claimant be examined by the Orthopaedic Consultants.

On March 12, 1980, the Orthopaedic Consultants diagnosed: "1. chronic dorsal and lumbar pain by history. 2. psychological class IV, previously documented". It was their opinion claimant's condition was stationary and that the dorsal spine symptoms, which began in January 1979, were not causally related to his injury of October 1970.

The Fund, on April 8, 1980, advised the Board it opposed an Own Motion Order reopening this claim. Further, it denied responsibility for the dorsal spine condition.

The Board, after reviewing all the evidence, finds that it is not sufficient to reopen claimant's claim under its own motion jurisdiction at this time. 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.

CLAIM NO. D53-160710 April 24, 1980

DELBERT WALKER, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On April 4, 1973, claimant sustained a compensable injury to his back. The claim was initially closed by a Determination Order, dated July 15, 1976, which awarded claimant compensation equal to 7.5° for 5% loss of his right leg. Claimant appealed this Determination Order. A Stipulation and Disputed Claim Settlement, dated May 4, 1977, claimant agreed to compromise and settle his claim for the sum of $5,250. In return for this claimant agreed that this sum was a complete and final settlement for all time of all claims which he had made or may thereafter make involving the conditions which were described in the settlement document. The conditions settled were those alleged to have arisen from and out of the claimant's employment with the employer. The claimant released the employer from responsibility for all benefits of any type under the provisions of the Oregon Workers' Compensation Act, including, but not limited to, temporary total disability benefits, medical expenses, attorney fees, aggravation, survivorship benefits to the widow and minor children, if any, permanent loss of wage earning capacity, or any permanent disability and/or any disability whatsoever.

On November 9, 1979, claimant requested his claim be reopened. After correspondence with the Board, claimant provided certain medical reports to it.

On January 7, 1980, claimant requested the Board reopen his claim. After the Board had written to Dr. John Vesseley, one of claimant's treating doctors, the Board, on February 15, 1980, advised Mr. Walker that it was submitting the information that he had provided to the Board to Employers Insurance of Wausau (hereinafter referred to Wausau) for their position regarding the reopening of his claim.

In August 1979, Dr. Sharon O'Conner examined the claimant. Claimant had given her a history of problems with a painful knee, hip and low back since 1976. Claimant related this to the onset of this condition to his right knee injury. Claimant said since this injury and treatment therefor, he had had pain and restriction of motion in his low back, neck and right hip. Dr. O'Conner felt that claimant possibly had sacroilitis and ankylosing spondylitis.

In December 1979, Dr. O'Conner reported claimant had a history of severe arthritis. Claimant told her this problem began in 1976 when he had pain in his knees, hips and low back. She reported she diagnosed ankylosing spondylitis which was a form of arthritis and fusion of the spine, which led to marked limitation of motion. She reported that this arthritis involved the small joints of his hands, feet and heels. Dr. O'Conner felt this would result in a certain amount of disability with respect to any physical labor, heavy lifting, or activity requiring good movement of his neck or back.

In January 1980, Dr. Shawn Walker reported that claimant had Klinefelter's syndrome and low back pain with manifestation of inflammatory sacroiliitis. He reported that claimant also had other problems such as obesity, hypertension, history of iritis and blepharitis and chronic infections of the fingers, toes and intertriginous areas. Dr. Walker indicated that claimant was having a lot trouble working because limitation of movement and an inability to perform work because of his neck, back, and right hip problems.

On March 28, 1980, Wausau advised the Board that it did not feel the evidence presented by claimant substantiated an aggravation of the injury he had sustained on April 7, 1973. Further, it was their position that the wording of the disputed claim settlement stipulation approved on May 4, 1977, would preclude any further benefits in any event. Therefore, it was their position that this claim should not be reopened.

Claimant can request a hearing on any issue in this claim within five years of the issuance of the first Determination Order. This time has not expired. The Board does not have the authority in cases such as this to reopen claims under its own motion jurisdiction since claimant has viable rights remaining. Further, even if the Board could exercise its own motion jurisdiction, it does not find that the medical evidence in this claim establishes any worsening of claimant's condition and would deny own motion relief. The request for own motion relief by claimant is denied.

IT IS SO ORDERED.

Pursuant to ORS 656.278(3) neither party has a right to a hearing, review or appeal.

CLAIM NO. GC 368887 April 24, 1980

DAVID F. WILLIAM, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

On April 4, 1972, claimant sustained a compensable injury to his left knee. Claimant missed two days of work and his claim was treated as a medical-only.

On October 29, 1979, claimant was seen by Dr. Raymond North for continuing left knee pain. An arthrogram performed on November 1, 1979 revealed a possible tear of the medial meniscus. Dr. North related this to claimant's original injury in April 1972. On December 14, 1979, Dr. North performed an arthroscopy and arthroscopic medial meniscectomy on claimant's left knee.

In December 1979, claimant returned to driving a cab on a limited basis. Dr. North, on January 15, 1980, reported claimant was working and had not lost any time from work. Claimant returned to full time work on January 21, 1980.

In March 1980, Dr. North indicated claimant had no effusion in his left knee and had a full range of motion of the knee. He felt claimant's condition could be considered medically stationary at the "end of this month" and that claimant had a mild amount of permanent partial impairment in the left knee.

On March 28, 1980, the State Accident Insurance Fund requested a determination of claimant's current disability. The Evaluation Division of the Workers' Compensation Department, on April 14, 1980, recommended claimant be granted an award of additional temporary total disability compensation from October 29, 1979 through December 21, 1979 and temporary partial disability compensation from December 22, 1979 through January 20, 1980 and compensation equal to 7.5° for 5% loss of the left leg.

The Board concurs in this recommendation.

ORDER

Claimant is hereby granted temporary total disability compensation from October 29, 1979 through December 21, 1979 and temporary partial disability from December 22, 1979 through January 20, 1980, less time worked. Claimant is also granted an award equal to 7.5° for 5% loss of the left leg.

WCB CASE NO. 78-8998 April 25, 1980

GLENN R. BECK, CLAIMANT
Welch, Bruun & Green, 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 awarded claimant additional compensation equal to 32° for 10% unscheduled disability for his neck injury. Claimant contends he is permanently and totally disabled.

FACTS

Claimant, a 56-year-old carpenter, was employed by Zuber Brothers Construction on November 11, 1977 when he fell headfirst into a hole. This injury was at first diagnosed as an acute cervical strain. Claimant continued to have difficulty with his neck and on January 31, 1978 underwent a myelogram. Dr. M. Johnson diagnosed: "L. C6-7 NERVE ROOT COMPRESSION, LEFT, SECONDARY TO CERVICAL SPONDYLOSIS, C5-6 AND C6-7 VERTEBRAL LEVELS, AGGRAVATED BY TRAUMA". On April 11, 1978, claimant underwent a cervical hemilaminectomy on the left at C6 with a C6 and a C7 nerve root compression on the left.

In June 1978, Dr. Johnson reported claimant continued to have a "markedly" stiff neck and could not turn his head to either side.

Dr. Richard Embick, of the William Callahan Center, in September 1978, reported claimant complained of neck pain, increased with movement of the head, and which occasionally locked. Claimant stated his left arm was sensitive and was painful when used. He also reported numbness in the fingers in his left hand, pain in his low back, sacrum and tailbone, and numbness in the fronts of both thighs. Dr. Embick felt claimant could not return to carpenter work, unless it was a light type of work. Claimant has a 10th grade education. Dr. Louis Loeb, a psychologist at the Center, opined claimant did not have any emotional problems. Claimant had worked in a bean mill for some time and in the carpentry field for 34 years.

Dr. W. R. Kohlheim, medical examiner at the Center, on October 6, 1978, felt claimant's condition was medically stationary.

A Determination Order, dated October 31, 1978, awarded claimant temporary total disability compensation and compensation equal to 160° for 50% unscheduled disability resulting from his neck injury.

In April 1979, Dr. Johnson felt claimant was medically stable. He felt claimant's condition was "self-limiting" and that improvement would be based on claimant's "potential gains as far as re-employment etc."

Dr. Edward Berkeley, in May 1979, opined claimant was then unemployable. He felt claimant had considerable disability due to claimant's symptoms and in view of the severity of the degenerative changes shown in x-rays of the cervical spine. Based on the x-rays and his examination, Dr. Berkeley felt claimant should be evaluated further. He felt that unless claimant was treated surgically his condition would continue to deteriorate with increasing pain in the neck, shoulders, arms and possibly also weakness and clumsiness in the hands.

In September 1979, Dr. Calvin Kiest reported claimant had back injuries in 1965, 1971 or 1972 and underwent a laminectomy. Claimant stated he had not returned to work after his July 11, 1977 injury. Claimant was then drawing Social Security disability. Dr. Kiest interpreted the x-rays as revealing massive generalized degenerative changes. He felt claimant's condition was medically stationary, but felt claimant could not ever return to "relatively hard work" and that he was not trainable into any other type of work. Dr. Kiest felt claimant's motivation was "gone" and even if he was "supremely motivated" it was unlikely he could return to work as a carpenter. Based on claimant's condition and other factors, Dr. Kiest felt claimant was not employable in any work capacity at that time or in the forseeable future and, therefore, was permanently and totally disabled.

Dr. Theodore Pasquesi, in October 1979, felt claimant's impairment was equal to 44% of the whole man. His diagnosis was spondylosis of the cervical spine with superimposed trauma causing radicular pain with an absent left triceps reflex and some neurological deficit in the form of sensation with limited motion throughout the cervical spine area.

Ms. Kathleen Germain, a vocational rehabilitation consultant, reported claimant said he was unable to lift, unable to stand more than half an hour and unable to sit for any length of time. He said he could walk only an hour-and-a-half and had limited motion in his neck and his leg was frequently numb. Claimant also reported he had constant back pain and dizzy spells. Ms. Germain found claimant probably would not be aided by vocational rehabilitation and concluded he was not employable.

At the hearing, claimant testified he has difficulty sitting, walking, sleeping and driving. He says he has frequent dizzy spells and must rest twice a day and his fingers go numb. Claimant stated he has constant pain for which he takes pain medication.

The Referee, based on all the evidence, felt claimant was not permanently and totally disabled. However, based on that same evidence he found claimant was entitled to an additional award of compensation equal to 32° for 10% unscheduled disability for injury to his neck.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, modifies the Referee's order. There are two types of cases of permanent total disability: (1) those arising from medical or physical incapacity or (2) those arising from physical condition of less than total incapacity plus other none medical conditions, such as age, education, motivation, etc. which when combined together result in permanent total disability. The Board, in this case, finds that claimant fits into the first category. The Board finds that claimant's injuries are of such severity, that regardless of his motivation, he would not be able to engage in any gainful and suitable employment. The Board concludes claimant is permanently and totally disabled.

ORDER

The Referee's order, dated December 4, 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 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. 79-917 April 25, 1980

WILLIAM G. FUNKE, CLAIMANT
Steven Goldberg, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

ISSUE ON REVIEW

The State Accident Insurance Fund (Fund) seeks review by the Board of the Referee's order which reversed its partial denial for claimant's ulnar nerve condition and remanded the claim to it for acceptance.

FACTS

Claimant was employed as a laborer for a tannery and on November 28, 1977 testified that he was stretching leather with a whet stone and hit a soft spot which flipped his left wrist under. Claimant testified that he felt immediate pain in his wrist and elbow.

Dr. William Charles initially diagnosed tenosynovitis and claimant gave a history of straining his wrist muscle at work on November 28, 1977. Dr. Hoda examined claimant and reported in December 1977 that claimant's complaints were in the wrist, forearm, and now the medial epicondyle. Dr. Hoda released claimant for work on December 16, 1977. Dr. Hoda reported that claimant returned to work on December 13 but he quit because he developed tingling on the top of his left hand.

On February 15, 1978, Dr. Thomas Boyden reported that claimant was disabled from injury to his left ulnar nerve.

In March 1978, the University of Oregon Medical School found claimant had subluxating ulnar nerve and physical therapy was commenced. Upon examination by Dr. Hoda it was noted he had subluxation over the epicondyle and vague hypesthesia in the left hand and arm. However, the ulnar nerve function, especially motor, was intact.

Subsequently, claimant had nerve conduction studies which Dr. Hoda said, on March 13, showed a slowing of velocity at the elbow, but no EMG changes.

On May 17, 1978, Dr. Frank Yatsu, a neurologist at the University of Oregon Health Sciences Center, reported his examination showed traumatic myositis. In October 1978, Dr. Yatsu indicated that claimant also had a mobile left ulnar nerve and surgery was recommended for a transplant. On November 16, 1978, claimant was hospitalized and this surgery was performed.

Dr. Robert Anderson, on December 18, 1978, reported that his diagnosis was contusion and strain in the palmar surface left hand and volar surface left forearm, acute and traumatic tenosynovitis, and unrelated left ulnar nerve neuropathy. In his opinion, there was no objective evidence to substantiate relationship between the ulnar nerve and the subsequent surgery to the initial injury. Dr. Anderson found very high functional overlay with insufficient objective findings to explain claimant's complaints and claimant's condition was stationary.

On January 23, 1979, a partial denial of the ulnar nerve palsy was issued by the Fund.

On January 26, 1979, Dr. Bryan Laycoe, of the University of Oregon Health Science Center and an orthopedist, opined that claimant had subluxation of the ulnar nerve at the elbow secondary to neuropathy as a direct result of the November 1977 injury. The surgical findings were consistent with the injury and the diagnosis and he disagreed with Dr. Anderson.

On February 2, 1979, Dr. Hoda reported that claimant came to see him to get him to retract statements he had made in his earlier report. The doctor stated he still felt there was no relationship between claimant's wrist injury and his ulnar nerve condition and concurred with Dr. Anderson. Also, in February 1979, Dr. Yatsu indicated he concurred completely with the report of Dr. Anderson.

On February 16, 1979, a Determination Order granted compensation for temporary total disability only regarding the wrist condition which is the only accepted portion of the claim.

On May 1, 1979, Dr. C.A. Fratzke reported that when claimant was examined at the orthopedic clinic in January 1978 after his injury he showed no trauma to the nerve and no nerve injury. Therefore, there was no causal relationship to the injury in Dr. Fratzke's opinion.

On May 24, 1979, Dr. Sam Tabet opined that the first nerve conduction studies and EMG showed a slowing of nerve conduction velocity across the elbow of the ulnar nerve. Claimant did have a subluxating ulnar nerve.

Dr. Laycoe testified at the second hearing. It was his opinion that before the November 17, 1978 surgery claimant had a subluxating nerve. The findings at surgery were consistent with inflammation of the nerve and consistent with the history of the injury. Claimant also had ulnar neuropathy. The doctor felt claimant could have had pre-existing subluxation and the injury then caused the neuropathy. Dr. Laycoe felt claimant's nerve condition was causally related to the industrial injury.

Dr. Yatsu testified at the hearing that he saw claimant on April 20, 1978 and saw no evidence of ulnar neuropathy. The injury did not cause any subluxation, but claimant did have a long tortuous ulnar nerve which was unusual. The only condition that he found was myositis. In the doctor's opinion, there was no causal connection between the ulnar nerve and the industrial injury.

The Referee found, based particularly on Dr. Laycoe's testimony, that the causal relationship of the ulnar nerve condition to the industrial injury had been proven and remanded that portion of the claim to the Fund for acceptance and an attorney's fee of $1,400.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, reverses the Referee's order. Drs. Anderson, Hoda & Yatsu all do not find any causal relationship between claimant's injury of November 28, 1977 and the ulnar nerve condition. Dr. Laycoe did find such a relationship. The Board finds that the preponderance of the evidence does not support a causal connection between claimant's injury and the ulnar nerve condition. Therefore, the Board finds claimant has failed to prove by a preponderance of the evidence a causal relationship between his injury and the ulnar nerve condition. Based on this finding, the Board reverses the Referee's order and would approve the Fund's denial of this condition.

ORDER

The Referee's order, dated August 20, 1979, is reversed in its entirety.

The denial issued by the State Accident Insurance Fund is hereby reinstated and approved.

WCB CASE NO. 79-6765 April 25, 1980

JANICE GONSALVES, CLAIMANT
Pozzi, Wilson, Atchison, Kahn
& O'Leary, Claimant's Attys.
Lang, Klein, Wolf, Smith, Griffith
& Hallmark, Employer's Attys.
Order of Dismissal

On February 18, 1980 the employer requested Board review of the Referee's order, dated January 23, 1980, which directed it to furnish samples of every "photoresist" available and to furnish claimant's attorney a list of dates on which air quality tests were conducted from January 8, 1979 to the date of the hearing. On April 18, 1980 claimant, by and through her attorney, requested that the request for review be dismissed for the reason that the Referee's order was not a final order appealable under the provisions of ORS 656.289.

The Board concludes that even though the Referee gave the parties appeal rights, the Interim Order of January 23, 1980 was not a final and appealable order and the employer's request for review should be dismissed.

IT IS SO ORDERED.

ELOISE HAIR, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary, Claimant's Attys.
Schwabe, Williamson, Wyatt, Moore & Roberts, Employer's Attys.
Request for Review by Employer

ISSUE ON REVIEW

The employer-carrier seeks Board review of the Referee's order which found that claimant was permanently and totally disabled.

FACTS

Claimant, a 42-year-old floor woman with GAF Corporation, on March 19, 1972, injured her left knee while bending down to pick up records. Dr. Howard Geist reported that claimant had been aware of crepitation in the region of both of her kneecaps for several years, but only recently had they been symptomatic. She indicated that in April of 1972, her left knee began swelling and she was treated by Dr. Wagner. Fluid was drawn off of her knee. Dr. Geist found that claimant had a very unstable left patella which was easily displaced laterally. His diagnosis was a congenitally unstable left patella and chondromalacia of the patella bilaterally which was symptomatic at that time only in the left knee. He felt that claimant's condition could possibly deteriorate and that she may need a patellectomy. In September 1972, Dr. Geist found that claimant had an elevated "sed" rate and was concerned if claimant had monarticular rheumatoid arthritis. He referred claimant to Dr. Stephen Maks for evaluation. Dr. Geist, in October 1972, reported that Dr. Maks did not feel that claimant had rheumatoid arthritis but probably had reactive synovitis due to overuse of her knees. Dr. Geist reported that claimant was developing increasing symptomatology in her right knee, very similar to that on the left. Dr. Geist finally determined that claimant had rheumatoid arthritis in her knees. During 1973, claimant began treating with Dr. Maks. On December 4, 1972, Dr. Geist performed a left patellectomy.

On May 8, 1973, Dr. Stephen Maks indicated that he had diagnosed claimant's condition as polyarticular rheumatoid arthritis. He noted that from the history, this had began when she strained her knee on the job on approximately April 8, 1972.

Dr. Geist, on December 18, 1973, reported that claimant was in need of no further orthopedic treatment and he had discharged her.

A Determination Order, dated May 15, 1974, granted claimant an award of temporary total disability compensation and compensation equal to 52.5° for 35% loss of her left leg.

The employer-carrier had denied claimant's claim for the rheumatoid arthritis condition. Claimant appealed this denial and on March 3, 1975, an Opinion and Order was entered by a Referee which remanded the claim to the employer-carrier for acceptance and payment of compensation. This order was affirmed by the Board after de novo review.

In February 1976, Dr. Maks reported that he was treating claimant approximately every two to four weeks. He opined that claimant had moderately severe polyarticular rheumatoid arthritis.

Mr. David Rollins, a vocational rehabilitation specialist, in April 1976, reported that claimant had given up hope of ever returning to work because of her arthritis. Claimant indicated to Mr. Rollins she had considerable difficulty in coping with the activities of daily living and fulfilling her role and responsibilities as a mother and housewife. Claimant reported that the arthritis had spread to her wrist, fingers, both hands, shoulders and "mandible". Mr. Rollins opined that because of the disabling affects of the rheumatoid arthritis, claimant would probably never, in the forseeable future, return to gainful employment.

In June 1977, Dr. Maks had reported that claimant had responded to the treatment and that her condition had at least temporarily stablized. However, he felt she was still disabled. Dr. Maks did not feel claimant would be able to return to her former employment or any type of employment because of the medical treatment she was receiving at that time allowed her just enough activity to take care of her personal needs.

Dr. Rocquelyn Jastak, in January 1978, opined that claimant was totally and permanently disabled from any type of employment.

On March 3, 1978, Dr. Theodore Pasquesi reported that claimant told him that the arthritis had spread to all of her joints. It was his opinion that claimant probably was having early symptoms of rheumatoid arthritis at the time her left knee began to bother her. Dr. Pasquesi opined that claimant's condition was medically stationary. He felt that because of her left knee, any occupation in which she would be employed would have to be predominantly a sedentary one in nature.

A Second Determination Order, dated June 19, 1978, awarded claimant additional temporary total disability compensation.

In November 1978, Dr. Jastak reported that she had changed her opinion and that she now no longer felt that claimant's rheumatoid arthritis was related to her industrial injury. She reported that claimant was minimally educated and unskilled, but that she felt claimant might be retrained for a sedentary type of job that did not require prolonged standing or lifting.

At the hearing, claimant testified that her arthritic condition was better at the time of the hearing than in 1973. She stated that she performed such housework as washing, vacuuming, dusting and cooking. She said that she is able to drive a car to do her shopping and spends time knitting, crocheting, reading, vacationing, watching television and attending church. Claimant testified that she has not looked for work since the March 1972 injury nor has she worked or attempted work since that time. She indicated, however, that she previously had worked in a cannery, as well as in a typing position for the Motor Vehicles Division.

The Referee, after reviewing all the evidence in this case, found that claimant was entitled to an award of compensation for permanent total disability, effective March 1, 1978. The Referee awarded claimant's attorney a fee out of the increased compensation.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, modifies the Referee's order. The Board finds that the prior determination that claimant's rheumatoid arthritis was related to her industrial injury was res judicata. However, the Board does not find that the medical evidence in this case alone establishes that claimant is permanently and totally disabled. The preponderance of the medical evidence indicates that claimant is capable of sedentary type of employment which does not require prolonged standing or lifting.

Claimant, by her own testimony, has not worked, sought work or attempted work since March 1972. She testified that she is able to engage in a series of activities including crocheting, knitting, performing housework, and other outside activities at this time. Based on this evidence, the Board finds that claimant has not shown a willingness to seek regular gainful employment or that she has made reasonable efforts to obtain such employment. Therefore, the Board, after reviewing all the evidence, finds that claimant is not permanently and totally disabled. However, the Board does find that claimant's condition does result in a loss of wage earning capacity and finds that claimant is entitled to an award of compensation equal to 192° for 60% unscheduled disability for her rheumatoid arthritis condition. Accordingly, the Board so modifies the Referee's order.

ORDER

The Referee's order, dated April 6, 1979, as supplemented by an order, dated May 2, 1979, is modified.

Claimant is hereby granted an award of compensation equal to 192° for 60% unscheduled disability for her rheumatoid arthritis condition. This award is in lieu of any previous awards of unscheduled disability. The remainder of the Referee's order is affirmed.

WCB CASE NO. 79-3959 April 25, 1980

JOSEPH R. JAIKIN, CLAIMANT
Richard Maizels, Claimant's Atty.
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 State Accident Insurance Fund's (hereinafter referred to as the Fund) denial of certain medical bills allegedly related to claimant's accepted injury.

FACTS

Claimant, a 38-year-old waiter, injured his back on January 9, 1979 while rearranging office furniture. Dr. William Parsons, on February 21, 1979, reported that claimant complained of pain in the dorsal back, right shoulder and chest which was of approximately two months' duration. He diagnosed a possible cervical cord lesion and recommended that claimant be hospitalized for diagnostic testing.

On February 22, 1979, Dr. Michael Blackman, D.C., reported that claimant had severe neck and chest pain and lower neck stiffness. He diagnosed an acute cervical thoracic strain.

Claimant was hospitalized on February 25, 1979 and February 26, 1979. Claimant underwent x-rays of the cervical spine, skull, a cervical myelogram, and a CT brain scan, all of which were normal.

On March 12, 1979, the Fund advised the claimant that his injury had been classified as non-disabling. On March 19, 1979, Dr. Parsons reported that claimant continued to complain of pain in the interscapular area of his dorsal back. Claimant indicated this was aggravated by flexing his neck and particularly by turning his head to either side. Dr. Parsons continued to treat claimant with outpatient physical therapy and also with pain medication.

On March 30, 1979 and April 2, 1979, the Fund advised Good Samaritan Hospital & Medical Center, Dr. Keith Wrigley, Dr. Richard Arkless and the Heart Clinic that their billings for various medical services had not been related to claimant's work injury. The Fund advised them that they could not make payment for their services without a report indicating their findings and their relationship to the injury.

On April 10, 1979, Dr. Donald Wysham reported that claimant had been hospitalized at Good Samaritan on February 13, 1979 as an emergency case because of chest pain. Claimant had noticed chest pain and the onset of numbness in the left side of his tongue and the lips associated with a shooting pain on the inside of his left arm extending down into the forearm. This was followed shortly by a sharp pain in the mid-chest with a sense of panic and also faintness. Claimant also reported he was slightly nauseated.

On February 15, 1979 claimant underwent a stress electrocardiogram which was considered to be negative. Dr. Wysham referred claimant to Dr. Wrigley, a gastroenterologist for evaluation. He found claimant had a diaphragmatic hernia and felt that claimant had a gastro-esophageal reflux and began appropriate therapy.

On April 20, 1979, the Fund denied payment of medical bills for claimant's hospitalization of February 13, 1979 at Good Samaritan Hospital, his subsequent treatment and/or services by Dr. Richard Arkless, Dr. Wrigley and the Heart Clinic. It was the Fund's position that these services were not related to the industrial injury sustained on January 9, 1979.

In May 1979, Dr. Parsons reported that claimant continued to complain of pain between his shoulder blades which radiated both up to the spine into the neck and the base of the skull as well as caudally into his lower back. He also reported

intermittent periods of tingling or a numb feeling in his left lower lip and occasionally in the left upper lip. Claimant continued to receive physical therapy treatments twice a week and to use medication. Dr. Parsons, in July 1979, reported that claimant began receiving cervical traction as well as other forms of physical therapy. He reported that claimant had continued to work at this job as a realtor during this time.

On August 27, 1979, Dr. Parsons reported that claimant still complained of pain in the shoulder blades and posterior thoracic region. Claimant reported that with turning movements of the head toward either side (particularly the right), he noticed a shooting pain from between the shoulder blades, up the back of his neck. Claimant continued to use pain medication as well as physical therapy and cervical traction. Dr. Parsons found that claimant had full range of cervical motion, but still complained of pain in the interscapular region both with extreme flexion of his neck and with turning his neck fully to the right or left. Dr. Parsons' diagnosis continued to be chronic dorsal strain.

Dr. Blackman, in September 1979, reported claimant continued to complain of severe mid-back and chest pain and low neck pain and stiffness. He felt these symptoms were related to claimant's January 9, 1979 injury. He felt that claimant's medical services were related to the hospitalization, as provided by Dr. Wysham, Dr. Wrigley, and Dr. Arkless as well as Dr. Parsons were necessary to diagnose and treat the symptoms caused by the cervical thoracic strain. He felt that all medical bills related for this treatment were incurred as a result of the treatment and diagnosis of claimant's occupational injury of January 9, 1979. Dr. Blackman testified at the hearing and reiterated this opinion.

The Referee did not accord Dr. Blackman's testimony any weight. Without the opinion of Dr. Blackman, the Referee found there was not any medical evidence causally relating the symptoms of February 13, 1979 to claimant's compensable injury. Therefore, the Referee found that claimant had failed to meet his burden of proof and affirmed the denial issued by the Fund.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, affirms the Referee's order. Dr. Wrigley's office advised the Fund that treatment was not related to claimant's compensable injury. Dr. Wysham's report, in April 1979, likewise indicates that claimant was treated on February 13, 1979 for chest pain. The medical reports indicate that claimant was suspected of having a possible myocardial infarction. Further testing was done to determine if, in fact, he had suffered a myocardial infarction. Dr. Wrigley found that claimant, in fact, had a diaphragmatic hernia and gastro-esophageal reflux which resulted in his hospitalization on February 13, 1979. The Board concurs with the Referee that the opinion of Dr. Blackman is not accorded any weight. It is apparent from Dr. Blackman's testimony in his reports that he was not aware of what Drs. Wysham, Wrigley, and Arkless were treating claimant for or why claimant was hospitalized on February 13, 1979. Therefore, the Board finds that the Fund's denial must be affirmed.

ORDER

The Referee's order, dated October 16, 1979, is affirmed.

WCB CASE NO. 78-5867 April 25, 1980

JACQUELINE MADDEN, CLAIMANT
Pozzi, Wilson, Atchison, Kahn
& O'Leary, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On October 10, 1979, a hearing was held. One of the issues raised by claimant at that hearing was her entitlement to vocational rehabilitation. She contended she was vocationally handicapped and should be placed on temporary total disability compensation and receive vocational retraining. The Referee felt the evidence was quite strong claimant should have been on vocational rehabilitation. Claimant had been denied vocational rehabilitation by the Field Services Division and by the Workers' Compensation Department. The Referee held, that under the law affecting this case, he did not have jurisdiction to alter the decision which resulted in claimant not being accepted for vocational rehabilitation. Therefore, that Request for Hearing was dismissed. Claimant did not appeal this order.

Claimant, on December 27, 1979, by and through her attorney, requested the Board to exercise its own motion jurisdiction and order that a training plan proposed be approved and be placed into effect and that claimant was entitled to special maintenance.

The Board requested both the State Accident Insurance Fund and the Workers' Compensation Department advise it of their positions on claimant's request. The State Accident Insurance Fund indicated it did not have an opinion in this case. The Workers' Compensation Department advised, after consulting with its legal staff, that it did not feel own motion relief should be granted. It again pointed out claimant was not vocationally handicapped within the definition of the administrative rules.

The Board, after reviewing all the evidence in this case, finds that it is not sufficient to warrant the Board's granting claimant's request. Claimant had the right to

pursue the Referee's decision, but failed to do so. Claimant failed to exhaust her administrative remedies. 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.

WCB CASE NO. 78-10,111 April 25, 1980

BORIS MUROFF, CLAIMANT
Olson, Hittle, Gardner & Evans,
Claimant's Attys.
Bullivant, Wright, Leedy, Johnson,
Pendergrass & Hoffman, Employer's Attys.
Request for Review by Claimant

ISSUE ON REVIEW

Claimant seeks Board review of the Referee's order which (1) affirmed the employer/carrier's denial of his aggravation claim; (2) allowed the employer/carrier to offset of an overpayment of temporary total disability compensation; and (3) granted claimant an award of compensation equal to 20% unscheduled disability for his low back injury, in lieu of and not in addition to any previous award.

FACTS

Claimant, a 37-year-old production worker in an electrical department with Moduline International, injured his back on May 22, 1975, when while walking backwards he took one step too many and fell off the end of a dock striking his elbow and hip. Dr. Steven DeShaw, D.C., diagnosed this injury as post-traumatic spinal neuralgia with attenuating radiculitis to the bilateral brachial plexus of the cervical spine area and right radiculitis in the lower lumbar spinal area.

On December 18, 1975, Dr. John Burr reported that x-rays revealed a rotoscoliosis of the lumbar area which was of a rather moderate degree, but which was compensated. Dr. Burr diagnosed early scoliosis with a strain of the lumbar spine. He did not feel that claimant was in need of any surgery and that with the use of a brace would be able to return to work.

Dr. E. A. Grossenbacher, in May 1976, reported claimant had attempted to work in May 19.. but had recurrent pain and had been unable to work. Claimant complained of dull, aching pain across the lumbosacral area, which was aggravated after standing for two hours or after sitting longer than an hour-and-a-half. Dr. Grossenbacher noted claimant had a good command of the English language. His diagnosis was a probable idiopathic scoliosis right lumbar rotation, grade three, and a superimposed lumbosacral strain. He felt the scoliosis was not related to claimant's industrial injury. In the doctor's opinion, claimant should not return to his previous type of employment if it involved lifting greater than 35 pounds or repetitive twisting motions of the torso and that claimant should avoid excessive walking or sitting.

A Determination Order, dated August 23, 1976, awarded claimant temporary total disability compensation and compensation equal to 16° for 5% unscheduled disability for his low back injury. Claimant had been overpaid temporary total disability compensation benefits prior to the issuance of this Determination Order.

In October 1976, claimant began a vocational rehabilitation program to become a television-radio repairman. On October 3, 1977 this program was terminated because of medical problems. On January 3, 1978, claimant again began this program and finished it on March 30, 1978.

Also, in October 1977, Dr. DeShaw reported that he released claimant for regular work as of March 12, 1976.

Dr. Grossenbacher, in February 1978, reported his examination was unchanged from that which he had done in 1976. He felt that claimant would have mild discomfort in the low back if he engaged in heavy labor and that claimant would continue to have exacerbations or remissions of this pain. Dr. Grossenbacher opined that claimant remained medically stationary.

After claimant completed his vocational rehabilitation program on March 17, 1978, a Second Determination Order, dated May 26, 1978, awarded claimant additional temporary total disability compensation.

On June 2, 1978, the carrier advised claimant that they had made a total overpayment in the amount of $3,614.60. This was in addition to the overpayment which had been made prior to the first Determination Order in the amount of $494.73. The carrier advised claimant that this amount would be deducted from any future award granted to him.

Dr. DeShaw, in July 1978, reported that claimant was still unable to work. He reported that claimant had a great deal of difficulty in studying and that he was not capable of completing his vocational rehabilitation course. On August 14, 1978, Dr. DeShaw reported that he disagreed with the orthopedic evaluation and the award of 5% unscheduled disability for his low back injury. It was his opinion that due to claimant's injury he would not be able to participate in full employment earning a full income as he had previously done. Dr. DeShaw, in November 1978, opined that claimant's permanent disability was closer to 50% than to 5% and that claimant's spinal problem was not correctable.

On November 15, 1978, claimant's attorney wrote to the carrier requesting that claimant be granted additional compensation on the basis that claimant's condition had worsened since the date of the original Determination Order, of August 23, 1976, requested re-evaluation of claimant's condition and an award of 50% permanent partial disability. On November 28, 1978, the carrier denied this request.

On December 7, 1978, Dr. Grossenbacher reported it was his opinion that claimant's condition had not essentially worsened since his previous examination and claimant was still medically stationary. His diagnosis continued to be a lumbar strain. He did not feel claimant was totally disabled, but he felt claimant had a permanent disability. He felt that claimant's sitting and standing should be limited to two hours at the longest and that it would be ideal if claimant could obtain a job which allowed for intermittent sitting and standing. Based on claimant's structural scoliosis he felt claimant's lifting should be limited. In conclusion, Dr. Grossenbacher felt that claimant was employable and had the intellectual resources for vocational rehabilitation or job training.

In February 1979, Dr. J. F. Olson-Garewal reported he felt that claimant had severe incapacitating back pain secondary to his old injury. It was his opinion that claimant should be considered permanently disabled as a result of his accident. Dr. Olson-Garewal felt claimant could not even perform a desk job because claimant reported sitting was painful.

On May 17, 1979, Dr. Burr reported claimant continued to complain of a great deal of pain in the back and also some neck pain. His diagnosis was severe rotoscoliosis of the right lumbar area which was compensated and a chronic strain of the lumbar spine. Dr. Burr opined that claimant was capable of working an eight-hour day, standing, sitting, and walking. He felt claimant was capable of performing a job as an electrician as long as it did not involve repeated bending and heavy lifting or working for any length of time overhead. In June 1979, Dr. Burr repeated this opinion. He felt that claimant would be able to perform a desk job or light work requiring standing or walking, but not involve heavy lifting or repeated bending.

Claimant's vocational rehabilitation plan was extended in 1978 to include the spring term. Claimant was reported to be ready for employment by the Vocational Rehabilitation Division on July 3, 1978.

In February 1979, claimant was referred to the International Rehabilitation Association, Inc. for further vocational assistance. Claimant advised the counselor he had working installing electrical receptacles and switches in mobile homes and had worked approximately 3-1/2 to 4 years in a small drainpipe factory. The counselor used an interpreter in his interview with the claimant and the counselor felt that English was difficult for claimant. However, the interpreter felt that claimant knew enough English to succeed in any employment efforts without being required to have additional language training. The counselor felt because of claimant's perception of himself as a seriously disabled person who had been treated unfairly by the system, claimant's "job readiness" was extremely poor. Claimant's motivation was rated as dismal. The counselor felt that claimant's attitude posed a significant handicap to his re-employment.

On September 11, 1979, Dr. DeShaw reported that claimant was not capable of doing more than two hours of work per day. He felt because of this restriction, claimant would not be able to perform any employment. Therefore, he opined that claimant's extent of disability would be 100%.

Claimant is a Russian immigrant who has some difficulty with the English language. His entire work experience has consisted of manual labor.

The Referee did not find Dr. DeShaw persuasive in light of all the other evidence in the case. Therefore, the Referee found no basis for the aggravation claim and approved the carrier's denial.

The Referee also found that the employer was authorized to offset any payments of temporary total disability compensation after claimant's completion of his vocational rehabilitation program which extended to include spring term of 1978. The Referee found that upon establishment of the date that claimant stopped participation in the authorized program, his temporary total disability benefits should be adjusted, if necessary.

As to the loss of wage earning capacity claimant sustained because of his injury, the Referee concluded claimant was entitled to an award of compensation equal to 64° for 20% unscheduled disability for his low back injury, said award to be in lieu of, not in addition to any previous awards of unscheduled disability. The Referee further granted an attorney fee equal to 25% of the additional compensation granted by the order, but not to exceed $2,000, said amount to be paid out of the award paid to claimant.

The Referee allowed the carrier/employer to offset the award of permanent partial disability by the accrued overpayments of temporary total disability made to claimant, less that amount, if any, which be allowed claimant as temporary total disability benefits while he was enrolled in an authorized vocational program after March 17, 1978. The Referee ordered that the verification of any additional temporary total disability compensation should be provided by the claimant.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, modifies the Referee's order. The Board concurs with the Referee in the determination of all the issues except the issue of extent of disability. Claimant is disabled from engaging in occupations requiring repetitive bending, heavy lifting, and any prolonged overhead work. The consensus of the medical opinion seems to be that claimant would be capable of performing a desk job or light work which required standing and walking or sitting. Considering claimant's age, education, prior work experience, and other relevant factors, the Board concludes that claimant is entitled to an award of compensation equal to 112° for 35% unscheduled disability for his low back injury. This award is in lieu of, and not in addition to, any previous awards of compensation of unscheduled disability for this injury.

ORDER

The Referee's order, dated December 3, 1979, is modified.

Claimant is hereby granted an award of compensation equal to 112° for 35% unscheduled disability for his low back injury. This award is in lieu of any previous awards of 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 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. 79-5412 April 25, 1980

GARY SPEAR, CLAIMANT
Jerry E. Gastineau, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order On Motion

On April 18, 1980, the claimant, by and through his attorney, requested the Board to dismiss the State Accident Insurance Fund's request for review in the above entitled matter based on the fact that the Fund had failed to file its brief in a timely manner. It is not the Board's policy to dismiss requests for review when no briefs are filed as it has no authority to do so. The matter will continue to be processed by the Board.

ORDER

Claimant's motion to dismiss the State Accident Insurance Fund's request for review is hereby denied.

WCB CASE NO. 79-244 April 29, 1980

MAXWELL GILLISPIE, CLAIMANT
Michael Arant, Claimant's Atty.
Robert Fraser, 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 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. 78-7162 April 29, 1980

KENNETH JOHNSON, CLAIMANT
Galton, Popick & Scott, Claimant's Attys.
Lang, Klein, Wolf, Smith, Griffith & Hallmark, Employer's Attys.
Order Denying Reconsideration

On April 22, 1980, claimant, by and through his attorney, requested the Board reconsider its Order on Review in this matter. Claimant's attorney contends he is entitled to attorney fees because the employer appealed the entire Opinion and Order of the Referee and he prevailed on all issues except the issue of extent of disability.

The employer requested Board review of the Referee's Opinion and Order in this case in its entirety. However, the sole issue argued by it in its brief was the extent of disability. The employer contends the award granted by the Referee was not supported by the evidence. Claimant, in his brief, also argued only the issue of extent of disability.

The Board, after de novo review, concurred with the employer that the award of compensation in this case was not supported by the evidence. Therefore, the Board modified the Referee's order by reversing his award of unscheduled disability in this case and affirmed the remainder of the Opinion and Order. The employer prevailed on this issue. Therefore, claimant's attorney is not entitled to a fee. The Board does not find claimant's attorney's contentions are sufficient under this set of facts to warrant reconsideration of its order. Therefore, the Board denies the Motion for Reconsideration.

IT IS SO ORDERED.

WCB CASE NO. 79-2950 April 29, 1980

BILL LOHR, CLAIMANT
John Haugh, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

The State Accident Insurance Fund (hereinafter referred to as the Fund) seeks Board review of the Referee's order which found claimant was permanently and totally disabled as of August 22, 1978, the date that claimant was found to be medically stationary. Further, the Referee awarded claimant's attorney a fee equal to 25% of the increased compensation granted by his order, not to exceed the sum of $2,000. The Fund contends this was in error.

FACTS

Claimant, a 40-year-old barker operator with Caffall Brothers Forest Products, injured his right knee on May 20, 1976 when he slipped on some stairs going to the barker. This injury was diagnosed as an internal derangement of the right knee. In April 1977, Dr. Raymond North performed an arthroscopy of the right knee and arthrotomy and medical meniscectomy of the right knee. After surgery, claimant began a physical therapy program to strengthen his knee and leg.

By September 1977, Dr. North reported that claimant complained of aching in the knee, but he felt claimant had made good improvement in his physical therapy. He reported claimant had difficulty communicating because of a hearing problem. Dr. North felt claimant should continue with therapy for another few weeks and then he felt claimant could be considered for modified work. Dr. North felt that claimant should avoid employment that required repetitive squatting or climbing.

On October 18, 1977, Dr. North reported that claimant's condition was medically stationary, however, it was not vocationally stationary and the claimant had no job, at that time, to return to. Dr. North opined that claimant was capable of work that did not require repetitive squatting, kneeling, crawling or climbing of ladders. He estimated a loss of the lower extremity of 10%.

A Determination Order, dated December 9, 1977, awarded claimant temporary total disability compensation and compensation equal to 15° for 10% loss of his right leg.

In January 1978, Dr. Edward Korn reported that claimant was completely 100% deaf in both ears. He also found that claimant had a speech impairment.

Claimant continued to have difficulty with his knee and returned to Dr. North. Dr. North reported that claimant had aching in his knee and was in need of vocational assistance. He indicated it was difficult to communicate with claimant because of his hearing loss and that he utilized the claimant's children who partially used sign language to communicate with claimant. In June 1978, Dr. North indicated that claimant was unable to work because of the pain, swelling and limping with the right knee. It was his opinion that claimant would need another arthroscopy. He requested the claim be reopened with time loss.

On July 17, 1978, Dr. North performed arthroscopic surgery of the right knee with removal of the osteocondyle body and part of the anterior cruciate ligament. After the surgery claimant reported that he was very happy and felt no pain or grinding in his knee. However, in August, claimant was complaining of intermittent knee pain, but no instability or effusion. Dr. North reported that his examination revealed no effusion and that the knee had full range of motion. He found no instability, but he did find slight crepitation. Dr. North indicated that claimant had recovered sufficiently that he could be directed to some type of employment around the first of September. However, claimant advised Dr. North he was being scheduled for schooling. Dr. North felt school was advisable, since claimant could not perform any work which required any bending, squatting, kneeling, heavy lifting or climbing.

Dr. North, on November 24, 1978, reported that claimant's condition was medically stationary. It was his opinion that there had been no additional objective physical impairment as a result of the second surgical procedure on claimant's right knee. He reported that claimant did have a mildly moderate amount of decreased durability in the knee after the first surgery and needed assistance in returning to work.

A Second Determination Order, dated January 4, 1979, awarded claimant an additional temporary total disability award and additional compensation equal to 7.5° for 5% loss of his right leg.

Claimant has a sixth grade education and has worked as a sawmill laborer, log truck driver, and farm worker. He stated that he has looked for work in sawmills in Washington, Eastern Oregon, and Southwest Washington and Central Oregon and various other places without success. He has not looked for other work because the only work he knows is sawmill work. He stated he cannot lift, squat, or bend because of the back injury he suffered in 1974. Further, he indicated two reasons why he can't drive a truck: first he can't hear and second he can't operate the clutch because of his right knee. He indicated that he had worked with the State Employment Agency prior to 1979 in attempting to find work.

Claimant's wife testified that he had been totally deaf for the last five years. She indicated that he injured his back in 1974 and it has made it difficult for him to "get up". She stated that claimant could not read or count well and did have a speech impairment. She has observed that claimant has difficulty in running, walking, or bearing weight because of his right knee condition. The knee also causes claimant pain and has given way on occasion. She is aware of the fact that claimant has sought work at various sawmills without obtaining any employment. She stated that claimant had been told he was a safety hazard because of his deafness and other impairments.

Mr. Patrick Kent, superintendent of Rose Valley Pallett Service, testified that claimant had worked with him at a lumber mill. He indicated that it would be difficult to reemploy claimant because of the communication problem and even if claimant was employed as a clean-up man he would be endangered because of his inability to hear a forklift. Mr. Kent also felt claimant could not work as a nightwatchman or a barker operator because of his inability to hear.

The Referee found that claimant was permanently and totally disabled. The Referee felt that claimant's impairment from this industrial injury together with the pre-existing condition disabled him from performing any work other than light sedentary work. Further, since claimant was functionally illiterate, lacked training or work skills for other physical labor when taken together with his other impairments and his good motivation to seek regular gainful employment and is all considered with the injury-related impairment claimant is permanently and totally disabled. Further, the Referee found that the claim had not been prematurely closed.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, reverses the Referee's award of permanent total disability. The evidence in this case indicates that claimant's injury on May 26, 1976 was to the right knee only. Claimant has not sustained any unscheduled disability as a result of this injury. In August 1978, Dr. North had found that claimant had no effusion in the knee and also had full range of motion in the knee. Dr. North found there was no instability but there was slight crepitation. Dr. North felt claimant should not work in employment which required repetitive bending, squatting, kneeling or heavy lifting or climbing. On November 24, 1978, Dr. North again stated that he did not feel claimant could engage in certain occupations because of his limitations and reported that claimant's condition was medically stationary. Dr. North did not feel there had been any added objective physical impairment from the second surgical procedure on claimant's right knee. He did note that claimant did have a mildly moderate amount of decreased durability after the meniscectomy.

The Board finds that the evidence does not indicate claimant has sustained any injury resulting in unscheduled disability. Further, it finds that the award of compensation for the right knee which claimant had previously been granted by the two Determination Orders correctly reflects his loss of function of the right leg.

The Board, however, finds that the closure of the claim on August 22, 1978 was premature. Dr. North did not indicate until November 24, 1978 that claimant's condition was medically stationary. Therefore, the Board would award claimant additional temporary total disability compensation for the period from August 22, 1978 through November 24, 1978.

The Board would recommend extensive Field Services Division assistance be provided to claimant and that he be assisted with job placement.

ORDER

The Referee's order, dated October 16, 1979, is reversed in its entirety.

Claimant is hereby granted temporary total disability compensation from August 22, 1978 through November 24, 1978. This is in addition to the previous awards of temporary total disability compensation.

Claimant's attorney is entitled to a fee equal to 25% of the increased temporary total disability compensation not to exceed $750.

The Determination Orders, dated December 9, 1977 and January 4, 1979, are affirmed.

WCB CASE NO. 78-992 April 29, 1980

JUDY MADEWELL, CLAIMANT
Lekas & Dicey, Claimant's Attys.
Schwabe, Williamson, Wyatt, Moore & Roberts, Employer's Attys.
Request for Review by Employer

The employer seeks Board review of the Referee's order which remanded claimant's claim to it for acceptance and payment of compensation pursuant to the Oregon Workers' Compensation Law and awarded claimant's attorney a fee of $750. The employer contends that claimant did not establish good cause for failing to timely request a hearing on its denial and that she did not establish by the preponderance of the evidence that she sustained a compensable injury.

FACTS

Claimant, a 34-year-old production supervisor with the Salvation Army, alleges that on November 7, 1977 she injured her back while pushing a cart filled with clothing. Dr. Ray Noel saw claimant on November 8, 1977 and diagnosed a bowel obstruction and a right hip-lumbar strain secondary to the bowel obstruction. He did not know if this condition was related to the injury described by the claimant as pushing and pulling on large clothing carts.

On December 9, 1977, the claim was denied. On December 16, 1977, Dr. Noel released claimant for light work with no lifting or pushing for approximately a two-week period.

Later, in December 1977, Dr. Noel reported he had first seen claimant on November 14, 1977 for pain in the abdomen with some diarrhea. His examination revealed tenderness along the low back area and claimant complained of low back pain. He felt that claimant did not have a bowel obstruction but simply had some type of virus infection. He felt she had a lumbar strain and also hip pain of an uncertain cause, possibly due to the virus infection which caused her bowel distress. He prescribed medication for claimant. She continued to complain of back pain. He referred claimant to a neuromuscular clinic and suggested claimant continue with her physical therapy. Dr. Noel noted that claimant stated that her job required her to lift heavy boxes and that she experienced a lot of strain at work and that he could personally see a relationship between her work and the stress to her low back, however, until he had a recommendation of a specialist, he would have to leave the prognosis "open".

On February 7, 1978, claimant wrote to the Hearings Division of the Workers' Compensation Board and requested a hearing on the denial of her claim. It was stipulated at the hearing by the parties that claimant's request for hearing was received by the Hearings Division on February 8, 1978. This request was date stamped as being received by the Hearings Division on April 17, 1978.

Dr. Noel, in March 1978, reported that claimant had continuing difficulty with her low back pain and he had continued to prescribe more medication. It was his conclusion that there was no direct evidence that claimant's pain was caused by her work. Dr. Noel felt that the pain in her back actually came at the same time the abdominal pain came and, therefore, he could not, with any certainty, state that the back pain was due to a work injury. He noted that the type of pain claimant complained of could be aggravated by lifting or reaching.

Dr. K. R. Satyanarayan, a psychiatrist, in July 1978, reported that claimant had continued to complain of back pain. He was unable to give any definite prognosis other than to say that it was guarded. He reported he had first seen claimant on May 16, 1978 and that she was complaining of constant low back and right sacroiliac joint pain. Claimant told him that she had awoke with pain and stiffness and that both legs ached. She said that riding in the car aggravated her pain and that lying down with her knees up was the most comfortable position for her. Dr. Satyanarayan felt that claimant had a possible gluteal tendinitis.

In January 1979, Dr. Kenneth Nelson, D.C., reported that on January 10, 1979 he had begun treating claimant. She had told him that on November 7, 1977 she was pulling a large clothing cart and pulled muscles in her back and stomach areas. She said that she had headaches, hot burning pain in the right hip, and an overall feeling of "her insides/ falling out". Further, she had pain in her legs and the upper part of her back extending across the shoulder. Dr. Nelson diagnosed a lumbosacral strain/sprain with associated myofascitis and sacroiliac sprain/strain on the right with associated myofascitis and radiculitis into the anterior thigh area.

Claimant testified that on November 11, 1977 she was doing some heavy lifting and attempted to pull some carts weighing between 500 and 750 pounds off of an elevator. Ms. Elvina Buckley, a co-worker, saw her attempt to pull the cart off the elevator and tried to assist her. Ms. Buckley stated that claimant had told her and she had also observed claimant injure herself pulling on the cart. Claimant testified that she reported the incident to her supervisor at 2 p.m. that day and because of abdominal pains went to her gynecologist. She testified she returned to work, but had more pain and had to go home. She indicated she missed approximately six to seven weeks of work after this injury.

After receiving the denial letter, on December 19, 1977, claimant stated she went back to work. Claimant testified that on more than one occasion she called the employer and the insurance carrier protesting the denial of her claim. She testified that on the second call she was advised the woman she had talked to was not there at that time, but that claimant's call would be returned. Claimant said this was never done. Claimant stated that after receiving the denial, she returned to work and worked full-time without missing work because of back pain. Upon receipt of the denial letter claimant said she set it on the T.V. set in her home and discussed the letter with her family and went to Dr. Noel to seek a written report reporting her claim. She stated that she was advised by the employer's insurance carrier that her request to have her claim reviewed was denied and there was nothing the insurance company could do about it. Claimant stated that she was under somewhat of an emotional strain during that period because of difficulty with her family. Her oldest daughter had run away from home and another daughter had been hospitalized in early January 1978.

The Referee found that claimant's request for hearing had been untimely filed. However, the Referee found that claimant had established good cause for the delay in her requesting a hearing to excuse the untimely filing. The Referee found that claimant had established by a preponderance of the evidence that her claim was compensable and remanded it to the carrier to be accepted for the payment of compensation pursuant to the Oregon Worker's Compensation Law 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 finds that claimant's request for hearing was not timely filed and that she has not established good cause to excuse her late filing. There is no evidence in this case that the acts of the insurance carrier in any way misled claimant. ORS 656.319 requires that a hearing shall not be granted and a claim shall not be enforced unless a request for hearing is filed not later than the 60th day after the claimant was notified of the denial or the request is filed not later than the 180th day after notification of the denial and the claimant establishes at the hearing there was good cause for failure to file the request by the 60th day after notification of the denial. Claimant's testimony as to certain personal difficulties in early January 1978 does not establish good cause for her failure to timely request a hearing in this matter. The Court of Appeals has repeatedly held that the time limitations are statutory and cannot be waived.

The Court of Appeals in the case of Signa Nelson v. SAIF, decided in November 1979, held that the benefits awarded in the Workers' Compensation Law are purely statutory and a claimant must strictly follow prescribed procedures in order to recover under the law. Further, the Court stated that time limitations prescribed by law are limitations from the right to obtain compensation are not subject to exceptions contained in the general statute of limitations. It stated that neither the Board nor the Courts could waive these requirments. In this case, the Court held that the claimant's mental incompetency at the time of the denial did not excuse her compliance with ORS 656.319(1).

The Board, after reviewing, all the evidence in this case, finds that claimant has not established good cause for her failure to timely request a hearing on the employer/carrier's denial of her claim. There is no evidence that claimant was misled by the insurance carrier in this matter. Further, the evidence of claimant's personal problems in early January 1978 does not justify her failure to timely request a hearing in this matter. Therefore, the Board would reverse the Referee's order.

The Board finds the issue of compensability is moot.

ORDER

The Referee's order, dated September 21, 1979, as corrected by an order, dated October 8, 1979, is reversed.

The denial, dated December 7, 1977, is affirmed.

WCB CASE NO. 79-6566 April 29, 1980

GEORGE SIMS, CLAIMANT
Olson, Hittle, Gardner & Evans,
Claimant's Attys.
Gary D. Hull, Employer's Atty.
Order Denying Motion

In April 1980, claimant, by and through his attorney, requested the Board remand this case to the Referee for receipt of additional evidence and testimony. Claimant contended this employer had provided and is providing erroneous information to potential employers and to vocational counselors to prevent him from securing employment.

On April 21, 1980, the employer/carrier advised the Board it opposed claimant's motion on the following grounds: (1) claimant failed to serve a copy of the motion on all parties as required by OAR 436-83-260; (2) claimant failed to supply affidavits of the vocational counselors and neglected to identify the people he mentioned in his affidavit; and (3) claimant's proper remedy, even if his allegations were true, lies in a civil action and claimant has not alleged any loss of wage earning capacity.

The Board finds that claimant's affidavit does not indicate that the Referee improperly, incompletely, or otherwise insufficiently developed or heard this case. It appears, as pointed out by the employer/carrier, claimant's remedy might be in a civil case. Further, the offered evidence does not appear to the Board to reflect on claimant's loss of wage earning capacity. Therefore, the Board denies claimant's motion for remand.

IT IS SO ORDERED.

WCB CASE NO. 79-1472 April 29, 1980

JIMMY A. SMITH, CLAIMANT
Williams, Spooner & Graves,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

The State Accident Insurance Fund (hereinafter referred to as the Fund) seeks Board review of the Referee's order which awarded claimant compensation for permanent and total disability. The Fund contends the evidence in this case does not support the award made by the Referee.

FACTS

Claimant, a 38-year-old journeyman plumber in his own business, injured his low back on December 3, 1974 while lifting a 10-foot piece of cast iron pipe. This injury was originally diagnosed as a lumbosacral strain and claimant was conservatively treated. However, due to continuing low back pain, claimant underwent a myelogram and discogram which revealed an abnormal disc at the L5-S1 level. On May 2, 1975, Dr. Donald Paluska performed a laminectomy at the L5-S1 level. Claimant continued to have difficulty with low back pain which radiated into both buttocks and legs.

On November 6, 1975, Dr. Paluska performed a "posterior interbody fusion (bilateral) of the lumbosacral joint".

On August 1976, Dr. Paluska reported that claimant still complained of constant pain in the lower portion of the back and diffused aching in the backs of both buttocks and thighs. Dr. Paluska opined that claimant would not be able to engage in his normal occupation as a plumber. Claimant had told Dr. Paluska that he had been advised to seek other employment which did not require heavy lifting. Since claimant was qualified as a minister, he had been working in that capacity. Dr. Paluska felt that the fusion was solid and advised that claimant's condition would be re-evaluated within two months.

In October 1976, claimant was hospitalized for five days for recurrent low back pain. While there claimant also underwent another myelogram which revealed no evidence of a herniated disc.

Dr. Paluska, in February 1977, reported that claimant again was complaining of pain in his back, in his upper thoracic and lower cervical spine. Dr. Paluska prescribed a transcutaneous nerve stimulator to relieve claimant's pain.

Claimant continued to complain of pain in the back area. In April 1977, Dr. Paluska concluded that claimant's claim could be closed with an appropriate award of disability. It was his opinion that claimant was permanently and totally disabled due to his back injury.

Dr. Paluska, in May 1977, reported that claimant had continued to have continuous back pain which was dull in nature and located just to the left of the mid-lumbosacral junction. X-rays demonstrated a pseudoarthrosis of the posterior interbody fusion on the left side. Dr. Paluska recommended surgical exploration and postero-lateral fusion. The bilateral posterior lateral spinal fusion was performed on May 20, 1977 by Dr. Paluska.

In June 1977, the Vocational Rehabilitation Division contacted claimant. He advised them he was interested only in returning to the ministry. Claimant said he had worked as a groundskeeper and a plumber. Claimant also indicated he had a 10th grade education, but had obtained a GED. Claimant was found to be eligible for vocational rehabilitation. In February 1978 he enrolled at a business college in a program leading to an associate degree in business administration. Claimant continued to express an interest in becoming a minister and indicated that he would continue to study for this on his own.

In November 1977, Dr. Paluska reported that claimant still experienced some back pain but to a lesser extent than previously. Claimant advised him he was using aspirin for relief of his pain and occasionally Soma Compound for relief of muscle spasms in the lumbar area. Claimant stated this pain did not radiate into his legs. Dr. Paluska felt that claimant could be enrolled in a rehabilitation program which did not require excessive standing or bending. He felt that a sedentary type of job would be very appropriate. In late November 1977, Dr. Paluska felt the claim could be closed.

Also, in November 1977, Dr. George Harwood, medical consultant for the Fund, reported that claimant still had some complaints of pain, mostly in the region of hamstring muscles bilaterally with some residual discomfort in the low back and region of the scar at the L5-S1 level. Dr. Harwood felt that claimant could function in some type of employment without bending or lifting. Further, he felt that claimant's condition was medically stationary and the claim could be closed.

In May 1978, Dr. Paluska said claimant complained that the prolonged sitting while attending classes aggravated his back condition. He felt that claimant should have re-exploration of the fusion mass to see if there was a psuedoarthrosis or if there was entrapment of nerve tissue.

In June 1978, the Orthopaedic Consultants reported that it was their opinion that no further surgical procedures should be done. It was their opinion that claimant's spinal fusion was solid and recommended claimant be referred to the Pain Clinic and that every effort be made to take him off the large amount of drugs he was taking. Dr. Paluska concurred with the Orthopaedic Consultant's recommendation that claimant attend the Pain Clinic to reduce his usage of drugs.

From October 24, 1978 through November 10, 1978, claimant attended the Northwest Pain Center program. At the end of his stay, claimant was given a transcutaneous nerve stimulator and had been weaned off all medication. Dr. Joel Seres, director at the Pain Center, felt that claimant required no additional medical treatment. Dr. Seres noted that unless claimant became more interested in taking a more active role in his rehabilitation, it was unlikely that any attempts to help him would be of much value. It was noted that claimant indicated he had decided not to return to his former occupation, but was interested in returning to the ministry.

A Determination Order, dated February 8, 1979, awarded claimant temporary total disability compensation, temporary partial disability compensation and compensation equal to 80° for 25% unscheduled disability for his low back injury.

In April 1979, claimant was re-evaluated by the doctors at the Pain Clinic. They reported that claimant had returned to work as an associate pastor on a part-time basis. Dr. John R. Painter, a clinical psychologist, reported that the prognosis for continuative conservative management was fair and the prognosis for return to full productive employment was fair. He considered claimant's psychological condition stationary. The occupational therapist reported that claimant's pain behavior was almost non-existent and that he had listed many positive changes carrying over from the program. Dr. Painter indicated that claimant said he occasionally had back pain which, at times, was very intense. Claimant said he was limiting his activities in certains areas such as chopping wood, hunting and boating.

In July 1979, Dr. Paluska reported that claimant walked haltingly as if he was experiencing discomfort in the lumbosacral area. He did not feel that claimant was capable of chopping wood as described by Dr. Painter. Claimant stated he did not own a boat and had not participated in any boating activities. Claimant said he had supervised plumbing in his church, but had not engaged in the active plumbing itself.

At the hearing, claimant complained that he had continual back pain which was increased by any activity requiring repetitive bending, stooping, prolonged walking, driving or standing. He stated this pain radiated bilaterally down into his legs. He feels he has lost strength in his back and is now limited in his outside activities and sporting endeavors. Further, claimant stated his back pain affects his sleeping. He said he is able to walk a mile. When he performs any activity which requires physical exertion, he said he has to seek bedrest because of increased back pain. Claimant indicated he was unable to finish the vocational rehabilitation program because of the prolonged sitting, walking, and standing required in connection with school because these activities worsened his back condition. Claimant said he was employed by Lyons Plumbing Corporation which was a family owned and operated corporation. He stated that he controlled the business and managed it, but still did some of the heavier portions of the work himself. Since his injury, claimant indicated this business had been sold. Claimant is currently working as an associate minister in a church in Brooks, Oregon and had been so employed since approximately December 1978.

The Referee found that the medical evidence itself did not indicate that claimant was permanently and totally disabled. However, the Referee found that the other evidence in this case convinced him that claimant was permanently and totally disabled. Therefore, the Referee granted claimant compensation for permanent total disability effective October 5, 1979, the date of the hearing.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, modifies the Referee's order. The Board concurs with the Referee's conclusion that the preponderance of the medical evidence does not indicate that claimant is permanently and totally disabled. Therefore, the Board must look to other relevant factors to determine the extent of claimant's disability. Claimant has the burden of proving permanent total disability and must establish that he is willing to seek regular gainful employment and that he has made reasonable efforts to obtain such employment.

In this case, the Board considers other factors such as claimant's age, training, aptitude, condition of the labor market, adaptation to non-physical labor, and claimant's emotional condition. The Board finds that the injuries claimant sustained, though severe, are not such that regardless of claimant's motivation that he would likely not be able to engage in gainful and suitable employment. The evidence indicates that claimant has voluntarily become a minister. Further, the evidence indicates claimant has decided that this is the only type of employment he wishes to seek and has not established that he has sought other employment. Therefore, the Board, based on all the evidence in this case, finds that claimant is not permanently and totally disabled. However, the Board finds, based on the same evidence, that claimant is entitled to an award of compensation equal to 208° for 65% unscheduled disability for his low back injury. This award is in lieu of that granted previously.

ORDER

The Referee's order, dated November 5, 1979, is modified.

Claimant hereby is granted an award of compensation equal to 208° for 65% unscheduled disability for his low back injury. This award is in lieu of any previous awards of unscheduled disability for this injury. The remainder of the Referee's order is affirmed.

WCB CASE NO. 79-2065 April 29, 1980

FLOYD F. VOSBERG, CLAIMANT
Ringo, Walton, Eves & Gardner,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

ISSUE ON REVIEW

The State Accident Insurance Fund (hereinafter referred to as the Fund) seeks Board review of the Referee's order which found claimant's claim for an injury to his left knee was compensable. The Fund contends this was in error.

FACTS

Claimant, a 60-year-old log truck driver for Northside Lumber Company, alleges he sustained a compensable injury to his left knee on December 1, 1978 when, while walking between two vehicles, he struck a protruding tow attachment for a tow bar with his left knee. This injury was not, at first, reported because claimant did not feel it was serious. On December 27, 1978, claimant, while at home, kneeled down to check a muffler on one of his vehicles. As he attempted to stand up he experienced severe pain and after this incident sought medical treatment. Claimant indicated that between the incident on the first of December and the incident on the 27th of December he had continued to work. Upon his admission to the hospital, he told the doctor that he had had persistent pain since the December 1 incident and had had a catching and locking sensation in the knee. He said that he felt something was moving in the knee. Claimant reported that he was not having a great deal of swelling in the knee.

Dr. Holm Neumann, on January 2, 1979, performed an arthrotomy and medial meniscectomy of the left knee. His diagnosis was a torn medial meniscus of the left knee. Dr. Neumann related this condition to claimant's bumping his knee on a tow bar attachment on the front of the vehicle.

On February 26, 1979, the Fund denied claimant's claim. The basis of the denial was the fact that it was unable to substantiate any on-the-job accident or incident occurring with the course and scope of his employment.

In July 1979, Dr. Neumann opined that claimant had sustained a tear of the medial meniscus when he injured his knee on December 1, 1978. He felt that there was a high medical probability "concerning his initial work injury and residual disability to the knee related to his injury of December 1, 1978".

Dr. Robert Anderson, also in July 1979, reported that claimant had advised him that immediately after striking the tow bar he had a severe pain which bothered him over the weekend. Dr. Anderson was given a history of no swelling, catching, locking or clicking after this incident. Claimant stated the pain subsided and he continued to work. Claimant advised Dr. Anderson that he returned to work on February 15, 1979 driving a log truck. Dr. Anderson diagnosed "1. Traumatic synovitis, 1 December, 1978 2. Torn medial cartilage, left knee - surgical removal x 1". It was Dr. Anderson's opinion that claimant's condition was medically stationary. He felt the original injury of December 1, 1978 was a bruising type of injury. He felt there was no strain placed against the ligaments or about the knee. He reported there was no catching, locking, clicking or swelling of the knee. Symptomatically, he felt it made a satisfactory "response" for a period of 26 days. On the date of the onset of the severe pain, December 27, 1978, claimant was knelling under a car with fully flexed knee and then came back to the upright position at which time "the history and findings indicate the medial semilunar cartilage was torn. Dr. Anderson opined that the diagnosis following the initial injury of December 1, 1978 would be that of traumatic synovitis as a result of a bruising type of injury about the knee. He felt the complaints for which claimant was treated were torn meniscus which from the history and findings seemed to result from the actue flexed position of December 27, 1978 was not connected necessarily with the initial injury of December 1, 1978.

Claimant testified that after the December 1 incident he experienced occasional catching in the knee. Claimant stated that after the initial injury his knee was black and blue and he had difficulty walking on it for some period of time. Further, he stated that the knee did swell up a little bit but he ignored it and continued to work.

The Referee, after reviewing all the evidence, found that claimant had established sufficient medical evidence of causation to link the knee surgeries to the work-related incident of December 1, 1978. The Referee found that Dr. Neumann opined there was a high medical probability concerning such a relationship. Dr. Anderson, who only examined claimant once, based his opinion on the facts that were not found to be wholly accurate. Therefore, the Referee remanded the claim to the State Accident Insurance Fund for acceptance and payment of benefits to claimant as provided by law and awarded claimant's attorney a fee of $850.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, reverses the Referee's order. The first incident, as described by Drs. Neumann and Anderson and by claimant was blunt trauma to the knee. The Board finds that Dr. Anderson's opinion in this matter is more persuasive. Dr. Anderson described the initial injury as a bruising type injury in which no strain was placed against the ligaments or about the knee. The claimant initially had a period of one or two days in which he had some difficulty in the knee, but he was able to continue to work. On December 27, 1978, claimant was kneeling under a car on a piece of plywood, which, according to Dr. Anderson, fully flexed the knee. Claimant then attempted to come to an upright position at which time, according to Dr. Anderson, the history and findings indicated a medial semilunar cartilage was torn. Therefore, the Board concludes that claimant has failed to establish a relationship between his on-the-job incident of December 1, 1978 and the resulting surgery performed on his left knee on January 2, 1979. The Board approves the denial by the State Accident Insurance Fund and reverses the Referee's order.

ORDER

The Referee's order, dated September 11, 1979, is reversed in its entirety.

The State Accident Insurance Fund's denial, dated February 26, 1979, is affirmed.

WCB CASE NO. 79-1482 April 30, 1980

STEVE J. BAUMAN, CLAIMANT
Doblie & Francesconi, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

ISSUE ON REVIEW

Claimant and the State Accident Insurance Fund (hereinafter referred to as the Fund) seek Board review of the Referee's order which granted claimant an award of compensation equal to 80° for 25% unscheduled disability for his back injury. This award was in lieu of the award granted by the Determination Order, dated February 9, 1979. The claimant contends this award is not sufficient and the Fund contends this award is excessive.

FACTS

Claimant, a 61-year-old tool and die maker from Omark Industries, allegedly injured his back on or about May 19, 1978 because of repeated heavy lifting and twisting while moving between a grinder and a surface plate. Dr. Clinton McGill saw claimant on June 1, 1978 when claimant came to him because of repeated muscle spasm in his back, leg cramps and nervous tremors. Dr. McGill reported that claimant continued to complain of severe back pain and claimant was hospitalized for four days in June because of it. It was his impression that claimant's work which required considerable turning from the waist and lifting of fairly heavy objects aggravated claimant's underlying back problem.

Dr. J. Richard Raines, on June 1, 1978, interpreted x-rays as revealing moderate kyphosis in the mid thoracic spine and severe lipping in the lower thoracic area and a first degree spondylolisthesis at L5 with severe degenerative change at the lumbosacral interspace.

On June 21, 1978, claimant returned to work on a half-time basis. Claimant returned to full-time work two days later.

Dr. Theodore Pasquesi, in December 1978, reported that claimant had worked with this employer for approximately 19 years and had been a tool and die maker for almost 30 years. Claimant indicated he had a high school education. He denied any prior back problems. Dr. Pasquesi diagnosed: "Pre-existent degenerative arthritis throughout the lumbar and dorsal spine areas with a spondylolisthesis and spondylolysis of L5 on S1". It was his opinion that claimant's degenerative changes or arthritis and the spondylolisthesis and spondylolysis preceded claimant's injury. Dr. Pasquesi noted that claimant did not have a specific injury per se, but had begun to develop pain in his low back gradually. It was his opinion that claimant would continue to work at his present job until he reached the age of 65 but would continue to have pain. It was noted claimant also had an unrelated tremor which affected his right and left arms. In conclusion, Dr. Pasquesi felt that claimant was not entitled to any disability for this condition. He felt that the limited motion that claimant had in his back, was probably related to degenerative changes rather than any industrial injury and did not consider it in reaching his opinion of claimant's impairment. He classified the claimant as having severe pain and expected that some of this pain preceeded claimant work. Dr. Pasquesi felt that claimant had a 10% impairment of the whole man on the basis of aggravation of his problems. However, he noted that claimant's impairment was considerably more than this, but that he attributed only 10% of claimant's impairment to the industrial episode.

In January 1979, Dr. McGill reported that x-rays revealed considerable degenerative arthritis of the spine. He reported that claimant continued to work through August and September of 1978. Dr. McGill, after noting that claimant had a congenital defect and a considerable amount of degenerative arthritis, felt that the motions of claimant's job which required considerable bending and twisting at the waist with fairly heavy objects had aggravated claimant's pre-existing condition to the point where hospitalization was necessary in June 1978. It was his opinion that the condition would not likely improve and in all likelihood claimant should be considered disabled. He noted that claimant was unusually motivated and would likely continue to work in spite of his pain.

A Determination Order, dated February 9, 1979, awarded claimant temporary total disability compensation and compensation equal to 32° for 10% unscheduled disability for his low back injury.

Dr. Winfred Clarke, in April 1979, reported that he had first seen claimant in 1966 when he had diagnosed a spondylolisthesis of L5 on S1. Claimant had been complaining of pain radiating into the right extremity. He reported claimant, at that time, was having a lot of pain in the lumbosacral area which radiated toward the right leg. Claimant reported he had trouble lifting, getting into a car, bending and it got to the point claimant felt he could not go back to work because he could not bend over. Dr. Clarke felt claimant had a grade two spondylolisthesis involving L5 "in its relationship to S1". Dr. Clarke indicated that his findings were essentially the same as those he had made in 1970, although they were worse now.

In May 1979, Dr. McGill released claimant for a period of trial work not involving any lifting of more than 20 pounds or unusual twisting or turning. Dr. McGill opined that claimant had a degenerative spine with no history of injury, but due to the constant wear and tear in the nature of his work, he had finally reached a point where he could no longer perform that job. Dr. McGill felt there was little doubt that claimant could not return to his previous occupation because of severe back problems.

Claimant testified that his work required heavy and awkward lifting, as well as much bending and twisting. He indicated that after his back episode of 1966 he returned to tool and die making and did not lose any time from work. He stated that he applied for a lighter form of work, but did not obtain that. He stated he worked from June of 1978 to December 14, 1978 without any time loss, however, he did use three weeks of vacation because of his back problems. He stated that he eventually terminated work on December 14, 1978 on Dr. Pasquesi's advice. Further, he testified that he had made several attempts to obtain modified work with the employer, but had been turned down. Currently, he says he is able to mow his yard in a piecemeal fashion, however, it bothers his back. He still is able to do some hunting and fishing. He testified that he currently wears a back brace about 25% of the time. He stated that sitting is very difficult for him and walking bothers his left leg although he is able to walk a mile-and-a-half. He stated that he can lift 20 pounds, but cannot twist or turn. Now he takes pain medication where previously to this incident he did not. He denies that he is permanently and totally disabled because he could do supervisory work if allowed. In December 1978, he had retired, however, if he had been able to, he said he had intended to work until the age of 65 because his retirement benefits would have been much greater.

The Referee, after reviewing all the evidence, found that claimant was entitled to an award of compensation equal to 80° for 25% unscheduled disability in lieu of that granted by the previous Determination Order.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, modifies the Referee's order. Claimant's congenital defect and resulting back condition pre-existed his industrial incident of May 1978. Drs. Pasquesi, McGill and Clarke all agree that claimant's degenerative changes or arthritis and spondylolisthesis and spondylosis preceeded the incident of May 1978. Drs. McGill and Clarke opined that claimant's work, which was heavy in nature, for approximately 20 years, aggravated his pre-existing condition to the point where claimant needed hospitalization. This injury was superimposed upon claimant's spondylolisthesis condition. The Board, after reviewing all the evidence in this case, finds that claimant is entitled to an award of compensation equal to 160° for 50% unscheduled disability for his low back injury. This award is in lieu of all prior awards of unscheduled disability.

ORDER

The Referee's order, dated November 15, 1979, is modified.

Claimant is hereby granted an award of compensation equal 160° for 50% unscheduled disability for his low back injury. This award is in lieu of all previous awards of unscheduled disability for this condition.

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.

The remainder of the Referee's order is affirmed.

WCB CASE NO. 79-3342 April 30, 1980

DONALD BROOKS, CLAIMANT
Keith Evans, Claimant's Atty.
Thomas A. Cavanaugh, Employer's Atty.
Request for Review by Employer

ISSUE ON REVIEW

The employer seeks Board review of the Referee's order which reversed its denial of claimant's claim.

FACTS

Claimant, a 51-year-old automobile sales manager, alleges that on January 15, 1979 he experienced blurred vision and numbness in his left arm while on the telephone with a customer. Claimant described this event as a stroke. Claimant was taken to a hospital emergency room and found to have blood pressure of 200/130 in both arms. He made a spontaneous recovery and went to Dr. William Wallace.

In February 1979, Dr. Wallace reported he had been treating claimant for high blood pressure since 1973. He indicated claimant had had high blood pressure since he was in his teens and throughout his adult life. In 1973 claimant's blood pressure was 160/110. Dr. Wallace treated claimant with medication. He was successful in lowering claimant's blood pressure, but felt claimant was still hypertensive 90% of the time. In July 1977, claimant had been hospitalized for pancreatitis due to excessive alcohol consumption.

On January 15, 1979, claimant told Dr. Wallace he had been working exceptionally hard lately under a lot of tension. Claimant said he continued to take his medication. Dr. Wallace indicated that when he saw him, claimant was asymptomatic. Dr. Wallace's diagnosis was transient ischemic

attack (TIA). This condition was described by Dr. Wallace as spasm in the arterial blood supply to some portion of the brain which was then relieved after a short period of time without any organic changes in the brain which could lead to permanent disability. By January 25, 1979, claimant's blood pressure was 140/86. Dr. Wallace was not sure if this lowered pressure was due to the increase in medication or claimant's absence from work.

On February 17, 1979, claimant's blood pressure was 148/90. Dr. Wallace advised claimant to stay off work indefinitely and that he felt claimant was incapable of handling the stress of his sales manager job. Dr. Wallace felt claimant should go into some line of work which was tension free.

On April 10, 1979, claimant's claim for the incident on January 15, 1979 was denied.

Dr. Wallace, in May 1979, reported claimant's blood pressure had varied from 110/100 to 150/90 from January 1979 to April 1979. Dr. Wallace diagnosed hypertension with chronic anxiety tension state, "much exacerbated by a certain level of performance required by his customary job which involves dealing with customers, employers, and colleagues under conditions which, to him at least, are extremely tension producing". Dr. Wallace felt claimant would not be able to work at a job involving meeting quotas, satisfying the demands of employers and customers and needed a prolonged rest before he could return to any job which had stress or tension. Again, Dr. Wallace suggested claimant change jobs. Dr. Wallace did not feel claimant's employment with this employer caused his hypertension and could not say if it was any worse insofar as its tendency to exacerbate claimant's hypertension was concerned than any other employment which claimant had had in the last ten to twenty years. He felt claimant would have reached the point he was at at that time no matter where he worked so long as he was doing the type of work he was. Claimant's history is that when he had been hospitalized for one reason or another and at bedrest or in between jobs and "taking it easy", his blood pressure was normal. However, upon his return to work and its problems his hypertension returned. TIA, according to Dr. Wallace, is a serious warning of a major stroke, but by themselves do not cause permanent damage.

In July 1978, claimant had begun work with this employer, Bud Meadows Ford, as an assistant sales manager. Claimant advised his manager in approximately August he would have to quit work for health reasons because he felt the hours and the pressure were too much for him. Claimant's work load was reduced. However, in November 1978, claimant had to return to a full-time schedule.

Claimant testified his job included hiring and training sales personnel, handling the financial arrangements and paper work involved in car sales. He said his hours varied, but he had worked as many as eighty hours in a week.

The Referee found claimant's work and its pressure exacerbated claimant's hypertension and chronic anxiety. The Referee found that this claim was an occupational disease and that claimant's work with this employer caused a temporary exacerbation of his pre-existing disease so as to require medical services which otherwise wouldn't have been necessary. Therefore, the Referee remanded this claim to the carrier for acceptance and payment of compensation as required by law until closed under ORS 656.268 and awarded claimant's attorney a fee.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, affirms the Referee's order. The Board finds that claimant's work with this employer caused a temporary aggravation of his hypertension. The evidence does not establish claimant's work with this employer resulted in any worsening of his underlying disease. Therefore, the Board affirms the Referee's order which remanded claimant's claim for the temporary aggravation of his hypertension to the Fund for acceptance of payment of compensation as required by law and until it is closed pursuant to ORS 656.268.

ORDER

The Referee's order, dated December 18, 1979, is affirmed as to the finding that claimant's work with this employer temporarily aggravated his hypertension and did not cause any worsening of his underlying condition/disease.

CLAIM NO. C 306143 April 30, 1980

JAMES P. COZART, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

On May 27, 1971, claimant sustained a compensable injury to his right leg. This was diagnosed as tibial chondromalacia of the right knee and a torn right medial meniscus. The right medial meniscus was surgically removed. This claim was initially closed by a Determination Order, dated October 31, 1973, which awarded claimant temporary total disability compensation and compensation equal to 30° for 20% loss of the right leg. Claimant's aggravation rights have expired.

On May 11, 1979, Dr. George Cottrell diagnosed: "probable partial regeneration of the medial meniscus of the right knee with impingement of arthritis spurs of the lateral femoral condyle." On August 9, 1979, claimant underwent an arthrotomy and lateral meniscectomy of the right knee with spur removal and cartilage shaving. This surgery was necessary because of a degenerative process in the knee related to the original injury.

The Board, under its own motion jurisdiction, reopened this claim effective August 9, 1979, until it was closed pursuant to ORS 656.278.

On January 6, 1980, Dr. John Harris reported that claimant's right knee condition was medically stationary. He indicated there had been a gradual degeneration since claimant had undergone a meniscectomy in 1971 by Dr. Fagan. He felt that this condition was a result of degenerative changes in the knee which had begun when claimant injured his knee in 1971. Dr. Harris anticipated further degenerative changes would slowly progress over a period of years and that claimant may eventually need a total joint replacement.

On March 14, 1980, the State Accident Insurance Fund requested a determination of claimant's current disability. The Evaluation Division of the Workers' Compensation Department, on April 16, 1980, recommended that claimant be granted an additional award equal to 20% loss of the right leg and an award of temporary total disability compensation from August 9, 1979 through January 6, 1980, less concurrent compensation paid in other claims.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted temporary total disability compensation from August 9, 1979 through January 6, 1980, less concurrent compensation paid in other claims. Claimant is also granted additional compensation equal to 20% loss of the right leg.

WCB CASE NO. 78-10,067 April 30, 1980

EDWARD HARRIS, CLAIMANT
Alan H. Tuhy, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order On Reconsideration

On March 27, 1980, the Board entered its Order on Review in the above entitled case remanding claimant's claim to the carrier for acceptance and payment of compensation to which he was entitled and granting claimant an attorney's fee of $750. On April 10, 1980, claimant, by and through his attorney, requested the Board reconsider its order for the reason that the attorney fee granted was not adequate.

The Board, after thoroughly reviewing this matter, concludes that claimant's motion should be denied. In comparing this case with the many other cases the Board has reviewed, it finds the award of $750 was correct. The Order on Review should remain unchanged. Claimant's motion for reconsideration is hereby denied.

IT IS SO ORDERED.

CLAIM NO. B 149679 April 30, 1980

ROBERT HEWITT, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On September 30, 1965, claimant sustained a compensable injury to his left eye. This claim was closed and his aggravation rights have expired.

In November 1977, Dr. Paul Robinson reported that the claimant's industrial accident had caused surgical aphakia of the left eye. The examination revealed that the ocular tension in each eye was at borderline high. Dr. Robinson opined that claimant had glaucoma which, in his opinion, occurring after serious injury, was most likely due to the injury and the only way to make a diagnosis was to perform provocative test.

In February 1980, Dr. George Harwood opined that the sequence of events in this case, the foreign body injury to the left eye in 1965, following by a cataract which had been removed, then an anterior vitrectomy with retinal detachment repair of the left eye, would indicate that claimant's current problems with the surgical correction thereof was due, or was a result of, the injury of September 30, 1965.

Dr. Sam L. Meyer hospitalized claimant on December 17, 1979 for an anterior vitrectomy with retinal detachment repair of the left eye. Claimant was discharged from the hospital on December 21, 1979 and was to return to Dr. Meyer for further examination.

The State Accident Insurance Fund, on April 14, 1980, advised the Board that claimant's aggravation rights had expired and that this matter was being referred to it for own motion consideration. It advised the Board it would not oppose an Own Motion Order reopening this claim for the December surgery.

The Board, after reviewing the exhibits forwarded by the Fund, finds they are sufficient, at this time, to warrant a reopening of claimant's claim effective the date he was hospitalized by Dr. Meyer for the surgery performed on his left eye and until his claim is again closed pursuant to the provisions of ORS 656.278.

IT IS SO ORDERED.

CLAIM NO. GC 75184 April 30, 1980

ROY A. PHILLIPS, CLAIMANT
Pozzi, Wilson, Atchison, Kahn
& O'Leary, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

On April 27, 1967, claimant sustained an injury to his right foot. The claim was initially closed by a Determination Order, dated June 23, 1967, which awarded claimant temporary total disability compensation. Claimant's aggravation rights have expired.

Dr. Francis Schuler reported in June 1979 that he had examined claimant and that on June 4, 1979 claimant had reported that he had awakened with a swelling and redness about the area of the scar from a previous operation on the dorsum of the right foot. Claimant reported that there had been no intervening injury or strain since the original injury. Claimant stated he had been working up until that time. Dr. Schuler felt claimant had a cellulitis in his right foot. It was his opinion that in all probability claimant had had some flare-up of the old infection in his foot for which claimant still had some residuals. Dr. Schuler reported that claimant be treated with antibiotics and would probably be off work for some period of time.

Claimant was released for work as of June 20 by Dr. Schuler. Claimant returned on October 8, 1979 to Dr. Schuler saying he had missed about three or four days in the first part of August because of another flare-up of pain in his right foot. Dr. Schuler reported that claimant had then returned to work. On October 9, 1979, Dr. Schuler reported that claimant had advised him that he had been off work since September 28, 1979. Dr. Schuler felt claimant could return to work.

On December 12, 1979, the Board, after reviewing all the evidence in this matter, ordered the reopening of claimant's claim under its own motion jurisdiction. The Board ordered the claim be reopened effective June 4, 1978 for payment of benefits until it was closed pursuant to ORS 656.278. The Board also provided that claimant's attorney was entitled to a fee out of the increased temporary total disability compensation.

On January 29, 1980, Dr. Schuler reported that he had last seen claimant on November 5, 1979 when claimant's foot still exhibited some swelling. Claimant, at that time, was complaining of pain and limped on the foot. Dr. Schuler advised claimant, after prescribing an elastic stocking for the foot, ankle and leg, and also a metatarsal bar, that he should return to him if he had continuing trouble. Dr. Schuler, in January 1980, reported he had not seen claimant since November 1979 which probably meant that claimant was getting along better. Dr. Schuler reported that he could not find anything to indicate that claimant's disability was greater than that which he had already received.

Claimant's claim had been closed a second time by a Determination Order, dated December 27, 1968, which awarded claimant compensation equal to 50% loss of use of the right second toe. The claim was reopened under own motion jurisdiction and in August 1975 closed by an Own Motion Determination which awarded claimant compensation equal to 25% loss of use of the right foot. This was in lieu of and not in addition to the award granted by the Second Determination Order.

On February 15, 1980, the State Accident Insurance Fund requested a determination of claimant's current disability. The Evaluation Division of the Workers' Compensation Board, on April 10, 1980, recommended that claimant be granted additional temporary total disability compensation from June 4, 1979 through October 8, 1979, less time worked and that he be granted no additional permanent partial disability award.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted an additional award of temporary total disability compensation from June 4, 1979 through October 8, 1979, less time worked.

Claimant's attorney has already been granted an attorney's fee by the Own Motion Order of December 12, 1979.

WCB CASE NO. 78-2194 April 30, 1980

MONIQUE SCARBOROUGH, CLAIMANT
Galton, Popick & Scott, Claimant's Attys.
Lang, Klein, Wolf, Smith, Griffith & Hallmark, Employer's Attys.
Order On Review

This matter is now before the Board on the employer's motion for reconsideration. It contends the Board misapplied two cases in reaching a decision in this case. The employer agrees that claimant's work caused an aggravation of her symptoms and caused her to quit work. However, the employer contends there is no evidence that claimant's underlying condition was either permanently or temporarily worsened through her work activity. Therefore, the employer contends her claim is not compensable and the Referee's order should be affirmed. In the alternative, the employer asked that the case be remanded to the Referee for a finding on whether or not claimant's shoulder condition was temporarily worsened by her work.

Claimant responded to the employer's motion and contends the evidence in this case supports compensability and falls squarely within the perimeters of the cases relied on by the Board.

The Referee, in this case, found claimant's right shoulder condition was made more symptomatic by her work. However, applying the case law existing at the time of the decision, the Referee found claimant had failed to establish that this condition became permanently worsened because of her work and affirmed the employer's denial of the claim. Subsequent to the decision, the Supreme Court reviewed a series of cases including those cited by the Board in its order and including the case cited by the Referee. The Board finds that based on the case law a work-related, temporarily worsening of an underlying condition is compensable to the extent it causes temporary total disability or medical care. In this case, the Board found the claimant

established by a preponderance of the evidence that her right shoulder condition was temporarily worsened and caused her to quit work and to seek medical care. The Board did not find claimant's underlying condition was compensable, but only that the temporary worsening of it was. The Board, after thoroughly reviewing this case, finds its Order on Review is correct.

ORDER

The Order on Review, dated March 28, 1980, is hereby reaffirmed and republished in its entirety.

CLAIM NO. 370-027 April 30, 1980

RICHARD L. SIMONS, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

On May 15, 1970, claimant sustained a compensable injury to his low back. In October 1970 claimant underwent a laminectomy by Dr. Arthur Hockey. The claim initially was denied, but after a hearing, was ordered accepted. The claim was initially closed by a Determination Order, dated August 2, 1971, which granted claimant temporary total disability compensation and compensation equal to 32° for 10% unscheduled low back disability. Claimant's aggravation rights have expired.

In January 1976, Dr. Kerry O'Fallon reported that he treated claimant on December 26, 1975 for back pain which was related to his May 15, 1970 injury. He reported that claimant was off work from December 26, 1975 until January 5, 1976. The claim was reopened and closed by a Second Determination Order, dated May 18, 1976, which awarded claimant additional temporary total disability compensation for the period of time he missed from work.

On June 27, 1978, claimant began missing work because of continuing low back pain. Dr. Mark B. Thomas, D.C., reported in July 1978 he had been giving claimant chiropractic treatment since June 27, 1978. Dr. Thomas released claimant for work on September 11, 1978, and felt claimant should restrict his work to avoid any extensive lifting or extremely awkward movements. Claimant, in fact, returned to work on September 11, 1978.

On March 21, 1980, the State Accident Insurance Fund requested a determination of claimant's current disability. The Evaluation Division of the Workers' Compensation Department, on April 9, 1980, recommended that claimant be granted additional temporary total disability compensation from June 27, 1978 through September 10, 1978, and be granted no additional award of permanent partial disability in excess of that granted by the Determination Order, dated August 2, 1971.

The Board, after reviewing this file, concludes claimant is entitled to the additional temporary total disability compensation as recommended by the Evaluation Division. Therefore, the Board awards claimant additional temporary total disability compensation from June 27, 1978 through September 10, 1978 and no additional award of permanent partial disability.

IT IS SO ORDERED.

WCB CASE NO. 78-4115 April 30, 1980

MARY L. WILKE, CLAIMANT
Olson, Hittle, Gardner & Evans,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Order On Reconsideration

On April 15, 1980, the Board issued its Order on Review in this case which affirmed the Referee's order. The Referee had found claimant was permanently and totally disabled and awarded her compensation equal to permanent total disability effective November 5, 1979. Claimant, by and through her attorney, requested the Board reconsider its order because the Board may have overlooked her contention that the award of permanent total disability should be effective as of February 28, 1978.

The Board finds its order is correct. The date claimant's award of permanent total disability became effective was not overlooked by the Board in its review of this case. The date the permanent total disability award became effective in this case was the date of the Referee's order. The Board finds no reason to change this date. It does not find claimant was permanently and totally disabled on February 28, 1978, the date she was found to be medically stationary by Dr. Hoda. Therefore, the Board affirms its Order on Review.

ORDER

Claimant's motion for reconsideration is hereby denied.

CLAIM NO. A 42 CC 155294 May 1, 1980

LEONARD COBB, CLAIMANT
Edwin S. Nutbrown, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On October 4, 1979, the Board issued an Own Motion Order in this claim remanding it 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.

In April 1980, the Evaluation Division advised the Board that the carrier had voluntarily reopened this claim on July 13, 1976 and that it had never been closed. The Evaluation Division felt the claim should properly be given a Determination Order.

The Board, after reviewing the evidence in this claim, finds its Own Motion Order, dated October 4, 1979, was incorrectly entered. The claim was in an "open status" at that time. Therefore, the Board sets aside its Own Motion Order and remands this claim to the carrier for processing and closure under ORS 656.268.

IT IS SO ORDERED.

WCB CASE NO. 78-9157 May 2, 1980

JAMES CYPERT, CLAIMANT
Richardson, Murphy, Nelson & Lawrence,
Claimant's Atty.
Velure, Heysell & Pocock, Employer's Attys.
Own Motion Order

On April 17, 1980, claimant, by and through his attorney, requested the Board under its own motion jurisdiction grant claimant benefits. This claim had been denied by the carrier. This denial was affirmed by the Referee, the Board and the Court of Appeals on the basis claimant's condition was related to an injury occurring in Nevada. Claimant subsequently filed a claim in Nevada which was denied on the basis his condition resulted from an injury in Oregon.

The Board denies claimant's request in this case. Claimant's Oregon claim has never been accepted. The Court of Appeals entered the final order in this case affirming the Board's finding of non-compensability. Under ORS 656.278 the Board has the power and jurisdiction to modify, change or terminate former findings, orders, or awards if, in its opinion, such action is justified. The Board cannot review or modify the decision of the Court of Appeals, which is what claimant in essence is asking it to do. The Court of Appeals order is final. Therefore, the Board cannot exercise its own motion jurisdiction in this case.

ORDER

Claimant's request for own motion relief is hereby denied.

CLAIM NO. HD 3544 May 2, 1980

JOSEPH R. DONALDSON, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

On January 28, 1974, claimant sustained a compensable injury to his neck and back. This claim was initially closed on March 27, 1974 by a Determination Order which granted claimant temporary total disability compensation. Claimant's aggravation rights have expired.

The claim was reopened because of continuing problems related to this injury. On October 2, 1974, Dr. David Waldram performed: "Exploration, Harrington instrumentation T3 through T7". A Second Determination Order, dated July 20, 1978, awarded claimant additional temporary total disability compensation and compensation equal to 20% unscheduled disability for his upper back injury and compensation equal to 40% loss of the left leg. This was appealed and resulted in claimant being granted compensation equal to 96° for 30% unscheduled disability for back injury and compensation equal to 112.5° for 75% loss of function of the left leg.

On September 25, 1979, Dr. Waldram removed the Harrington rod. On October 30, 1979, the Board ordered this claim reopened as of September 24, 1979, the date claimant was hospitalized for the surgery and until it was closed pursuant to ORS 656.278.

On March 11, 1980, Dr. Waldram reported claimant's condition was stationary. He reported claimant still had "some chronic irritation in his back associated with heavy lifting and repetitive bending".

On March 28, 1980, the State Accident Insurance Fund requested a determination of claimant's current disability. The Evaluation Division of the Workers' Compensation Department, on April 17, 1980, recommended claimant be granted an award of additional temporary total disability compensation from September 24, 1979 through March 11, 1980 and no additional permanent partial disability.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted compensation for temporary total disability from September 24, 1979 through March 11, 1980, less time worked.

CLAIM NO. ZC 150403 May 2, 1980

JAMES J. FRAZIER, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

On September 30, 1968, claimant sustained a compensable injury to his left foot and knee. The claim was initially closed by a Determination Order, dated May 16, 1979, which awarded claimant compensation equal to 15% loss of the left leg. Claimant's aggravation rights have expired.

On September 19, 1979, Dr. Herbert Spady reported claimant was having increasing pain in the knee. Small foreign bodies were found and, on September 20, 1979, removed. Dr. Spady, in October 1979, indicated he had removed sutures on September 30, 1979 from claimant's knee and that the wound was completely healed and claimant was fit for employment. Dr. Spady felt claimant suffered no impairment of function due to this surgery.

The Board, on November 27, 1979, reopened this claim under its own motion jurisdiction effective September 20, 1979, the day claimant was hospitalized, and until it was closed pursuant to ORS 656.278.

Claimant's wife, on December 18, 1979, advised the State Accident Insurance Fund (hereinafter referred to as the Fund) that claimant had missed only one day of work because of the surgery.

On April 7, 1980, the Fund requested a determination of claimant's current disability. The Evaluation Division of the Workers' Compensation Department, on April 23, 1980, recommended claimant be granted additional temporary total disability compensation for one day only on September 20, 1979 and no additional award for permanent partial disability.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted temporary total disability compensation for one day only, September 20, 1979.

WCB CASE NO. 79-1408 May 2, 1980

JEANETTE GRIMALDI, CLAIMANT
Green & Griswold, Claimant's Attys.
Schwabe, Williamson, Wyatt, Moore & Roberts, Employer's Attys.
Order Denying Motion

On April 9, 1980, claimant, by and through her attorney, requested the Board to remand her case to the Hearings Division for the taking of additional evidence. Attached to claimant's request was a report, dated April 8, 1980, from Dr. James King which she wanted to be included in the record. On April 21, 1980, the employer responded to claimant's motion stating that it opposed remanding the matter to a Referee. The employer indicated that there was no explanation as to why Dr. King's report could not have been obtained prior to the hearing and just because it was "new" was not sufficient reason to allow a remand.

The Board, after thoroughly considering the arguments of both parties, concludes that claimant's motion to remand for additional proceedings should be denied. The matter will be reviewed by the Board in due course with all briefs due on June 20, 1980.

ORDER

Claimant's motion to remand the above entitled case to the Hearings Division is hereby denied.

CLAIM NO. 985 C 2105 May 2, 1980

MINNIE B. JOHNSON, CLAIMANT
William Whitney, Claimant's Atty.
Charles Holloway III, Employer's Atty.
Own Motion Order

On July 30, 1968, claimant sustained a compensable injury to both wrists. This claim was initially closed by a Determination Order, dated January 17, 1969, which awarded claimant compensation equal to 5% loss of each forearm. Claimant's aggravation rights have expired. This claim subsequently was reopened and closed on two occasions resulting in no additional award of permanent partial disability compensation. Claimant also had previously requested own motion relief which was denied by the Board.

On October 3, 1978, claimant, by and through her attorney, requested the Board reopen this claim under its own motion jurisdiction. Attached to this request was a report, dated June 16, 1978, from Dr. Warren Anderson in which he opined claimant's condition was probably worse than would be indicated by the 5% award. Dr. Anderson had no plans for further treatment of claimant and found it difficult to explain the deterioration in claimant's condition on the basis of the 1968 injury.

The Board requested the carrier advise it of its position with respect to claimant's request. On November 1, 1978, the carrier indicated it opposed own motion relief because Dr. Anderson's report did not relate claimant's worsened condition to her original injury. The Board denied claimant's request.

Claimant, on March 20, 1980, again requested the Board reopen her claim under its own motion jurisdiction. The Board requested claimant provide medical support of her request.

On April 14, 1980, Dr. Walter Reynolds reported claimant continued to complain of continuous and consistent pain in both hands, finger and wrists. Claimant last worked in July 1968. Dr. Reynolds felt claimant was disabled and had been since 1968. He felt the claim should be reopened and claimant should be re-evaluated.

The Board, after reviewing the evidence in this claim, finds it is not sufficient to reopen this claim under its own motion jurisdiction. Claimant's request for own motion relief is denied.

IT IS SO ORDERED.

WCB CASE NO. 78-4735 May 2, 1980

JAMES J. JONES, CLAIMANT
Ackerman & DeWenter, Claimant's Attys.
Lang, Klein, Wolf, Smith, Griffith & Hallmark, Employer's Attys.
Order On Review After Reconsisderation

On March 20, 1980, the Board entered an Order on Review in the above entitled case. The Board modified a Referee's order and granted claimant an award of compensation equal to 80° for 25% unscheduled disability for his neck and left shoulder. The Referee had granted claimant an award of compensation equal to 32° for 10% unscheduled disability. The Board's order was abated on March 18, 1980 based on the employer's request for reconsideration.

The employer contended the Board failed to give the proper weight to the Referee's findings regarding claimant's credibility. The employer asked that the Referee's order be affirmed in its entirety.

Claimant responded to this request. Claimant stated the matter raised by the employer was fully briefed, argued and considered before the Board's order was issued.

The Board, after reconsidering this case, affirms its prior order. The Board finds the employer's contentions were presented, briefed, argued and considered by the Board in reaching its decision in this case. Therefore, the Board affirms its Order on Review, dated March 20, 1980.

IT IS SO ORDERED.

JOHN MARLEY, CLAIMANT
Lively & Wiswall, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On January 3, 1980, claimant, by and through his attorney, requested the Board to reopen his claim for his April 9, 1971 back injury under its own motion jurisdiction. Claimant also had requested a hearing on the State Accident Insurance Fund's (hereinafter referred to as the Fund) denial of continuing responsibility of his back condition, including refusing to pay additional temporary total disability compensation and various hospital and medical bills. Attached to claimant's request for own motion relief were various medical reports.

On September 7, 1979, Dr. Donald Stainsby recommended a laminectomy of L4-L5 to decompress the cauda equina. He felt claimant had symptoms of claudication secondary to cauda equina compression. Dr. Stainsby could not definitely relate the need for this surgery to claimant's original injury.

The Orthopaedic Consultants, in October 1979, reported they did not feel claimant's current symptoms were related to the April 1971 injury.

The Board requested that the Fund advise it of its position. It did not respond.

The Board, after reviewing the material in this file, finds it would be in the best interest of the parties if it remanded this case to the Hearings Division. An expedited hearing shall be held to determine if claimant's current condition and need for surgery is related to his April 9, 1971 industrial injury. This matter should be consolidated with claimant's request on the Fund's denial of continuing responsibility for his back condition. Upon the conclusion of the hearing, the Referee shall cause a transcript of the proceeding, together with additional evidence presented at the hearing, to be prepared and forwarded along with the Referee's recommendation to the Board on claimant's request for own motion relief. The Referee shall enter an appropriate order disposing of claimant's request for hearing on the Fund's denial of continuing responsibility for claimant's back condition and related medical expenses.

WCB CASE NO. 79-3364 May 2, 1980

BILLIE G. MATTHEWS, CLAIMANT
Olson, Hittle, Gardner & Evans,
Claimant's Attys.
Cheney & Kelley, Employer's Attys.
Request for Review by Claimant

Claimant seeks Board review of the Referee's order which affirmed a Determination Order, dated November 16, 1978, which did not award claimant any compensation for permanent partial disability.

FACTS

Claimant, a 47-year-old laborer, injured his back on December 19, 1977 while unloading cartons of meat from a dock to the ground. This injury was diagnosed by Dr. Martin Mueller as a lumbosacral-sacroiliac strain. Dr. Mueller released claimant for regular work on March 8, 1978, but reported claimant's condition was not medically stationary.

Dr. Theodore Pasquesi, on March 30, 1978, reported claimant complained on and off of pain in his low back and right knee. Dr. Pasquesi diagnosed an acute lumbosacral strain, which was not stationary.

On June 9, 1978, Dr. Mueller reported claimant's condition was medically stationary. Dr. Mueller indicated claimant had been working since March 7, 1978 and had only slight intermittent lumbosacral pain after increased exercises or lifting. Dr. Mueller opined claimant did not have any permanent impairment.

Claimant was struck in the face on October 17, 1978 by a box of frozen meat while working. Dr. F. W. Bieker diagnosed multiple abrasions and laceration of the columella of the nose and nose tip which was surgically repaired.

A Determination Order, dated November 16, 1978, granted claimant an award of temporary total disability compensation from December 19, 1977 through March 7, 1978, less time worked.

Also, in November 1978, Dr. Raymond North reported claimant was complaining of pain in the neck, low back, right elbow, arms and right knee. He diagnosed a probable cervical strain related to the October 17, 1978 incident.

Dr. F. W. Bieker, in December 1978, reported claimant's injury in October 1978 did not leave claimant with any permanent disability. He had requested claimant remain off work for two weeks.

Claimant was released for a trial period of work on January 10, 1979 by Dr. North. However, claimant called Dr. North and stated his neck pain increased and he felt he was unable to return to work. Dr. North suggested claimant stay off work two more weeks.

In April 1979, claimant told the Orthopaedic Consultants he had been with this employer for about 20 years. He told them he had an 8th grade education. Claimant said he had injured his right knee and had a meniscectomy and had injured his right wrist and forearm prior to this injury. Claimant felt his major problems were his neck and right knee. The Orthopaedic Consultants diagnosed hypochondriasis with associated multiple somatic complaints, post-right knee arthrotomy and meniscectomy, chronic lumbar strain and cervical strain by history, and by history a minimal degree of tendinitis of the right arm. They felt claimant's hypochondriasis should be verified by a psychological examination. It was their opinion claimant's condition was medically stationary and he could return to his former occupation. They rated the total loss of function of claimant's back and neck as related to his injuries as none. Dr. North concurred with this report, however, in September 1979, indicated he felt claimant because of his neck and back strain should avoid repetitive bending, twisting, stooping, lifting and prolonged sitting and standing.

On September 11, 1979, Dr. Deena Stolzberg, a psychiatrist, felt claimant had a compensation neurosis. Dr. Stolzberg recommended closure of the case as soon as possible since claimant was not motivated to work due to the compensation he was receiving. Dr. Stolzberg did not find claimant to be depressed and that psychotherapy was contraindicated because it would increase claimant's compensation neurosis.

Dr. Jerry Larsen, on September 18, 1979, reported claimant would not be able to do any type of heavy lifting without reinjury or aggravation of "his existing condition". Dr. Larsen felt claimant was depressed and in need of psychotherapy.

The Referee found the reports of the orthopedic doctors and Dr. Stolzberg to be more persuasive than Dr. Larsen's reports. Therefore, the Referee, after reviewing all of the evidence, found claimant was not suffering an orthopedic or psychological problem as the result of back injury and affirmed the Determination Order.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, affirms the Referee's order. The Orthopaedic Consultants found claimant had no loss of function of his back and neck. Dr. Mueller likewise found no permanent impairment. Dr. Stolzberg indicated claimant did have a compensation neurosis and was not motivated to return to work as long as he was receiving compensation. However, Dr. Larsen found claimant had certain limitations due to his back and neck strain. The Board finds that the preponderance of the evidence establishes that claimant has not sustained any loss of wage earning capacity due to his back injury. Therefore, the Board concludes the Referee correctly affirmed the Determination Order.

ORDER

The Referee's order, dated October 17, 1979, is affirmed.

WCB CASE NO. 78-4234 May 2, 1980

MICHAEL A. PUCKETT, CLAIMANT
Blyth, Porcelli, Moomaw & McSweeney, Claimant's Attys.
SAIF, Legal Services, Defense Atty
Request for Review by Claimant

Claimant seeks Board review of the Referee's order which granted him an award of compensation equal to 32° for 10% unscheduled disability for his right shoulder injury. Claimant contends he is entitled to a larger award of unscheduled disability.

FACTS

Claimant, a 30-year-old delivery driver for Dad's Root Beer-Canada Dry Bottling Company, sustained a compensable injury to his right shoulder on June 21, 1976 while pulling cases off his truck. Dr. William Stanley diagnosed possible degenerative arthritis right and left "A-C". Claimant was released for light work on July 7, 1976.

On August 18, 1976, Dr. Grant Lawton reported claimant told him he had had increasing difficulty with his right shoulder the last two years. Claimant states he could perform light lifting without pain, but after performing heavy lifting over one hour he began to have increasing pain. Dr. Lawton opined claimant's condition was medically stationary. He felt claimant may eventually require reconstructive surgery and would be unable to return to any job requiring heavy lifting.

Dr. Thomas Bachhuber, in September 1976, reported he had treated claimant in 1970 and in 1975 for bilateral shoulder pain.

In November 1976, claimant was interviewed for vocational rehabilitation. He listed his previous occupations as construction work and soft drink driver/deliveryman. Claimant stated he has a 12th grade education. Claimant was enrolled in an electronics technician program to run from January 3, 1977 to January 30, 1979. In July 1977, claimant terminated this program. He indicated he had an "old back" problem which was bothering him.

In August 1977, Dr. Theodore Pasquesi indicated claimant had injured his shoulders while in the service. Claimant complained of pain in acromioclavicular joint, made worse by motion, especially overhead and rotatory motions. Dr. Pasquesi felt claimant had acromioclavicular arthritis without any bony changes. He felt that claimant's condition was probably stationary and that claimant should avoid repetitive overhead work as much as possible. Dr. Pasquesi rated claimant's impairment as 10% of the whole man on the basis of chronic moderate pain. Dr. Lawton agreed with this report.

In September 1977, claimant began a vocational rehabilitation program with the vocational goal of "floristry". However, for various reasons, this program was terminated and in March 1978 claimant began another vocational rehabilitation program with the vocational goal of "salesman". Claimant completed this program in April 1978 and obtained a job as a salesman on May 1, 1978.

A Determination Order, dated May 17, 1978, awarded claimant temporary total disability compensation and compensation equal to 16° for 5% unscheduled disability for his right shoulder injury.

In February 1979, Dr. Lawton indicated claimant was having back and neck symptoms which made it difficult to determine the acromioclavicular disability. By April 1979, Dr. Lawton reported claimant had a fair range of motion in his right shoulder and good strength in it. However, claimant felt he had less strength in it than he used to have. It was Dr. Lawton's opinion claimant's condition was medically stationary.

At the hearing, claimant testified he has constant and nagging shoulder pain. He feels he could not return to any job which required lifting. He stated he has limited his outside activities and cannot perform many tasks around his home, such as yard work. At the time of the hearing, claimant was working as a salesman for a marina. Claimant testified that the math in the electronic technician rehabilitation program was too difficult for him. In the floristry program, claimant could not understand the use of the generic names of the plants. He stated he worked for Marv Tonkin for two months and quit because he didn't like the way the operation ran. After that he worked as an estimator for a construction firm and then obtained his current job.

The Referee, after reviewing all the evidence, found claimant's loss of wage earning capacity did not exceed his impairment. Therefore, the Referee granted claimant an award of 32° for 10% impairment in lieu of the Determination Order of May 17, 1978 and granted claimant's attorney a fee out of the increased compensation.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, affirms the Referee's conclusion, however, for different reasons than stated by the Referee. Impairment is but one element considered with other factors in determining a claimant's loss of wage earning capacity. Our appellate courts have repeatedly held that impairment along with age, educational level, work experience, adaptability, training, the condition of the labor market, and claimant's adaptability to non-physical labor and his emotional condition should be considered. In this case, claimant is 33 years old, has 12 years education and has completed sales training through a vocational rehabilitation program. His work experience has been in construction work and truck driver-salesman. Since his completion of the rehabilitation program claimant has adapted to sales work. There is no evidence claimant has any emotional problems. The labor market condition is such that claimant has obtained three jobs in the sales field. The Board finds, based on all the evidence in this case, claimant is entitled to an award of compensation equal to 32° for 10% unscheduled disability for his right shoulder injury representing his loss of wage earning capacity. Claimant's work aggravated his pre-existing condition affecting his shoulder.

ORDER

The Referee's order, dated November 13, 1979, is affirmed.

WCB CASE NO. 76-5723 May 2, 1980

DONALD E. SODEMAN, CLAIMANT
Alan Jack, 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.

WCB CASE NO. 78-6493 May 2, 1980

THOMAS W. SPRINGGAY, CLAIMANT
A.C. Roll, Claimant's Atty.
Schwabe, Williamson, Wyatt, Moore & Roberts, Employer's Attys.
Request for Review by Employer

The employer seeks Board review of the Referee's order which granted claimant a permanent total disability award. The employer contends claimant failed to prove he is permanently and totally disabled.

FACTS

Claimant, a 46-year-old welder, on June 20, 1973, injured his low back while turning a jug over. This injury was diagnosed as a back sprain and Dr. Robert Cook felt claimant would not suffer any permanent impairment from it.

A Determination Order, dated January 24, 1974, awarded claimant temporary total disability compensation.

In May 1974, Dr. Cook reported he had treated claimant for a knee injury and claimant's back was examined. He found minimal pathologic findings. However, later in June, Dr. Cook reported claimant was unable to work because of a combination of back and knee problems. Claimant had been released for modified work on April 29, 1974 and was to avoid bending, lifting, kneeling, climbing and squatting.

In July 1974, Dr. Cook reported claimant's knee had progressed satisfactorily, but he continued to complain of back pain. He felt claimant should avoid employment which involved a great deal of "walking, stooping, squatting, bending, lifting, etc.".

Dr. Norman Hickman, a psychologist, in August 1974, reported claimant had a 9th grade education and had completed a welding training program. Claimant said he had worked as a truck driver, custodian, and various other things. Dr. Hickman found claimant was experiencing moderately severe anxiety tension reaction. He felt claimant was functioning at an average intellectual level and classified him psychologically as a 4. Dr. Hickman felt claimant would not suffer any significant permanent psychological disability if he could become vocationally re-established.

Dr. James Mason, of the Disability Prevention Division, also in August 1974 felt claimant needed a job change and should avoid employment requiring bending, twisting, lifting, climbing and squatting.

Claimant appealed the Determination Order and was awarded compensation equal to 80° for 25% unscheduled disability for his low back injury. This was affirmed by the Board.

Dr. Arlan Quan, a psychiatrist, on December 10, 1974, reported claimant had a chronic mild passive-aggressive personality. He did not find significant anxiety.

Claimant began a vocational rehabilitation program with a vocational objective of a draftsman. Claimant withdrew from this program in January 1975 and indicated he wanted training in outboard motor repair. Claimant said he left the drafting program because he couldn't sit very long. Claimant entered a small engine repair training program which he completed. Unable to find a job in this area, claimant opened his own shop with another person and until a problem developed between them. Eventually, claimant closed the shop. Claimant said because of increasing back pain from bending, stooping, and lifting he felt he couldn't perform this type of work.

In June 1977, Dr. Cook reported claimant had acute low back syndrome with bilateral "leg numbness". A myelogram suggested defects at the L4-5 and L5-S1 levels on the right. Dr. Cook opined these problems were related to claimant's original injury. Claimant was treated with a transcutaneous stimulator which failed to relieve his pain. On August 5, 1977, Dr. Curtis Hill performed a bilateral stereotactic facet rhizotomy at the L4-5 and L5-S1 levels. In October 1977, Dr. Hill reported claimant continued to complain of back pain. He felt surgery would not benefit claimant and referred claimant to the Northwest Pain Center.

In December 1977, Dr. Joel Seres, director of the Northwest Pain Center (Pain Center), reported claimant wished to return to work steam cleaning boilers. Dr. Seres felt claimant was "reasonably well motivated to return to work". Dr. John Painter, a psychologist at the Pain Center, felt claimant had a moderate hysterical conversion reaction, compensation neurosis with significant secondary gains, moderate depression, chronic alcohol abuse and marital and family problems, but an average level of intellectual function. Claimant enrolled in and completed the Pain Center program. Claimant had engaged in "fairly vigorous" activity and used no analgesics while at the Pain Center. Dr. Seres felt claimant had "significant" back disability.

In June 1978, the Orthopaedic Consultants opined claimant's condition was medically stationary. It was their opinion claimant was poorly motivated and could manage a small engine repair shop with help and was capable of performing light work not requiring lifting or bending. They rated claimant's loss of function of the lumbar spine as related to this injury as mildly moderate and the loss of function of the right knee as mild. Dr. Cook concurred with this report.

A Second Determination Order, dated August 9, 1978, awarded claimant additional temporary total disability compensation and compensation equal to 15% unscheduled disability for his low back injury, in addition to the previous awards.

Dr. Cook, in October 1978, indicated claimant had considerable difficulty with his low back with a "chronic pain syndrome largely exacerbated by bending and lifting type motion as well as prolonged standing". He felt claimant could not pursue very physically demanding activities which coupled with his education, rendered him seriously disabled. In March 1979, Dr. Cook opined claimant had a "chronic axial skeletal syndrome primarily degenerative intervertebral disc disease which has created very definite activity restrictions". Dr. Cook felt claimant could perform some productive activity, noting the possibilities were quite limited. He felt claimant could perform a job which allowed him to sit and to stand in a random fashion with no lifting or bending being required.

Claimant returned to the Pain Center in March 1978 for a re-evaluation. Claimant said he was using his boat to do crab fishing. He described a popping sound in his back related to pain. Dr. Painter indicated claimant was attempting to teach small engine repair. Claimant admitted he was very angry and being driven to "desperate measures". Dr. Painter felt claimant was decompensating and possibly was lapsing into a psychotic state with marked paranoid overtones and should begin psychotherapy. In May 1979, Dr. Painter reported he felt with appropriate treatment claimant could return to work.

At the hearing, claimant testified he moved to the Oregon coast. He said he had to give up the crab fishing because it increased his back pain. He taught a small engine repair class from September 1978 through March 1979, but avoided bending or stooping. Claimant also attempted to dig clams commercially. The prior work experience of claimant has been welding, sheet metal work, construction work, furnace repair, plumbing, driving trucks and buses, working in canneries and sawmills and doing custodial work in schools. Claimant said he applied for light work with this employer, but was turned down. Claimant also testified he split wood for sale and had done some steam cleaning and roto-tilling for hire. Also, he has built a garage doing most of the work himself.

The Referee, based on all the evidence, found claimant was unemployable and granted claimant a permanent total disability award.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, modifies the Referee's order. The Board does not find claimant has proven by a preponderance of the evidence he is permanently and totally disabled. The medical evidence by itself does not establish claimant is permanently and totally disabled. Claimant is now in his early 50's, has an 8th grade education and has completed a vocational rehabilitation program on small engine repair as well as welding training. Claimant's work history consists of manual work. He can teach small engine repair and has done so. Claimant is able to engage in a number of activities if he wants to which are physically demanding. Claimant has no motivation and has not shown he has sought regular gainful employment or that he has made reasonable efforts to do so as required under ORS 656.206(3). Therefore, the Board, after considering all the evidence, finds claimantis not permanently and totally disabled. However, the Board, based on the same evidence, finds claimant is entitled to an award of compensation equal to 240° for 75% unscheduled disability for his low back injury. This award is in lieu of any previous awards of unscheduled disability for this injury.

ORDER

The Referee's order, dated July 27, 1979, is modified.

Claimant is hereby granted compensation equal to 240° for 75% unscheduled disability for his low back injury. This award is in lieu of the award granted by the Referee in his order which, in all other respects, is affirmed.

LEONARD L. CLARK, CLAIMANT
A.C. Roll, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant
Cross-appeal by the SAIF

Claimant and the State Accident Insurance Fund (hereinafter referred to as the Fund) seek Board review of the Referee's order which ordered the Fund to pay for chiropractic treatment ordered by Dr. Schmidt for a reasonable period of time and denied claimant's request for an increased award of unscheduled disability. Claimant contends he is entitled to an additional award of unscheduled disability. The Fund contends the Referee erred in ordering it to pay for chiropractic treatment ordered by Dr. Schmidt.

FACTS

Claimant, a 43-year-old truck driver for Crown Zellerbach Corporation, on January 23, 1976, developed severe cramping, mid-abdominal pain and a mass in his umbilicus. Dr. Keith D. Holmes diagnosed this condition as an umbilical hernia with incarceration and probable early strangulation. This was surgically repaired. Dr. Holmes did not feel this would cause any permanent impairment to claimant. Claimant was first released for regular work on April 19, 1976. However, there was some confusion about claimant's release for work; eventually Dr. Holmes released claimant for regular work on June 14, 1976.

Dr. William Graham, in August 1976, reported claimant continued to complain of umbilical and supra-umbilical pain. Dr. Graham diagnosed diastasis recti without evidence of recurrent or incisional epigastric or umbilical herniation. He felt claimant could be treated surgically or conservatively which included weight loss, avoidance of strenuous activity and the possible use of a supportive garment.

On September 9, 1976, Dr. Graham performed a ventral hernioplasty. In November 1976, Dr. Graham reported that claimant had progressed well until he had developed an acute viral gastroenteritis. He noted that claimant had had the maximum amount of abdominal reconstructive work that could be done without a prosthesis and that he should avoid any strenuous activity. He felt claimant should engage in a vocational rehabilitation program.

In March 1977, Dr. Robert Ho diagnosed abdominal myositis. He felt that claimant should lose weight and be treated with acupuncture to reduce his pain. Dr. Ho felt the claimant would suffer some permanent partial impairment and function related to abdominal pain as a result of his injury.

Dr. Graham, on March 21, 1977, reported that claimant's condition was stationary and that his recovery had not been optimal. He felt that he had exhausted all modalities of medical and surgical treatment.

Dr. Ho, on April 20, 1977, reported that claimant's condition was stationary with regard to abdominal discomfort. He reported that claimant had elected not to continue acupuncture treatments.

A Determination Order, dated May 26, 1977, awarded claimant additional temporary total disability compensation equal to 32° for 10% unscheduled disability for his abdomen injury.

On June 28, 1977, claimant was referred for vocational rehabilitation. He eventually began a program with a vocational goal of electronics technologist. Claimant advised his counselor that he had an eleventh grade education, had worked as a truck driver, heavy equipment operator, and farmer.

A stipulation, dated October 25, 1977, reopened this claim for a program of vocational rehabilitation, payment of temporary total disability commencing June 28, 1977.

In November 1977, claimant changed his program to major in agri-business. The case notes from the vocational rehabilitation counselor indicate that claimant continued to have pain and occasionally missed school because of it.

In May 1978, Dr. Graham reported that claimant continued to have abdominal pain. He suggested claimant attend the Pain Center.

On June 22, 1978, Dr. Edward Colbach, a psychiatrist, interviewed claimant and described him as very tense, guarded and rigid. Claimant advised Dr. Colbach that he felt there was nothing that could help him and doubted that he would ever be able to return to work. Dr. Colbach felt claimant demonstrated a definite anger and dependency in his personality. He felt that claimant's discomfort was probably psychosomatic or hysterical in nature. From a psychiatric standpoint, Dr. Colbach felt claimant's condition was stationary. He felt that claimant's pain, if it was psychosomatic, might be a neurotic problem and was unclear whether or not this was related to claimant's job. Dr. Colbach concluded that in any event he did not feel that any kind of psychiatric disability was warranted. In conclusion, Dr. Colbach felt that claimant considered himself an invalid and his family was taking care of him and that any further rehabilitative efforts would not assist claimant because of his state of mind.

Also, in June 1978, Dr. Stephen Choong reported that claimant would be unable to return to his previous type of employment. He felt it was possible claimant may benefit from a trial blockage of his sympathetic nerves. Dr. John Raaf, a neurologist, in September 1978, reported that after examining the claimant he did not feel that there was any neurological problem present. He stated he agreed with Dr. Colbach's analysis of claimant and that he felt that no further treatment was indicated. He did not feel that a sympathetic block would be of any value and felt that claimant's condition was stationary.

In December 1978, Dr. Norman Hickman, a psychologist, reported that claimant indicated while attending the vocational rehabilitation program he was missing a lot of classes because of pain. Claimant advised Dr. Hickman that he did not feel that even after completion of this program he would be able to hold down a full-time job. Claimant said he had to repeatedly lay down in order to get relief from his pain. Testing revealed that claimant had an I.Q. of 116 which placed him in the bright/normal intellectual level. Dr. Hickman's diagnosis was mild anxiety tension reaction, situational feelings of anger, hostility and bitterness. He found no evidence of significant chronic neurotic or psychotic reactions. He classified claimant as a 2-3 psychologically. Dr. Hickman felt there was no evidence of significant psychopathology and there was no reason to believe that claimant would suffer any permanent psychological disability as a result of his accident. Dr. Hickman concurred with Dr. Colbach that claimant was not a candidate for any type of pain center program.

On February 1, 1979, Dr. J. E. Schmidt, D.C., reported that it was his opinion that claimant would benefit greatly from physical therapy and manipulative procedures.

The Fund, on February 16, 1979, denied the request from Dr. Schmidt to perform chiropractic treatment. It was their opinion that after reviewing the file and consulting with its medical staff that chiropractic treatment was not indicated as being related to the original injury. In response to this denial, in March 1979, Dr. Schmidt reported that claimant was suffering from lyphatic congestion which was a direct result of his injury and the surgeries which were necessary to repair his injury.

In May 1979, Dr. Wayne Kelley, chiropractic orthopedist, at Western States Chiropractic College, opined that based upon his conversation with claimant and his wife and a review of the medical evidence coupled with the fact that claimant had stated that he had no spinal pain or no back injury as the result of the original injury, that it was very difficult for him to assess or evaluate the role or validity of chiropractic treatment in this case. He did not see any correlation among the subjective and objective elements in this case, the history involved, and the application of chiropractic treatment.

Claimant completed the vocational rehabilitation program on June 10, 1979 and a Third Determination Order, dated June 20, 1979, awarded claimant additional temporary total disability.

At the hearing, claimant testified he continues to have pain in the abdominal area which varies in intensity and when it is severe he indicated that his abdomen swells. Claimant's wife testified that he no longer uses pain medication. Claimant stated that he could sit for approximately one to two hours, stand for two to three hours, however, walking increased his pain and caused charley-horse type cramps in his abdomen which caused him to fall down. Claimant stated this pain was relieved by laying down. Further, he said he has restrictions in the amount of bending, lifting, and stooping he can do and the amount of weight that he can carry. Claimant's family performs custom hay baling and discing. Claimant said he had attempted to help his family perform this work but had been unable to do much to assist them. He said that he can bale hay for approximately two to four hours and run a tractor for one to two hours. After performing this work claimant said that he felt "lousy".

The Referee, after reviewing all this evidence, found that the award of unscheduled disability was correct. However, the Referee found that the denial issued by the Fund on February 16, 1979 denying chiropractic treatment offered by Dr. Schmidt was incorrect and set it aside. The Referee further ordered the Fund to pay claimant's attorney the sum of $500 as and for a reasonable attorney's fee in addition to the compensation awarded to claimant.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, modifies the Referee's order. The Board concurs with the Referee's assessment and affirmation of the award of unscheduled disability in this case. However, the Board does not concur with the Referee's conclusion regarding the carrier's responsibility for chiropractic treatment as requested by Dr. Schmidt. The Board does not find that Dr. Schmidt's suggested chiropractic treatment is necessary as a consequence of claimant's original injury. In this matter, the Board finds that Dr. Kelley's evaluation is more persuasive than that of Dr. Schmidt. Therefore, the Board would reverse that portion of the Referee's order which set aside the Fund's denial and ordered it to pay for certain chiropractic treatment offered by Dr. Schmidt for a reasonable period of time and granted claimant's attorney a fee.

ORDER

The Referee's order, dated September 10, 1979, is modified.

That portion of the Referee's order which overruled the denial of the State Accident Insurance Fund of February 16, 1979 and ordered it to pay for denied chiropractic treatment offered by Dr. Schmidt at least for a reasonable period of time and granted claimant's attorney a fee of $500 is reversed.

The denial issued by the State Accident Insurance Fund is approved.

The remainder of the Referee's order is affirmed.

WCB CASE NO. 79-2320 May 5, 1980

VIRGINIA A. JEREMIAH, CLAIMANT
Anderson, Fulton, Lavis & VanThiel,
Claimant's Attys.
Schwabe, Williamson, Wyatt, Moore
& Roberts, Employer's Attys.
Request for Review by Claimant
Cross-request by Employer

Claimant and the employer seek Board review of the Referee's order which granted her an award of compensation equal to 14.4° for 15% loss of the right thumb. Claimant contends this award does not adequately reflect her disability. The employer contends this award is excessive.

FACTS

Claimant, a 23-year-old laborer with Alaska Packers Association, sustained a compensable injury on August 23, 1978 to her right thumb when while sliming fish her right thumb became painful. Dr. Charles Linehan diagnosed right thumb tendinitis. Claimant was referred to Dr. John Swanson, who treated claimant conservatively.

On November 13, 1978, Dr. Swanson reported he felt claimant had suffered some minor permanent impairment from the strain of her metacarpal-phalangeal joint of her right thumb. Claimant said she was unable to perform any heavy work with the thumb, although she is able to utilize it to write with and to perform her household chores.

The Orthopaedic Consultants, in January 1979, felt claimant's condition was stationary and her claim could be closed. They felt she could return to her former occupation with limitations or to some other occupation. It was their opinion the disability in claimant's right thumb due to this injury was minimal.

In February 1979, Dr. Swanson reported he found no objective evidence to support claimant's subjective complaints. However, he felt a job not requiring continued repetitive hand use was advisable.

A Determination Order, dated March 7, 1979, awarded claimant temporary total disability compensation.

Dr. Swanson, in June 1979, reported claimant complained of mild discomfort of her right index finger. Claimant had a full range of motion of her index finger. Dr. Swanson could find no objective evidence to support claimant's subjective complaints. In July 1979, Dr. Swanson reported claimant had a full range of motion of the right thumb. He felt claimant had a mild permanent disability related to pain in her thumb, but found no objective evidence to support her subjective complaint.

At the hearing, claimant testified she experiences pain in her right thumb when she uses it in gripping or pinching functions. She said she uses her left hand more now to avoid using her right hand and does not now experience pain in the thumb. She continues to be very physically active and uses her left hand when participating in sports activities.

The Referee, after considering all the evidence, granted claimant an award of compensation equal to 14.4° for 15% loss of the right thumb.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, modifies the Referee's order. The preponderance of the evidence in this case indicates claimant has a minimal residual disability in her right thumb. Claimant is able to perform her household chores and to write with her right hand involving use of the right thumb. She does have difficulty in performing gripping or pinching functions. The Board, based on all the evidence, finds claimant is entitled to compensation equal to 4.8° for 5% loss of her right thumb in lieu of all previous awards and so modifies the Referee's order.

ORDER

The Referee's order, dated August 24, 1979, is modified.

Claimant is hereby granted compensation equal to 4.8° for 5% loss of function of the right thumb. This award is in lieu of that granted by the Referee's order which, in all other respects is affirmed.

WCB CASE NO. 77-4695 May 5, 1980

RUSSELL LEWIS, CLAIMANT
Galton, Popick & Scott, Claimant's Attys.
Rankin, McMurry, Osburn, Gallagher & VavRosky, Employer's Attys.
Amended Order On Review

On April 24, 1980, the Board entered its Order on Review in the above entitled case which lowered the amount of the penalty due claimant but affirmed the Referee's order in all other respects. Subsequently, claimant, by and through his attorney, requested that an attorney's fee be granted in this matter. Even though the employer appealed and prevailed on the issue of penalties to some extent, the majority of the issues raised on appeal were unchanged. The Board, therefore, concludes that claimant's attorney is entitled to a fee and would amend its Order on Review to that extent.

On page four, under the Order portion of the Order on Review, the following paragraph should be added:

> "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 employer and its carrier."

The remainder of the Board's April 24, 1980 Order on Review is affirmed.

WCB CASE NO. 78-8390 May 5, 1980

JOHNNY A. OSBORNE, CLAIMANT
Olson, Hittle, Gardner & Evans,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Claimant seeks Board review of the Referee's order which affirmed the State Accident Insurance Fund's (hereinafter referred to as the Fund) denial of his claim.

FACTS

Claimant, a 27-year-old laborer, was employed by A.C. and Wanda Stites, dba Stites Well Drilling, which was a non-complying employer. Claimant said he did a lot of heavy lifting and alleges that in approximately April 1977 he attempted to lift a heavy drill bit from a pickup and dropped it. He said he felt pain in the groin area and it swelled up the next day. Mr. Stites was told by claimant of this incident the day after it happened. Claimant went to a doctor four or five times, but failed to mention this incident. According to claimant, Mr. Stites told him to hold off on this matter until he "saw about insurance".

On February 4, 1978, Dr. Phillip Leveque reported claimant had a sore lump on the bottom of the right testicle. Claimant told him he had this for about two years. Claimant was referred to Dr. J. Vandenberg.

On May 5, 1978, Dr. Vandenberg performed a right epididymectomy. Claimant told Dr. Vandenberg he had intermittent pain and swelling for the last two years in the right scrotal area. The diagnosis was a chronic sclerosing epididymitis.

Claimant filed a claim with the Fund on June 2, 1978. On October 4, 1978, the Fund denied the claim.

On October 6, 1978, Dr. Vandenberg reported claimant had not mentioned any injury to him. He stated: "The association between possible injury and the low-grade chronic epididymitis has been reported and is considered valid; however, at the onset of the patient's initial contact with me, there was no indication of this. Since then, however, the patient has stated this was associated with an on-the-job occurrence".

In August 1979, Dr. W. Romney Burke reported claimant had undergone two surgical procedures on the right epididymis. He had performed a right inguinal exploration of the testicle. Dr. Burke agreed with Dr. Vandenberg's comments about the association between possible injury and the low grade chronic epididymitis.

Claimant testified he did not tell the doctors of the on-the-job injury initially because he knew Mr. Stites would not pay for it and he was trying to get his wife's insurance to cover it.

The Referee, after noting discrepancies in claimant's testimony and the doctor's histories, concluded claimant had failed to prove by a preponderance of the evidence he suffered an injury arising out of and in the course of his employment. Therefore, the Referee affirmed the Fund's denial.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, concurs with the Referee's affirmance of the Fund's denial of the claim. Claimant has the burden of proving by a preponderance of the evidence his contention that he suffered a compensable injury. The Board, based on all the evidence, does not find that claimant has met his burden of proof. Therefore, the Board affirms the denial of the Fund.

ORDER

The Referee's order, dated October 23, 1979, is affirmed.

WCB CASE NO. 78-8173 May 5, 1980

WILLIAM RUSSELL, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary, Claimant's Attys.
Lang, Klein, Wolf, Smith, Griffith & Hallmark, Employer's Attys.

Claimant seeks Board review of the Referee's order which granted him an award of compensation equal to 16° for 5% unscheduled disability for his back injury. Claimant contends he is entitled to an additional award of temporary total disability and permanent partial disability compensation.

FACTS

Claimant, a 30-year-old warehouseman with this employer, sustained a compensable injury on March 22, 1977 to his back and neck while unloading a box car. This injury was originally diagnosed as a cervical strain and contusion to the head.

On June 20, 1977, Dr. Theodore Pasquesi reported that claimant complained of pain in the right side of his neck which was not constant but was made worse by turning his head. Claimant also complained of low back pain which was reportedly made worse by lifting. Dr. Pasquesi diagnosed a mild cervical strain and felt that claimant's condition was not yet stationary. He felt there was a serious question as to whether claimant would be able to return to heavy laboring work such as that of a warehouseman. Dr. Pasquesi felt that it would be prudent for claimant to enroll in the Disability Prevention Division program to determine whether or not he may need help in obtaining a different type of employment or training.

Claimant enrolled on two different occasions in the William A. Callahan Center program. On August 25, 1977, claimant reported at the Center and was examined by Dr. Daniel A. Halferty, medical examiner. Dr. Halferty diagnosed a mild cervical strain, lumbar lordosis and secondary strain and the residuals of a left hand injury which occurred in 1967 and involved the fifth finger. Claimant was discharged from the Center on September 9, 1977 because of repeated absences.

Dr. Howard Mintz released claimant for light work on September 27, 1977 with a limitation of no heavy lifting. Dr. Mintz was claimant's family physician.

Claimant returned to the Callahan Center in November 1977. He was complaining of difficulties in the low back area. Dr. Halferty again diagnosed chronic lumbosacral strain secondary to severe lumbar lordosis, residual mild left hand injury of 1967, and mild chronic cervical strain which was improving. Dr. Halferty reported that claimant's attendance again was sporadic and that "he did not qualify as being cooperative". On December 21, 1977, claimant was administratively discharged from the Center. Dr. Halferty opined that claimant had not attended the Center enough to allow him to make an estimate of claimant's physical capabilities. Dr. Louis Loeb, a psychologist at the Callahan Center, reported that claimant said he had graduated from high school in 1966, served in the United States Marine Corp from 1966 to 1968, and had a service-connected disability. He told Dr. Loeb while serving in Viet Nam he had a mental breakdown, diagnosed by a corpman but he was never hospitalized. Claimant stated that he had worked for his parents in a small restaurant, for a large paper manufacturer running some type of machine, and as a warehouseman. Claimant reported he had attended Portland State where he had taken some accounting courses and also Portland Community College where he had taken some law enforcement courses. Testing revealed that claimant had an I.Q. of 95. Dr. Loeb felt

that claimant had "endorsed" a large number of items indicating that claimant may have serious problems not related to his injury. He felt claimant's return to substantial gainful activity would be predicated upon his ability to return to his previous employment and that otherwise he represented a poor risk for rehabilitation services.

In September 1977, claimant was referred to a Field Services Coordinator for job placement assistance.

Dr. Mintz released claimant for modified work on October 25, 1977 and indicated that he concurred with the report of Dr. Pasquesi. In February 1978, Dr. Mintz reported that he had released claimant to modified work "three days per month". In June 1978, Dr. Mintz reported claimant continued to complain of pain and discomfort in his low back which was made worse by prolonged sitting of more than two hours. Claimant indicated he could only drive for one hour, stand for approximately 30 to 40 minutes and was able to walk one to two minutes without pain. Claimant reported that pushing a lawn mower or lifting anything greater than 50 pounds occasionally or repeatedly lifting anything more than 20 to 30 pounds, twisting or turning, aggravated his back.

In June 1978 Dr. Russell Keizer diagnosed chronic lumbosacral spine strain. He opined that based on the mild to moderate pain he felt that claimant was medically stationary with chronic pain equal to 5% loss and total permanent impairment of the whole body.

A Determination Order, dated September 26, 1978, awarded claimant temporary total disability compensation from March 22, 1977 through August 31, 1978, less time worked.

Claimant was referred in August 1978 to the Crawford Rehabilitation Services for employment re-entry assistance. Claimant indicated he wished to return to work for this employer and work as a truck driver. The employer advised the counselor that no modified work situation existed because of the union contract. The counselor was unable to say whether claimant was uncooperative however, he noted that claimant offered no information unless asked directly and appeared to be bored and disgusted with the whole matter. The counselor thought it would be very difficult, indeed, to motivate claimant for employment due to his statement of constant, but unidentifiable pain, and his extreme lack of motivation. Claimant's re-entry assistance program was terminated in February 1979.

In June 1979, Dr. Lawrence Duckler reported that claimant had been first seen in October 1978 complaining of severe pain in his neck which radiated down his left arm. He

advised the doctor that he had injured his neck in March 1977. Claimant reported that three days before he came to Dr. Duckler he felt he had overextended himself at work and developed progressive pain in the neck that radiated into the left shoulder. The examination revealed no loss of muscular neurological function of the neck and arm. Dr. Duckler felt claimant should return to work as of June 3, 1979 since he felt he was medically stationary and felt that claimant did not have any permanent partial disability related to his injury.

At the hearing, claimant testified that he returned to full-time work as a warehouseman on August 1, 1979. He stated he worked a full shift and often one to two hours overtime per day. He complains that his back continues to bother him and he takes hot baths and exercises in order to work. He said he wears a back brace while working and occasionally takes Valium in order to sleep.

In the request for hearing, claimant and his attorney set forth the issues to be determined at the hearing as the nature and extent of claimant's permanent partial disability, whether claimant's injury had become stationary, and whether claimant's claim should be opened for further time loss compensation and medical treatment. At the time of the hearing, claimant withdrew the latter two issues, leaving extent of permanent partial disability the only issue for the Referee to decide.

On October 31, 1979, the Referee issued an Opinion and Order in which he found that claimant sustained a slight loss of wage earning capacity and, therefore, granted him an award of compensation equal to 16° for 5% unscheduled disability for his low back injury and awarded claimant's attorney a fee equal to 25% additional compensation granted by the order.

On November 9, 1979, claimant, by and through a different attorney, requested that the Referee set aside the Opinion and Order entered in this matter and allow the presentation of further testimony on the issue of claimant's entitlement to further temporary total disability between October 28, 1978 and June 3, 1979. This was opposed by the employer. Claimant, on November 28, 1979, requested Board review of the Referee's order alleging that he was entitled to additional temporary total disability compensation and permanent partial disability compensation.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, reverses the Referee's order. The Board finds that in this case, the preponderance of the medical evidence indicates that claimant has not sustained any permanent partial disability. Claimant returned to work in August 1979 to his job as a warehouseman. He has continued to work at this job full time including working overtime as required. Dr. Duckler opined that claimant did not have any permanent partial disability related to this injury. Therefore, the Board finds that the preponderance of the evidence indicates claimant has not sustained any loss of wage earning capacity due to this injury and reverses the Referee's award and affirms the Determination Order, dated September 26, 1978.

As to claimant's request that this matter be remanded to the Referee for presentation of additional evidence, supporting his contentions, the Board denies this request. The Board finds that the Referee's denial of claimant's motion to reconvene the hearing was proper and therefore affirms it. The acts of claimant's counsel are the acts of the claimant. Therefore, the failure of counsel in handling the matter becomes the failure of the claimant. In this case, claimant's attorney withdrew two issues from consideration by the Referee. Claimant concurred with these withdrawals Under ORS 656.295(5), if the Board determines that a case had been improperly, incompletely, or otherwise insufficiently developed or heard by the Referee, it may remand the case to the Referee for further evidence taking, correction or other necessary action. In this case, the Board could not so find and, therefore, refuses to remand this matter to the Referee.

ORDER

The Referee's order, dated October 31, 1979, is reversed.

The Determination Order, dated September 26, 1978, is reinstated and affirmed.

The Board denies claimant's motion to remand this case to the Referee.

WCB CASE NO. 79-4317 May 5, 1980

ROY D. STURDIVAN, CLAIMANT
Flaxel, Todd & Nylander, Claimant's Attys
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

The State Accident Insurance Fund (hereinafter referred to as the Fund) seeks Board review of the Referee's order which set aside its denial and remanded the claim to it for acceptance and payment of compensation and other benefits until closed. It contends claimant's "recurrent disc" did not arise out of his work activity.

FACTS

Claimant, a 57-year-old bulldozer operator, alleges that on October 23, 1978, while employed by Coos County Highway Department and operating a "D-7 cat" in a rock quarry, he hit a rock, jarring him and causing back pain.

In December 1978, Dr. Mario Campagna reported claimant had a L4 disc on the left removed on March 20, 1978 and had done fairly well until this incident. Claimant was complaining of fairly constant left low back, left hip and left leg pain. A myelogram revealed a large ruptured disc at L4.

Dr. D. T. Weinman also saw claimant in December 1978 and diagnosed a recurrent herniated disc at L4-5 on the left. Claimant said he had the same pain in his left leg that he had prior to his first laminectomy.

On January 5, 1979, Dr. Campagna performed a microlumbar discectomy and removed the extruded L4 disc on the left. Dr. Weinman, in February 1979, opined that it was likely that more disc material extruded out of the same space as had been previously injured and, in that respect, was an aggravation of the prior injury. However, he felt this incident might have caused more disc material to extrude from the weakened area caused by claimant's previous disc protrusion and surgery for it. In March 1979, Dr. Campagna reported claimant's current problems were the result of a new injury.

On April 1, 1979, claimant was released for regular work by Dr. Campagna.

The Fund denied this claim on April 3, 1979 on the basis the recurrent disc was not related to his work with this employer. The Fund had paid temporary total disability from December 21, 1978 to March 31, 1979.

In July 1979, Dr. Campagna indicated claimant's work activities on October 23, 1978 were the cause of the material worsening of his pre-existing back condition at the L4 level and the second laminectomy.

At the hearing, claimant testified he recovered from his previous back operation and was having no serious problems. Claimant said he had continued to work up until December 1978. Since his second operation, he has returned to work.

The Referee found that the preponderance of the evidence indicated claimant suffered a new injury and set aside the Fund's denial and remanded the claim to it for acceptance and payment of compensation. The Referee found no basis to assess penalties in this case.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, affirms the Referee's findings of a new injury. The Referee in his order found claimant's first laminectomy was in March 1974 when it in fact was in March 1978. The Board finds that this error is not material and in its de novo review considered the Fund's contentions regarding this error. The Board finds the opinion of Dr. Campagna to be persuasive in this case. There is no medical or any evidence to support the Fund's contention that the first surgery by Dr. Campagna was incompetently done. Therefore, the Board finds claimant sustained a new injury on October 23, 1978 as he alleges and that the Referee correctly decided that issue.

ORDER

The Referee's order, dated November 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 $250, payable by the Fund.

CLAIM NO. DC 405769 May 5, 1980

RICHARD A. WARE, CLAIMANT
Ken Colley, Claimant's Atty.
Lang, Klein, Wolf, Smith Griffith & Hallmark, Employer's Attys.
Order On Motion

On April 14, 1980, the Board entered its Own Motion Order in the above entitled case remanding claimant's 1972 low back claim to the State Accident Insurance Fund (Fund) for acceptance and payment of compensation until closed under ORS 656.278. On April 22, the Fund requested that the Board reconsider its order or, in the alternative, refer the matter to the Hearings Division to be set for a hearing.

The Board, after reconsidering the evidence before it, concludes that its Own Motion Order was correct and should not be changed. The Fund's request for a hearing will be referred to the Board's Hearings Division to be set for a hearing in due course. The Fund's motion for reconsideration should be denied.

IT IS SO ORDERED.

CLAIM NO. C384753 May 8, 1980

JANICE K. DETWEILER, CLAIMANT
SAIF, Legal Services, Defense Atty.
Amended Own Motion Order

The Board issued an Own Motion Order, dated December 12, 1979, denying reopening of this claim under its own motion jurisdiction. Subsequent to this order, claimant forwarded a report from Dr. John Thompson, dated January 29, 1980, in which the three days claimant lost from work in July (the 18th, 19th and 20th) were related to her industrial injury.

The Board finds claimant is entitled to temporary total disability compensation for those three days and would amend its Own Motion Order.

ORDER

The Own Motion Order, dated December 12, 1979, is amended. Claimant is granted temporary total disability compensation from July 18, 1979 through July 20, 1979.

ROBERT DUDDING, CLAIMANT
Dennis W. Skarstad, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Claimant seeks Board review of the Referee's order which affirmed a Determination Order, dated April 20, 1978, which granted claimant temporary total disability compensation and compensation equal to 16° for 5% unscheduled disability for his back injury. The Referee also approved the State Accident Insurance Fund's (hereinafter referred to as the Fund) denial of his aggravation claim. Claimant contends he is entitled to a greater award of permanent partial disability; is entitled to have certain medical expenses paid by the Fund; and is entitled to penalties and attorney fees for its failure to pay them.

FACTS

Claimant, a 22-year-old pipelayer with Modern Plumbing, injured his back on August 26, 1977 when a ditch caved in, partially covering him with clay dirt. The injury was diagnosed as multiple contusions and a fracture T7-T8 with minimal displacement.

In October 1977, Dr. Edward Grossenbacher reported claimant felt he was unable to return to his previous line of work. Dr. Grossenbacher felt claimant should be considered for vocational rehabilitation.

Dr. Ted Vigeland, on December 13, 1977, reported claimant's condition was medically stationary. He rated claimant's total loss of function of the thoracic spine as related to this injury as mild. Dr. Vigeland doubted claimant could return to his previous employment, even with limitations against heavy lifting. Claimant expressed interest at working as a graderman or forklift driver. Dr. Grossenbacher concurred with this report.

On January 9, 1978, Dr. Grossenbacher reported there was full function of the vertebral column. He found that the contusions and compression fractures had healed. Dr. Grossenbacher rated claimant's "disability" as five to eight percent and found claimant's condition was medically stationary.

In March 1978, claimant went to the Disability Prevention Center. Dr. Daniel Halferty, medical examiner at this Center, diagnosed by history a mild compression fracture T7-T8 with some residual soreness on heavy activity involving use of the shoulder muscles. He felt claimant had a phobia of returning to a job involving deep ditches. A job change was recommended.

A Determination Order, dated April 20, 1978, granted claimant temporary total disability compensation equal to 16° for 5% unscheduled disability for his back injury.

In May 1978, claimant was referred for employment re-entry assistance and to Comprehensive Rehabilitation Services Inc. Claimant indicated he graduated from high school and worked as a graderman, forklift operator, farm work and as a pipe layer. In August 1978, it was reported claimant had gone to Montana to seek employment and that it was unlikely he would return to this area in the near future.

In August 1978, Dr. George Schemm of Montana reported claimant continued to have neck and upper back ache. Claimant was hospitalized and underwent a series of tests, including a myelogram which was normal. Dr. Schemm diagnosed chronic recurrent upper dorsal spine strain. On October 6, 1978, Dr. Schemm advised the Fund claimant was under his care and was unable to work.

In October 1978, Dr. Edward Shubat, a Montana psychologist, felt claimant "presented" a conversion reaction and had a great deal of anxiety, tension and depression. Dr. Shubat felt claimant's injury provided occasion for him to focus his emotional problems upon his physical symptomatology.

Also, in October 1978, Dr. J. W. Bloemendaal, a doctor from Great Falls, Montana, reported he was proceeding with work-up studies on claimant.

On October 18, 1978, claimant's mother called the Fund and requested this claim be reopened. She said claimant needed retraining or job placement.

The Fund, on November 3, 1978, denied claimant's claim for aggravation.

Claimant testified he sought medical treatment in Montana at his father's suggestion.

The Referee, after reviewing the evidence in this case, affirmed the Determination Order, dated April 20, 1978, and the Fund's denial of November 3, 1978.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, modifies the Referee's order. The Board concurs with the Referee's affirmance of the denial of claimant's aggravation claim. However, the Board finds the evidence indicates that claimant has sustained a larger loss of wage earning capacity than that which he has been compensated for. Therefore, the Board grants claimant an award of compensation equal to 48° for 15% unscheduled disability for his neck and back injuries.

The Board does not find claimant is entitled to have his medical bills for treatment he received in Montana paid for by the Fund. In Rivers v. SAIF, decided by the Court of Appeals on April 28, 1980, the claimant moved out of Oregon and received medical services from a non-Oregon physician. The insurer denied payment of those out-of-state medical services. It contended ORS 656.245 allowed claimant free choice of physician only from physicians within the state of Oregon. The carrier contended that outside of the confines of the state of Oregon, the carrier controls medical services. The Court agreed with the carrier. In this case, claimant moved to Montana and sought treatment at the request of his father. The Fund did not agree to provide such treatment and under the holding of the Rivers case is not required to do so. Therefore, the Board finds claimant is not entitled to have the medical bills incurred for his treatment and testing performed in Montana paid for by the Fund.

The Board does not find claimant has proven by a preponderance of the evidence he suffers any psychological disability related to this injury. Further, it finds that the Fund's acts in this are not unreasonable so as to require the awarding of penalties and attorney's fees.

ORDER

The Referee's order, dated May 17, 1979 and as supplemented on July 6, 1979, is modified.

Claimant is hereby granted an award of compensation equal to 48° for 15% unscheduled disability for his neck and upper back injury. This is in lieu of all previous awards of unscheduled disability for this injury.

Claimant's attorney is hereby granted as and for a reasonable attorney's fee 25% of the increased compensation for permanent disability, payable out of said compensation as paid, not to exceed $3,000.

CLAIM NO. C366561 May 8, 1980

MICHAEL C. JOHNSTONE, CLAIMANT
Schlegel, Milbank, Wheeler
& Hilgemann, Claimants Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On January 23, 1980, claimant, by and through his attorney, requested the Board exercise its own motion jurisdiction and reopen his claim for his April 1, 1972 knee injury. This claim was initially closed by a Determination Order, dated May 17, 1978, and his aggravation rights have expired. A Second Determination Order, dated August 1, 1978, awarded claimant additional temporary total disability compensation and compensation equal to 45% loss of his left leg.

In September 1979, Dr. John Burr reported claimant needed vocational retraining for sedentary or light work requiring short periods of standing and walking. He requested the claim be reopened for retraining.

The State Accident Insurance Fund (Fund) requested claimant be examined by an independent medical examiner. Dr. Robert Anderson performed this examination. On April 3, 1980, he reported claimant's problem remained the same as it was in June 1978. Claimant still had a painful knee following bilateral meniscectomy and arthritis. Dr. Anderson indicated claimant had more subjective complaints, but the objective findings were the same. He felt claimant could be helped with injections of Hydrocortisone and that claimant should be rehabilitated. It was his opinion claimant's condition would be stationary in 60-90 days. He found no indication of the need for surgery.

On April 21, 1980, the Fund indicated it opposed an own motion order reopening the claim.

The Board, after reviewing the material in this claim, denies claimant's request for own motion relief. Claimant is seeking vocational rehabilitation which the Board does not have the power or authority to order. The Board finds claimant is entitled to additional medical care and treatment as prescribed by Dr. Anderson under ORS 656.245. The evidence does not indicate claimant is entitled to any temporary total disability compensation. Therefore, the Board denies claimant's request for own motion relief.

IT IS SO ORDERED.

CLAIM NO. C 445181 May 8, 1980

DONALD KOSANKE, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On April 16, 1980, claimant, by and through his attorney, requested the Board exercise its own motion jurisdiction and reopen his claim for an injury he sustained on May 19, 1973 to his low back. Attached to this request is a petition and various medical reports. This claim was initially closed by a Determination Order, dated June 3, 1974, which granted claimant compensation equal to 25% unscheduled low back disability. This was appealed and resulted in claimant receiving an award of compensation equal to 50% unscheduled disability for his back injury. Claimant's aggravation rights have expired.

Subsequently, claimant filed an aggravation claim which was denied by the carrier in this case. The denial was affirmed by a Referee and likewise affirmed by the Board and is now on appeal to the Court of Appeals.

Claimant contends that his condition has deteriorated to the point where he is in need of additional surgery. In January 1980, Dr. Mohammed Hoda reported it was his opinion claimant needed additional surgical treatment. He reported that even if the surgery was successful it would not allow him to return to his regular job of pulling on the greenchain. In July 1979, Dr. Poulson had reported that he felt claimant had enough disability to justify additional surgery in an attempt to improve his condition so that he could once again be made a productive worker.

In October 1979, the Orthopaedic Consultants reported that claimant's condition was stationary and in their opinion he was not a candidate for surgery. They felt that part of claimant's problem at that time was due to his injury of May 1973 and in part was due to the gradual development of degenerative arthritis and disc disease in his spine.

In March 1980, Dr. Chen Tsai reported that claimant continued to complain of low back pain and right sciatica. Dr. Tsai felt this was related to a chronic right L5 radicular compression and that the results of surgery would be poor. He did not recommend surgery at that time.

The Board, in April 1980, advised the State Accident Insurance Fund (Fund) of claimant's request and asked that it respond thereto. On April 25, 1980, the Fund responded that it opposed an own motion order reopening this claim for surgery. This was based on reports that indicated that not all the doctors were in agreement as to the need for this surgery and at least part of claimant's current problems were not a direct result of the injury for which the claim had been estabilshed.

The Board, after reviewing all the material in this file, finds insufficient evidence to warrant reopening of claimant's claim under its own motion jurisdiction at this time. Therefore, the Board would deny claimant's request for own motion relief.

IT IS SO ORDERED.

WCB CASE NO. 79-1776 May 8, 1980

ALLAN L. LARSON, CLAIMANT
Galton, Popick & Scott, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Claimant seeks Board review of the Referee's order which affirmed the State Accident Insurance Fund's (hereinafter referred to as the Fund) denial of his claim for a psychological condition. Claimant contends his claim is compensable.

FACTS

In November 1978, claimant filed a claim for a psychological condition allegedly resulting from work pressure and a wage dispute with his employer, Triangle Milling Company. Claimant had worked for this employer since 1976. The Fund provided workers' compensation coverage for the employer.

On January 25, 1978, claimant was hospitalized. Dr. Frederick Turner reported claimant had been depressed for several months and possibly much longer. There were no recent precipitating factors, but in March 1977 claimant's young son had died of apparent "crib death". Claimant admitted he had several episodes of rather severe depression over the past ten years, some of which lasted several months to a year. Claimant recovered from all of these episodes spontaneously without treatment. Claimant said his marriage had deteriorated because when he became depressed he would

leave home and stay away 2-4 days at a time. Claimant said that sometimes his depression became so intense he would withdraw and be unable to work. While claimant was hospitalized Dr. Turner diagnosed severe depressive illness. Claimant was discharged from the hospital on February 10, 1978 and released for work on February 13, 1980.

On February 21, 1978, claimant took an overdose of medication. Dr. Turner felt claimant was still very depressed. Claimant said he had gone to work on Monday and experienced "marked tremulousness, agitation and anxiety to the point of panic". The diagnosis was depressive illness. While hospitalized claimant admitted he had been depressed for the past twenty years. Claimant said his job required him to give negative feedback and this was very difficult for him.

Claimant's wife said the claimant's mother had died when he was 12 years old. The death had occurred sometime around Christmas. She said claimant had recurrent depression every year during the Christmas holidays and in recent years had not seemed to recover as quickly as before. Two sons had been struck by a car while crossing a street. Claimant and his wife had been told one child would be confined to a wheel chair and would not live beyond the age of twenty because of a brain tumor. After extended and costly medical treatment, it was determined that this child had cerebral palsy which would not worsen. Claimant's wife went on to testify that a car had crashed into their yard and damaged one of their vehicles and some furniture; this evidently was an upsetting experience.

In March 1978, Dr. Ward Smith reported claimant had been "overwhelmed" by a number of things after his first discharge from the hospital. Claimant felt the death of his young son was the cause of most of the trouble at that time. Claimant reported this employer treated him extremely "well", however, due to his illness the employer had to remove him from his position as assistant superintendent.

The record indicates that during November 1978, claimant was having further marital problems; that he had indicated he wanted to quit his job and look for a new one; and that he was again hospitalized.

On January 29, 1979, Dr. Deena R. Stolzberg reported claimant said he had left his job with this employer because of job pressures and subsequent depression. Claimant said he was a manager and could not cope with this job. He felt he got caught in the middle between his men and his supervisors. Claimant said he had been first paid on an hourly basis and then was placed on a salary. Claimant said he had been promised a raise which he never got. He felt he had been treated unfairly and had difficulty with a new supervisor.

Dr. Stolzberg's diagnosis was a personality disorder with major features of chronic depression, anxiety, some obsessive-compulsive features, a tendency to be worried, self-depreciating, tense and overly sensitive. Dr. Stolzberg did not feel claimant's personality disorder was in any way related to his job and opined claimant's "psychiatric profile was in no way aggravated by his employment".

On February 21, 1979, the Fund denied this claim.

In April 1979, Dr. Ward Smith reported he felt claimant's job duties and job environment did in fact contribute to the onset of his disabling psychological problems. Dr. Smith felt claimant's job did materially aggravate claimant's chronic difficulty managing his emotions. He concurred with Dr. Stolzberg that claimant's personality structure was not altered by his work, but felt his job did contribute to the onset of his mood disorder.

Claimant testified that in July 1978 he had been working a lot of overtime and had no problem doing his work and was earning a good salary. On September 1, 1978, he was made assistant supervisor and put on a monthly salary that was less than his hourly wage. Claimant said in September and October 1978 he experienced numerous frustrations and problems with his new job. Claimant said he had been promised a raise in October 1978 which he did not receive. Claimant quit work on October 27, 1978.

The Referee, after reviewing all the evidence, found claimant's psychopathology did not arise out of and in the course of his employment and affirmed the Fund's denial of this claim.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, affirms the Referee's order. The Board finds Dr. Stolzberg's opinion in this case to be more persuasive than Dr. Smith. The Board does not find that claimant's pre-existing and underlying condition was worsened by his employment with this employer. This underlying condition was not worsened to the extent it produced disability or required medical services. Claimant's employment merely provided a forum for claimant to display his problem. In this case, the employer situation was coincidental to the emotional and other psychological problems. Therefore, the Board affirms the Referee's order.

ORDER

The Referee's order, dated August 30, 1979, is affirmed.

WCB CASE NO. 78-2194 May 8, 1980

MONIQUE SCARBOROUGH, CLAIMANT
Galton, Popick & Scott, Claimant's Attys.
Lang, Klein, Wolf, Smith, Griffith & Hallmark, Employer's Attys.
Amended Order On Review

On April 9, 1980 the employer requested that the Board reconsider its March 28, 1980 Order on Review. On April 16, 1980, claimant's attorney filed a response to the employer's motion, for which he requests a fee be granted. The Board, after consideration of the claimant's response, concludes that a fee is in order for the attorney's efforts on behalf of claimant. Therefore, the Board's April 30, 1980 order should be amended. On page 2, under the "Order" portion, the following paragraph should be inserted:

"Claimant's attorney is hereby granted a reasonable attorney's fee for his services in the amount of $100, payable by the carrier."

The remainder of the Board's order is affirmed.

IT IS SO ORDERED.

CLAIM NO. 502104 May 8, 1980

BOB B. SMITH, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On February 8, 1969, claimant sustained a compensable injury to his right thumb. Dr. C. S. Neace diagnosed this injury as an amputation of the distal 1/2" of the right thumb. This claim was initially closed by a Determination Order, dated June 25, 1969, which awarded claimant temporary total disability compensation and compensation equal to 45% loss of the right thumb by separation and use. Claimant's aggravation rights have expired.

The employer, on April 16, 1980, advised the Board that claimant's request to have his claim reopened for further treatment and time loss. The employer had received a copy of a report from Dr. Robert O. Morrison, dated March 31, 1980, in which he stated that claimant's nail plate on the right thumb had been growing out in a hooked fashion. This resulted in claimant frequently catching it and causing it to bleed and causing a certain amount of pain and disability. Claimant wanted to have a finger resected. Dr. Morrison felt the injury to the right thumb was not great, but the nuisance of the nail bed, in his opinion, should be surgically treated. He stated this could be done by a excision of the nail plate and bed and another closure of the stump. He also indicated that claimant required treatment for the correction of the Depuytren's contractions of the middle and fourth fingers and the palm of his hands. Dr. Morrison felt these could be attributable to an injury claimant had sustained in 1966 although they also could be caused by heavy hand usage which appeared to be prominent in certain individuals regardless of their employment. It was his opinion that the contractures could be surgically repaired. The employer advised the Board it opposed an own motion order reopening for further treatment and time loss.

The Board, after reviewing the evidence in this matter, finds it is sufficient to warrant a reopening of claimant's claim for his February 3, 1969 right thumb injury and not for the treatment of the Depuytren's condition. The Board orders the claim for this injury should be reopened when and if claimant submits to the surgery suggested by Dr. Morrison to correct the right thumb problem and the claim remain open until it is closed pursuant to ORS 656.278.

IT IS SO ORDERED.

WCB CASE NO. 79-3386 May 8, 1980

SAMUEL M. WETZEL, CLAIMANT
Olson, Hittle, Gardner & Evans,
Claimant's attys.
Schwabe, Williamson, Wyatt, Moore
& Roberts, Employer's Attys.
Request for Review by Employer

The employer seeks Board review of the Referee's order which set aside its denial of April 5, 1979 and remanded the claim for payment of chiropractic treatments to it, assessed a penalty equal to 10% of the amount due for these treatments, set aside the denial of claimant's aggravation claim and remanded the claim to the employer and its carrier for acceptance and payment of all benefits, plus a 10% penalty paid claimant on all time loss, if any, that should have been paid commencing on October 26, 1978 and continuing to the date of the Referee's order, and awarded claimant's attorney a fee. The employer contends that the aggravation claim was not timely filed and claimant did not prove by a preponderance of the evidence his aggravation claim. The employer also contends that its denial of the chiropractic bills was reasonable.

FACTS

Claimant, a 46-year-old mechanic with Goodwin Brothers, sustained a compensable injury to his low back on April 23, 1973. He was driving a new truck that had a "tire bounce" phenomenon which caused him to be bounced forward and backward in the cab. The injury was diagnosed as a lumbosacral strain. Claimant was released by Dr. Edward Moore, D.C., for regular work as of July 9, 1973 and found to be medically stationary on July 12, 1973.

The claim was initially closed by a Determination Order, dated October 26, 1973, which awarded claimant temporary total disability compensation.

On April 1, 1974, Dr. Moore reported that claimant continued to have back pain and he commenced treatment and chiropractic manipulation. On September 18, 1974, Dr. Moore reported he referred claimant to Dr. Fax and that claimant's condition was medically stationary with residual pain.

On September 24, 1974, Dr. J. Nicholas Fax reported that claimant was fearful of reinjuring his back if he returned to doing heavy lifting. On October 19, 1974, Dr. Fax released claimant for modified work. Dr. Fax, on November 8, 1974, reported that claimant's condition was stationary and that claimant had moderate permanent disability which would prevent him from doing heavy lifting, bending or stooping. He felt claimant was capable of light mechanical work or a bench-type work.

In January 1975, claimant went to the Disability Prevention Center. Claimant was examined by Dr. Norman Hickman, a psychologist, who reported that claimant had an 8th grade education and had obtained a GED while in the service. Claimant had worked as a truck mechanic for 28 years, this being his only occupation. Claimant advised Dr. Hickman he did not expect to return to his former job and felt he could hold down a full-time job if it was within his ability. Dr. Hickman reported that claimant was experiencing moderate depressive reaction because of his present situation. He found no evidence of any severe neurosis or psychosis and classified claimant as a 3. Dr. Hickman felt the moderate psychopathology was moderately related to the alleged injury.

Dr. John Thurlow, medical examiner, upon claimant's discharge from the Disability Prevention Center, opined that claimant had a minimal to mild loss of the use of the back due to his industrial injury. He felt that a job change was advisable and that claimant should avoid heavy manual labor.

The claim was again closed by a Determination Order, dated April 8, 1975, which granted claimant additional temporary total disability compensation and compensation equal to 32° for 10% unscheduled disability for his low back injury. This Determination Order was appealed and a Referee granted claimant additional compensation equal to 80° for 25% unscheduled disability for his low back injury.

In April 1976, Dr. Fax reported that claimant was having increasing problems with his back. Claimant was complaining of pain in his back and pain down into his right leg and some pain in the left leg. Dr. Fax reported this was a new problem which had not been present before. Claimant was hospitalized and placed in traction. Dr. Fax's diagnosis was a lumbosacral strain with degenerative disc disease.

In June 1976, Dr. Moore reported that it was his opinion that claimant would have permanent partial disability and should receive chiropractic manipulations to the lumbar spine to aid in healing and to prevent any more disability.

A Third Determination Order, dated June 30, 1976, awarded claimant additional temporary total disability compensation and additional compensation equal to 16° for 5% unscheduled disability for his back injury.

The Orthopaedic Consultants, in August 1976, diagnosed chronic lumbosacral strain with sciatica and probably had a herniated disc at L5-S1 on the right. They did not feel that claimant's condition was stationary.

Dr. Hickman, also in August 1976, reported that claimant felt he had not recovered from his physical problems the way he thought he should and had not received any vocational assistance. Dr. Hickman felt that these conditions contributed significantly to a rather serious deterioration in claimant's emotional condition since January 1975. He reported that claimant was verbalizing more symptoms than he did in 1975 and felt that he was more disabled now than in 1975. Dr. Hickman opined that the claimant was currently suffering from moderately severe anxiety tension reaction with depression and pre-occupation with physical and emotional complaints.

A Stipulation, dated September 21, 1976, reopened the claim effective August 4, 1976.

In March 1977, Dr. Moore reported that claimant's back pain had increased and that he was treating claimant three times per week. On June 16, 1977, Dr. Fax reported that he felt claimant's condition was stationary as of May 19, 1976.

On October 27, 1977, Dr. Herbert Spady reported that in his opinion the claim could be closed with an appropriate award of disability commensurate with the existing impairment of function. He also reported that claimant was using an electrical stimulator for pain relief. Claimant stated that his pain was increased by bending, lifting, periods of sitting and jarring but that walking, standing, and lying flat did not increase his pain. Claimant said he was taking no medication.

A Fourth Determination Order, dated November 17, 1977, which awarded claimant additional temporary total disability.

Dr. Arlan Quan, a psychiatrist, in January 1978, diagnosed mild to moderate depressive neurosis. He felt that claimant appeared to have a depression which was related to his industrial injury. Dr. Quan felt the psychiatric condition was not severe enough to preclude claimant from performing gainful employment. He felt that retraining or rehabilitation would be part of any psychotherapeutic program.

Also, in January 1978, Dr. Fax reported claimant's limitation appeared to be approximately 1/2 hour of sitting and that he could stand for reasonably longer periods of time without much discomfort. He stated he had not noticed any psychopathology or functional overlay in claimant's condition. He noted that claimant had gotten somewhat depressed during a period of time because of chronic pain but he did not feel that claimant had any significant psychological overlay.

In February 1978, Drs. Fleming and Hickman reported that claimant's disappointments for the last several years had brought about significant emotional deterioration since August 1976. It was their opinion that there had been significant increase in depression, alienation and distrust of others. It was their opinion that claimant's increase in psychopathology between 1976 and 1978 was directly and materially related to his feelings that he had not improved physically and to the fact that he had not been able to return to gainful employment. They felt that claimant had lost all hope that he would ever improve. It was their opinion that the prognosis for restoration and rehabilitation of claimant was quite guarded. They concluded the psychopathology was now permanent and must, therefore, be considered in conjunction with physical limitations placed on him by the medical doctors.

Claimant appealed the Fourth Determination Order and, after a hearing, a Referee granted claimant an additional award of compensation equal to 112° for 35% unscheduled low back disability. This gave claimant a total of 75% unscheduled disability for his back injury. Claimant appealed the Referee's order, contending he was permanently and totally disabled. The Board, in October 1978, entered its Order on Review which granted claimant an award of compensation equal to 192° for 60% unscheduled low back disability in lieu of any previous awards of unscheduled disability.

On October 3, 1978, Dr. Fax reported that he had received a telephone report that the carrier wished to send claimant to the Northwest Pain Center. He felt that this might benefit claimant. On October 19, 1978, Dr. Fax reported that he felt there was very little further to add that might be of benefit to claimant other than to refer him to one of the two Portland Pain Centers. Dr. Fax strongly recommended that arrangements be made to have claimant enrolled in one of the Pain Centers.

In February 1979, Dr. Fax reported that the chiropractic treatments were not authorized nor recommended by him and that he was unaware that claimant had been getting chiropractic treatments.

In May 1979, Dr. Don Poulson felt that claimant should undergo a discogram. This was done and the discogram demonstrated degeneration in the disc at L3-4, L4-5 and L5-S1. In May or early June 1979, Dr. Poulson reported that claimant was probably looking for permanent total disability. He did not feel that claimant was permanently and totally disabled. Claimant said he worked about two hours a day around his dairy and that he kept the machinery going and did some welding. Dr. Poulson assumed that claimant was doing more than two hours of work a day in that type of work. In July 1979, Dr. Poulson reported that claimant's condition would not be helped by surgery and that he should go to the Pain Center.

Also, in July 1979, Dr. Moore reported that his treatments were necessary, his charges were reasonable, and that all his charges were for services actually rendered. He indicated he first treated claimant on April 28, 1973 and had continued to treat him up to the present time.

On April 5, 1979, the carrier denied the payment of a bill from Dr. Moore. In April 1979, claimant, by and through his attorney, requested a hearing on the denial of the chiropractic bill. This request was amended to include the de facto denial of claimant's aggravation claim of October 1978, claimant's entitlement to disability benefits and penalties and attorney's fees.

In May 1979, the employer, by and through its carrier, denied that claimant was entitled to the 63 chiropractic treatments from December 4, 1978 through March 23, 1979 since they were not recommended by Dr. Pax. Further, the employer indicated it was willing and able to provide any necessary medical treatment submitted to it on behalf of the claimant as it may be related to and required by his injuries as a result of this injury. Further, the employer indicated it had not received any claim of aggravation within the five-year statutory period and the first Determination Order of October 26, 1973.

Claimant testified he experienced increasing sciatic pain in October 1978 and that without the chiropractic treatments three times a week, the pain got so severe he could not stand it. Claimant stated on September 22, 1978, he called the carrier and requested this claim be reopened.

The Referee ordered that the carrier pay for the chiropractic treatments and set aside its denial of payment for these and awarded a 10% penalty to claimant for unreasonable refusal to pay the chiropractic treatments. Further, the Referee set aside the carrier's de facto denial of claimant's aggravation claim and remanded it to the employer for acceptance and payment of compensation and awarded a 10% penalty on any and all temporary total disability compensation due claimant. The Referee further awarded claimant's attorney a fee.

BOARD ON DE NOVO REVIEW:

The Board, after de novo review, modifies the Referee's order. The Board concurs with the Referee's reversal of the carrier's denial in ordering payment of the chiropractic bill and the assessment of a penalty. The Board would point out the procedures were set forth under the Workers' Compensation Department rules by which a carrier-employer can contest the rendering of certain medical services. In this case, the defendant failed to follow these rules.

The Board would reverse the Referee on his setting aside of the de facto denial of the carrier-employer of claimant's aggravation claim. The Board is unable to find that claimant filed a valid aggravation claim as required under Oregon law. ORS 656.273(1) provides that after the last award or arrangement of compensation, an injured worker is entitled to additional compensation, including medical services for worsened conditions resulting from the original injury. Subsection (3) of that section provides that a physician's report indicating a need for further medical services or additional compensation is a claim for aggravation. The evidence in this case indicates that Dr. Fax's reports in October 1978 do not indicate a worsening of claimant's condition. He does recommend that claimant attend the Pain Clinic because of his subjective complaints of pain. The Board finds that such a report does not constitute a claim for aggravation. Therefore, the Board reverses that portion of the Referee's order that sets aside the de facto denial of claimant's aggravation claim and remanded it to it for acceptance and payment of compensation until it was closed plus a 10% penalty on all temporary total disability compensation for the period of October 26, 1978 through the date of the Referee's order, September 26, 1979. In addition, the Board also would reduce the attorney's fee granted by the Referee from the sum of $1,000 to the sum of $500. This award of attorney's fees is made for claimant's prevailing on the Fund's denial of payment for the chiropractic treatments herein contested. Since the Board found that no aggravation claim was, in fact, filed, it need not decide whether the alleged aggravation claim was timely.

ORDER

The Referee's order, dated September 26, 1979, is modified.

That portion of the Referee's order which set aside the de facto denial by the carrier of claimant's aggravation claim and remanded it to the employer and its carrier for acceptance and payment of all benefits until the claim was closed plus a 10% penalty to be paid to claimant on all temporary total disability compensation, if any, that should have been paid, commencing October 26, 1978 and continuing to the date of the Opinion and Order is reversed. The carrier's de facto denial of claimant's aggravation claim is approved.

That portion of the Referee's order which awarded claimant's counsel a fee of $1,000 is modified and claimant's counsel is hereby awarded a fee of $500 for prevailing on overcoming the denial issued by the carrier for payment of the contested chiropractic treatments.

CLAIM NO. C 416838 May 9, 1980

LYLE AMMON, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On December 20, 1972 claimant, while helping to lift a large cant, developed an abdominal hernia. The claim was initially closed by a Determination Order dated March 16, 1973 which awarded claimant compensation for temporary total disability. Claimant's aggravation rights have expired.

On February 4, 1980, Dr. R. W. McIntyre reported that claimant had a large epigastric hernia. He related this to claimant's original injury. Claimant underwent a herniorrhaphy on February 4, 1980 which was performed by Dr. McIntyre.

The State Accident Insurance Fund on April 11, 1980 advised the Board that it would not oppose an Own Motion Order reopening this claim for the recent surgery and for time loss that claimant was claiming.

The Board, after reviewing the material contained in this claim file, finds that it is sufficient to warrant the reopning of claimant's claim and orders the claim reopened as of the date claimant was hospitalized for the surgery performed by Dr. McIntyre and until his claim is closed pursuant to the provisions of ORS 656.273.

IT IS SO ORDERED.

CLAIM NO. C121906 May 9, 1980

LOUIS WAYNE CROSS, CLAIMANT
Alan Scott, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order

On May 2, 1980, claimant, by and through his attorney, requested the Board to issue an interim order, ordering the State Accident Insurance Fund (Fund) to pay interim temporary total disability compensation benefits while it investigated claimant's request for own motion relief. The Fund, in April, 1980, in response to a letter from the Board, advised the Board that it did not have enough information to make a decision on claimant's request for own motion relief.

There is no provision in the Board's Administrative Rules nor in the case law which would authorize the Board to order the payment of interim compensation as requested by claimant. Therefore, the Board denies claimant's request that the Board order the Fund to pay temporary total disability compensation benefits while it investigates claimant's request for own motion relief.

IT IS SO ORDERED.

CLAIM NO. TC 260596 May 9, 1980

WILLIE R. FORSHEE, CLAIMANT
Evohl Malagon, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

On August 10, 1970 claimant sustained a compensable injury to his back. The claim was initially closed by a Determination Order dated July 13, 1979 which awarded claimant temporary total disability compensation and an award equal to 48 degrees for 15% unscheduled low back disability. Claimant's aggravation rights have expired.

After the initial closure claimant underwent surgery which consisted of a fusion from L4 to the sacrum. The claim was again closed by a Determination Order dated October 22, 1974 which awarded claimant additional temporary total disability compensation and an additional award equal to 48 degrees for 15% unscheduled disability for his low back injury. Subsequent to this closure, two stipulations were entered into which resulted in claimant receiving a total award of compensation equal to 224 degrees for 70% unscheduled disability for his low back injury.

On December 29, 1977, claimant was examined by Dr. N. J. Wilson. Dr. Wilson found that claimant had a pseudoarthrosis of the spinal fusion. He suggested that claimant undergo additional diagnostic procedures and possibly additional surgery.

The Board, under its own motion jurisdiction, in an order dated November 8, 1978, ordered the claim be reopened as of December 29, 1977 and to remain open until closured pursuant to ORS 656.278.

On January 24, 1979 claimant was hospitalized and underwent a myelogram and on January 26, 1979 a lumbar laminectomy and re-fusion at the L4-5 level. Dr. Wilson, on March 25, 1980, reported claimant continued to have low back pain and right sciatica intermittently with any increased activity. He opined that claimant's condition was medically stationary and the claim could be closed. Dr. Wilson rated claimant's disability in the

moderately severe range, and felt that he was able to perform light to sedentary type of activity and should refrain from heavy work and any heavy lifting.

On April 15, 1980, the State Accident Insurance Fund (Fund) requested a determination of claimant's current disability. The Evaluation Division of the Workers' Compensation Department, on April 25, 1980, recommended that claimant be granted additional temporary total disability compensation from January 24, 1979 through March 25, 1980 and no additional award for permanent partial disability.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted temporary total disability compensation from January 24, 1979 through March 25, 1980.

Claimant's attorney is hereby granted, as a reasonable attorney fee, the sum of 25% of the increased compensation granted by this order, not to exceed the sum of $750.

CLAIM NO. C 256782 May 9, 1980

DAVID GORDON, CLAIMANT
J. David Kryger, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On January 2, 1980, claimant, by and through his attorney, requested the Board to exercise its own motion jurisdiction and reopen his claim for his February 28, 1973 injury. This claim had initially been closed by a Determination Order, dated January 17, 1973, which was appealed and resulted in claimant being awarded compensation equal to 80% unscheduled disability for his injury. Claimant's aggravation rights have expired.

In December, 1979, Dr. John Chester reported that claimant said his back pain had increased. No surgery was recommended. Dr. Chester felt there was nothing that could be done to "dramatically" help claimant. He felt, based on claimant's age, training, background and physical condition, he was not suitable for regular work. In January, 1980, Dr. Chester reported any treatment provided would be supportive and palliative.

In March, 1980, the Orthopaedic Consultants reported that claimant had a healed compression fracture at D-10, a solid fusion D9-D11, increased dorsal kyphosis and functional overlay. They found, as unrelated conditions, a possible dorsal aneurysm, arteriosclerotic heart disease, chronic alcoholism and drug dependency. It was their opinion that no curative treatment was recommended and noted that claimant's overall strength had deteriorated. They opined claimant was not physically able to perform in a gainful occupation.

On April 18, 1980, the State Accident Insurance Fund (Fund) indicated it opposed an Own Motion Order reopening this claim. It did not oppose an order granting additional permanent partial disability.

The Board, after reviewing this claim, finds it would be in the best interest of the parties to have claimant's request referred to the Hearings Division. The Referee shall conduct a hearing to determine if claimant's condition has worsened since his last award or arrangement of compensation due to his industrial injury and, if so, the extent of claimant's disability. The Referee shall cause a transcript of the proceedings to be prepared and forwarded to the Board along with the other evidence presented and his recommendation.

IT IS SO ORDERED.

CLAIM NO. B 96609 May 9, 1980

ELMER HICKEY, CLAIMANT
Douglas Green, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On April 17, 1980, claimant, by and through his attorney, requested the Board to convene a hearing under its own motion jurisdiction to reopen his claim. Claimant had injured his back on December 4, 1964 and the claim for this injury was accepted. The claim was initially closed by a Determination Order, dated June 15, 1965, which awarded claimant compensation equal to 40% disability for "loss of function of an arm for unscheduled disability". A stipulation increased this award to 55% loss of an arm for unscheduled disability and 20% loss of function of the right leg. Claimant's aggravation rights have expired.

Claimant contends his condition continued to deteriorate. A myelogram performed in September, 1979 revealed spondylosis defects at the L2-3, L3-4 and L4-5 levels. Dr. Ray Miller indicated claimant had been working as a carpenter.

In October, 1979, Dr. John Raaf indicated claimant had had back pain all of his life and had had two back surgeries. Claimant indicated he had back pain and right leg pain.

The Orthopaedic Consultants in January, 1980, opined that claimant's condition was stationary and there was no need to reopen this claim. They noted that while claimant had progressive degenerative osteoarthritis condition, his present back problems were definitely related to both of his industrial injuries and subsequent treatment. Claimant had injured his back in 1963 and 1964. The Fund provided workers' compensation coverage on the last injury. It was the Orthopaedic Consultant's opinion that claimant could not return to carpentry work and rated the total loss of function due to these two injuries in the range of moderately severe. They did not feel claimant had any increased disability in the right leg.

On February 7, 1980, the Fund advised claimant and his attorney that it would continue to pay for any medical treatment related to his 1964 injury. In April, 1980, it advised the Board that it opposed the Board reopening this claim under its own motion jurisdiction.

The Board, after reviewing the evidence in this claim, finds it would be in the best interests of the parties if it remanded this case to the Hearings Division for a hearing. The issues at the hearing are: (1) whether claimant's condition has worsened since his last award or arrangement of compensation; (2) is this worsening, if any, related to his 1964 injury, and (3) what is the extent of claimant's current disability. Upon the conclusion of the hearing, the Referee shall cause a transcript of the proceedings to be prepared and forwarded to the Board, along with a recommendation on the above issues and the other evidence introduced at the hearing.

IT IS SO ORDERED.

WCB CASE NO. 79-924 May 9, 1980

BILL E. JONES, CLAIMANT
Allen T. Murphy, Jr., Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order On Reconsideration

On May 1, 1980 the State Accident Insurance Fund (Fund) requested the Board to reconsider its order in the above entitled case. The Board found this case had not been fully developed and remanded it to the Referee to develop additional evidence on claimant's vocational potential, his trainability, employability and his vocational aptitude. The Board ordered this case reopened as of the date of the hearing. The Fund contends that the Board's ordering of the claim to be reopened as of the date of the hearing is not clear and questions the Board's authority to do so. It further contends that if the Board wishes to do so, it should be allowed to offset the temporary total disability compensation payments against any future award of permanent partial disability compensation.

The Order on Review states that this claim is to be reopened as of the date of the hearing, August 1, 1979. There has been only one hearing in this case. The Board found that this case had not been fully developed concerning claimant's vocational potential, etc. The Board found that in order to reach a fair and just determination of the issues in this case, more evidence had to be developed on those issues. There is no evidence that claimant is vocationally stationary. Therefore, the Board ordered the Fund to reopen the claim in order to protect the status quo of the parties, pending a final decision. The Board does not feel, in this case, that the Fund is entitled to offset the award of additional temporary total disability compensation against future awards. Such compensation cannot be classified as an "over-payment". Therefore, the Board, with the above explanations, would deny the Fund's request for reconsideration.

ORDER

The Fund's motion for reconsideration is denied.

WCB CASE NO. 78-5867 May 9, 1980

JACQUELINE MADDEN, CLAIMANT
Peter Hansen, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On April 29, 1980 claimant, by and through her attorney, requested the Board to exercise its own motion jurisdiction and grant her vocational rehabilitation benefits. The basis of this request was that claimant had sought Board review of a Referee's order on this point, but had not timely filed a request for review.

The Board does not find the contentions set forth in claimant's petition warrants the exercise of its own motion jurisdiction to review claimant's request for vocational rehabilitation benefits. Therefore, the Board denies claimant's request.

IT IS SO ORDERED.

CLAIM NO. 373-103 May 9, 1980

LARRY MCDONALD, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

On March 26, 1973 claimant sustained a compensable injury to his left leg. This claim was originally closed by a Determination Order dated October 29, 1973 which granted neither temporary total disability nor permanent partial disability compensation. Claimant's aggravation rights have expired.

In December, 1978, Dr. Stephen J. Schachner reported that claimant had a chronic draining osteomyelitis of the left tibia. Dr. Schachner recommended that the claim be reopened until claimant returned to the stationary state. The carrier reopened the claim on January 19, 1979 and paid temporary total disability compensation from January 4, 1979. Claimant returned to work with this employer on January 22, 1979.

Dr. Schachner, in March, 1980, reported that claimant had chronic osteomyelitis currently in a period of remission.

On April 7, 1980, the carrier requested a determination of claimant's current disability. The Evaluation Division of the Workers' Compensation Department on May 2, 1980 recommended that claimant be granted temporary total disability compensation from January 4, 1979 through January 19, 1979, as paid and that he be granted no permanent partial disability.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted compensation for temporary total disability from January 4, 1979 through January 19, 1979, as paid.

CLAIM NO. 941 C 23 55 74 May 9, 1980

DARLENE NAEVE, CLAIMANT
Richard Kingsley, Claimant's Atty.
Lawrence Paulson, Defense Atty.
Own Motion Order

In February, 1972 claimant developed tendonitis in her right arm while using lens grinding equipment. Her claim was accepted and initially closed on September 13, 1973 by a Determination Order. Claimant's aggravation rights have expired.

On March 24, 1980, claimant, by and through her attorney, requested the Board to exercise its own motion jurisdiction and reopen her claim. Later, various medical reports were sent to the Board.

In August, 1978, Dr. George Throop reported that two weeks previously claimant had developed increasing right and left shoulder pain. Electrical studies of the right arm were normal. In July, 1979, Dr. Throop reported that claimant's right shoulder had never improved since her original problem.

In January, 1979, Dr. Michael Baskin indicated claimant's "recent problem . . . was in the same area as her original complaint."

Dr. Richard Cronk, in January, 1980, reported that claimant had a history of 7 1/2 years of difficulty with her right shoulder. When he had last seen claimant in October, 1979 she complained of constant pain in her right arm.

On April 14, 1980, the Board advised the insurance carrier of claimant's request and asked it to respond to it. The carrier, on April 22, 1980, advised the Board that it opposed an Own Motion Order reopening this claim because it felt there was inadequate medical or legal grounds for the Board to act.

The Board, after reviewing the material in this file, finds the evidence is insufficient at this time to warrant a reopening of the claim. Claimant's request for own motion jurisdiction relief is denied.

IT IS SO ORDERED.

CLAIM NO. WC 262399 May 9, 1980

JANET F. O'BRIEN, CLAIMANT
Evohl Malagon, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On August 20, 1970 claimant sustained a compensable injury to her back. This claim was initially closed by a Determination Order dated March 10, 1971, which awarded claimant temporary total disability compensation and an award equal to 32 degrees for 10% unscheduled disability for her low back injury. Claimant's aggravation rights have expired. Subsequent to the original closure, claimant appealed the Determination Order, resulting in additional award of 10% unscheduled disability for her low back injury. Also the claim was reopened on two occasions and stipulations were entered into on two occasions, resulting in claimant receiving a total award of compensation equal to 192 degrees for 60% unscheduled disability for her low back injury and an award of 10% loss of her left leg.

On December 26, 1979, claimant, by and through her attorney, requested the Board to reopen her claim under its own motion jurisdiction. Attached to her request was a report from Dr. N. J. Wilson, dated June 20, 1979 in which he indicated that claimant's limitations were in the moderately severe range. He felt that claimant would have to be confined to light to sedentary work, if she could return to employment. In January, 1980, Dr. Wilson reported that claimant said she was having increasing difficulty with her low back pain and a sensation of giving way in her left foot. Claimant said she had pain and numbness in her left leg which radiated into the foot. Dr. Wilson recommended that this claim be reopened for treatment and consideration of decompression and re-fusion of the L4-5 level.

On February 15, 1980 the Board advised 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 April 15, 1980 advised the Board that it opposed an own motion order reopening the claim because the preponderance of evidence, in their opinion, was against further surgical intervention. The Fund indicated that it would continue to pay all related medical bills. Attached to this letter was a report from the Orthopaedic Consultants. They opined that because claimant had rather unusual symptoms relating to her possible pseudoarthrosis and because of her psychological makeup they suggested caution in recommending a second operative procedure.

The Board, after reviewing all of the evidence, finds that it is not sufficient to reopen claimant's claim. The Board concurs with the Fund that the claimant is entitled to continuing medical care and treatment as related to her original injury as required under ORS 656.245. Therefore, the Board would deny claimant's request for own motion relief.

IT IS SO ORDERED.

WCB CASE NO. UNKNOWN May 9, 1980

ANCEL H. PEDIGO, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

On September 11, 1971, claimant sustained a compensable injury to his back. This claim was initially closed on June 16, 1972 by a Determination Order which granted claimant no award of temporary total disablity or permanent partial disability compensation. Claimant's aggravation rights have expired.

On September 23, 1971, claimant sustained another injury to his back. This claim was closed by a Determination Order dated June 16, 1972 which awarded claimant compensation equal to 16 degrees for 5% unscheduled disability for his low back. These two claims were treated as one by a stipulation entered into by the claimant and the employer.

Claimant continued to have difficulty with his back and the claim was reopened in April, 1975. Claimant had undergone laminectomy in 1971 and in May, 1975 underwent a repeat lumbar laminectomy. Dr. Donald Schroeder, claimant's treating physician, in November, 1975, reported that claimant had made a good recovery from his second laminectomy. He anticipated further permanent residual disability and strongly recommended that claimant restrict himself from working in a job requiring heavy lifting, bending and stooping, and that he continue to perform a light duty type of occupation. He felt claimant's claim was stationary. Claimant returned to work on July 28, 1975.

A Second Determination Order, dated December 31, 1975, awarded claimant additional temporary total disability compensation and an award equal to 32 degrees for 10% unscheduled disability for his back injury in addition to the amounts he had previously been granted.

On April 16, 1979, claimant again suffered an acute strain injury to his low back. The employer voluntarily reopened the claim as of that date.

On April 30, 1979, Dr. Schroeder reported that claimant had a full range of the lumbar spine motion. He indicated that claimant was almost totally asymptomatic at that time. Dr. Schroeder released claimant for work on May 7, 1979.

On April 21, 1980, the employer requested a determination of claimant's current disability. The Evaluation Division of the Workers' Compensation Department on May 2, 1980 recommended that claimant be granted additional temporary total disability compensation from April 16, 1979 through May 6, 1979 and no permanent partial disability compensation in addition to that which had previously been granted.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted additional temporary total disability compensation from April 16, 1979 through May 6, 1979.

CLAIM NO. 375668 May 9, 1980

VIRGINIA M. SCHMIDT, CLAIMANT
D. Keith Swanson, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On March 13, 1980, claimant, by and through her attorney, requested the Board to exercise its own motion jurisdiction and reopen her claim for her May 17, 1972 back injury. This claim was initially closed on January 4, 1973 by a Determination Order. Claimant's aggravation rights have expired. Attached to claimant's request were several medical reports.

In May, 1979, Dr. John White reported that claimant was complaining of left leg pain. He diagnosed a possible herniated lumbar disc at the L4-5 level on the left. However, later in May, Dr. White, after reviewing X-rays, diagnosed lumbar spondylosis with left sided nerve root compression. On June 11, 1979, Dr. White performed a complete laminectomy at L4 and L5 with decompression of the left side nerve roots and cauda equina.

Dr. White, In July, 1979, reported that Dr. Charles May and he believed that claimant's spondylosis was the result of "a back injury sustained in 1972 or 1973".

The Orthopaedic Consultants in November, 1979, reported claimant had undergone a myelogram in 1975 which revealed degenerative changes at the L3-4 level. They felt from that time until the second myelogram, prior to claimant's surgery in June, 1979, there had been marked changes. It was their opinion that these changes from 1975 until 1979 were degenerative changes and were not related to the May 17, 1972 injury sustained by claimant.

In December, 1979 and in April, 1980, the State Accident Insurance Fund indicated it did not feel that claimant's current condition nor her surgery and related treatment in June, 1979 were related to her original industrial injury. Therefore, the Fund opposed the Board's reopening of this claim under its own motion jurisdiction.

The Board, after reviewing the evidence in this claim, finds it is not sufficient to warrant the reopening of the claim. In this claim the Board finds the Orthopaedic Consultant's opinion the more persuasive as to the relationship between claimant's surgery and her need for medical care and other benefits in June, 1979. Therefore, the Board denies claimant's request for own motion relief.

ORDER

Claimant's request for own motion relief is denied.

WCB CASE NO. 79-10, 379 May 13, 1980

RICHARD T. BOATRIGHT, CLAIMANT
Harold W. Adams, Claimant's Atty.
Lang, Klein, Wolf, Smith, Griffith & Hallmark, Employer's Attys.
Order

On May 1, 1980, claimant requested the Board reconsider its Order on Review in this case. The Board, in reversing the Referee's order, found the employer had correctly terminated temporary total disability when claimant was released for work by Dr. Peachey. Claimant contends the Board failed to consider the following:

1. Claimant was not declared medically stationary by anyone, and

2. Dr. Cheatham's testimony made it clear he used the word "pallative" in a manner quite differently than is commonly used in determining the beginning or end of temporary total disability compensation.

The Board, in its order, clearly states it found Dr. Peachey to be more persuasive than Dr. Cheatham. It did read all of the transcript including the testimony of Dr. Cheatham, but found Dr. Peachey to be more persuasive and gave his opinions and statements greater weight. As to claimant's other contentions it is clear from the Board's order it relied on Dr. Peachey's releasing of claimant for work on a particular date in determining the employer had correctly terminated temporary total disability compensation. Therefore, whether or not claimant was medically stationary was not determinative in this case.

The Board does not find its order has to be reconsidered based on claimant's contention. Therefore, it denies claimant's request for reconsideration.

ORDER

Claimant's request for reconsideration is denied.

WCB CASE NO. 78-1369 May 13, 1980
WCB CASE NO. 78-2603

JAMES BUCHANAN, CLAIMANT
Pozzi, Wilson, Atchison, Kahn
& O'Leary, Claimant's Atty.
Cavanaugh & Pearce, Employer's Attys.
SAIF, Legal Services, Defense Atty.
Order On Remand

On May 24, 1979, the Board issued its Order on Review in the above case reversing the Referee's order, dated September 1, 1978, which found claimant had proven an aggravation claim and remanded it to Universal Underwriters, approved the State Accident Insurance Fund's denial of a new injury claim, assessed a penalty on all temporary total disability due from January 27, 1978 to May 22, 1978 and an attorney's fee of $200 and awarded claimant's attorney a fee to be paid by Universal Underwriters. In its order, the Board found that claimant had not proven either an aggravation or a new injury claim and reversed the Referee's order, approved the denial by Universal Underwriters and reversed the award of attorney fee, but affirmed the award of penalties and attorney fee granted by the Referee.

Claimant appealed the Board's order and the Court of Appeals, in an opinion and order entered January 14, 1978, concurring with the Referee's findings which ruled claimant had proven an aggravation of his April 22, 1977 injury.

The Board, in compliance with the judgment and mandate of the Court of Appeals issued April 23, 1980 hereby reverses its Order on Review entered in this case and affirms the Referee's order.

IT IS SO ORDERED.

WCB CASE NO. 78-5346 May 13, 1980

RUSH W. BUTCHER, CLAIMANT
Panner, Johnson, Marceau, Karnopp
& Kennedy, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Order On Remand

On August 22, 1979, the Board issued an Order on Review affirming the Referee's order, dated March 7, 1976, which granted claimant an award of compensation equal to 10° for 72% loss of his left leg. This order was timely appealed by claimant.

The Court of Appeals, on March 17, 1980, in an opinion and order, held claimant was permanently and totally disabled and remanded this case to the Board for entry of an order finding claimant to be permanently and totally disabled.

The Board, in compliance with the judgment and mandate of the Court of Appeals, issued April 30, 1980, hereby modifies its order and hereby enters an order finding claimant is permanently and totally disabled as of March 17, 1980.

ORDER

Claimant is hereby granted an award for permanent total disability compensation effective March 17, 1980.

WCB CASE NO. 79-4144 May 13, 1980

MICHAEL F. CLAY, CLAIMANT
John D. McLeod, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

The State Accident Insurance Fund seeks Board Review of the Referee's order which set aside its denial dated April 13, 1979 and remanded this claim to it for acceptance and payment of compensation as provided by law and granted claimant's attorney a fee of $950.00.

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 November 19, 1979, is affirmed.

CLAIM NO. TODC 5594 May 13, 1980

LAWRENCE S. NELSON, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant developed bursitis in the left heel while picking heavy loads of lumber during early September, 1972. This claim was accepted and initially closed on November 16, 1973 by a Determination Order which granted claimant temporary total disability compensation and compensation equal to 6.75 degrees for 5% loss of the left foot. A Second Determination Order dated October 18, 1974 granted claimant additional temporary total disability compensation and additional compensation equal to 20.25 degrees for 15% loss of his left foot. Claimant's aggravation rights have expired. Claimant subsequently appealed the Second Determination Order which resulted in him being awarded compensation equal to 35% loss of the left foot in lieu of all prior awards.

Dr. J. K. Wakefield, a doctor from Alberta, Canada, reported that on April 10, 1979 he had operated on claimant's left heel. He indicated this operation was necessary because claimant's initial injury had worsened in the last year or two. Dr. Wakefield indicated that the exostotsis of the left heel had only been partially removed and required complete removal in order to alleviate claimant's problem. He felt that claimant would require approximately two months convalescence. The State Accident Insurance Fund (Fund) reopened this claim in June, 1979 and paid temporary total disability compensation commencing on April 10, 1979.

Claimant also received treatment from Dr. Phillip Haley, a Minnesota physician. On September 10, 1979, Dr. Haley reported that claimant had a chronic left achilles tendinitis. He felt if claimant did return to work, it should be on a trial basis He felt claimant would not be able to spend long periods of time standing or walking on uneven ground or carrying heavy loads. He released claimant for work as of September 11, 1979 on a limited duty basis. In February, 1980, Dr. Haley reported that claimant could work as long as he wore a sturdy boot and avoided walking on uneven surfaces, carrying heavy loads or being on his feet for unusual periods of time. He indicated that no specific further treatment was indicated. Dr. Haley, in March, 1973, reported that he felt that claimant had a 50% permanent disability due to his original injury.

On April 4, 1980, the Fund requested a determination of claimant's current disability. The Evaluation Division of the Workers' Compensation Department, on April 30, 1980, recommended claimant be granted additional temporary total disability compensation from April 10, 1979 through September 10, 1979 and temporary partial disability compensation from September 11, 1979 through February 13, 1980 and additional permanent partial disability compensation equal to 24.25 degrees for 15% loss of the foot, making a total award of 50% loss of the left foot.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted additional temporary total disability compensation from April 10, 1979 through September 10, 1979 and temporary partial disability compensation from September 11, 1979 through February 13, 1980.

Claimant is hereby granted an additional award for permanent partial disability compensation equal to 24.25 degrees for 15% loss of the foot, making a total award to him of 50% loss of the left foot.

WCB CASE NO. 78-6493 May 13, 1980

THOMAS A. SPRINGGAY, CLAIMANT
A.C. Roll, Claimant's Atty.
Schwabe, Williamson, Wyatt, Moore & Roberts, Employer's Attys.
Order On Reconsideration

On May 6, 1980, claimant, by and through his attorney, requested the Board reconsider its Order on Review, dated May 2, 1980, which granted claimant an award of compensation equal to 75% unscheduled disability in lieu of the Referee's award of permanent total disability. In his request, claimant set forth several arguments why he was entitled to an award of permanent and total disability.

The Board, after reviewing claimant's request, finds all of his arguments, except the argument about the composition of the current Board, were considered by the Board in its decision. The Board finds its order is correct and does not need to be reconsidered on the basis of claimant's arguments. Therefore, the Board denies claimant's request for reconsideration.

ORDER

Claimant's request for reconsideration of the Board's May 2, 1980 Order on Review is denied.

Interim Orders are not appealable. They are not "final orders" in the sense that they do not determine the rights of the parties so that no further questions can arise before the tribunal hearing the matter. Mendenhall v. SAIF, 16 Or App 136, 517 P2d 706 (1974). Therefore, the Board dismisses the Fund's request for Board review in this case.

IT IS SO ORDERED.

WCB CASE NO. 79-6515 May 13, 1980

JOHN P. SWEARINGEN, CLAIMANT
Jerome F. Bischoff, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order of Dismissal

On April 1, 1980, a Referee entered an Interim Order directing claimant to undergo a myelogram and the State Accident Insurance Fund (Fund) to pay for it and related expenses including special maintenance. The Referee ordered this to resolve some confusion aspects of the medical evidence. No appeal rights were included in this order.

The Fund, on April 25, 1980, requested Board review of the above order.

CLAIM NO. 65-77592 May 15, 1980

JOHN L. THOMPSON, CLAIMANT
D.S. Denning, Claimant's Atty.
Daniel L. Meyers, Employer's Atty.
Disputed Claim Settlement

IT IS HEREBY STIPULATED by and between John L. Thompson, by and through his attorney, D.S. Denning, and Gordon Ford Tractor, through its insurer, Scott Wetzel Services, by and through Daniel L. Meyers of its attorneys, that claimant suffered an industrial injury on or about January 18, 1973. The industrially compensable vehicle accident resulted in injuries to claimant involving his right shoulder, low back, pelvis, right leg, right hip, thoracic spine, and neck. The claim was closed by Determination Order on February 20, 1974. On May 25, 1979, more than five years following the Determination Order, claimant requested claim reopening on an aggravation basis due to allegedly worsened conditions involving osteoarthritis of the lumbar, thoracic, and cervical spine, degenerative disc disease, spondylosis, and spondylolisthesis at L5-S1, for which a lumbar fusion has been proposed. It is the carrier's position that the conditions for which claimant is now seeking compensation are not related to the aforesaid industrial injury. The medical reports of Drs. Gray, Bills and Edward E. Rosenbaum support the carrier's position. Claimant cites the medical opinion of Dr. Gus Tanaka in support of his claim.

Claimant requested the Board to extend Own Motion jurisdiction, and a hearing was scheduled. The parties agree that this claim constitutes a bona fide dispute as to compensability, and the parties wish to resolve their dispute through a disputed claim settlement rather than a hearing.

IT IS HEREBY STIPULATED AND AGREED that this matter may be compromised and settled on a disputed claim basis with the carrier paying and the claimant accepting the sum of $4,500, in consideration for which claimant agrees that all of the aforesaid conditions are not compensable and are not related to the industrial accident of January 18, 1973.

IT IS FURTHER STIPULATED AND AGREED that this is a settlement on a bona fide disputed basis and resolves all claims which have been made or could be made against the employer.

IT IS FURTHER STIPULATED AND AGREED that claimant's attorney shall receive, as a reasonable attorney's fee, the sum equal to 25 percent of the settlement amount, payable out of the settlement and not in addition to it.

SETTLEMENT APPROVED AND REQUEST FOR HEARING IS DISMISSED WITH PREJUDICE this 13th day of May, 1980.

SETTLEMENT APPROVED AND REQUEST FOR HEARING IS DISMISSED WITH PREJUDICE this 15th day of May, 1980.

CLAIM NO. 52-862587 May 16, 1980

HARVEY O. BODDA, CLAIMANT
Gregory L. Decker, Claimant's Atty.
J. Philip Parks, Defense Atty.
Own Motion Determination

On May 3, 1966, the claimant sustained a compensable injury to his right ankle. This claim was initially closed by a Determination Order dated September 30, 1968 which awarded claimant compensation equal to 50% loss of the left foot. Claimant's aggravation rights have expired.

Claimant continued to have difficulty with his foot and in 1977 requested his claim be reopened. This request was remanded to the Referee for a hearing. The Referee found that the claimant had sustained a compensable injury on May 3, 1966 which had required an ankle fusion. Dr. Van Olst performed the ankle fusion surgery.

In December 1977, Dr. Gallagher hospitalized claimant for an elective fusion, performed on December 7, 1977, of the subtalar joints and calcaneal joint of the left foot. Dr. Gallagher related this to the May 3, 1966 ankle injury. Claimant history revealed that he had six surgeries in addition to the tibiofibular fusion performed by Dr. Van Olst and had had several other joints fused. Dr. Gallagher opined that claimant's ankle condition was related to the 1966 injury.

The Referee recommended to the Board that the claimant's claim be reopened for payment of compensation for temporary total disability from December 7, 1977 the date of surgery performed by Dr. Gallagher and until the claim was closed pursuant to ORS 656.278 less any time worked. The Board followed this recommendation and ordered this claim reopened effective December 7, 1977 until closed pursuant to ORS 656.278.

On February 25, 1980, Dr. Gallagher reported claimant's condition was medically stationary. He reported at that time that claimant was not working, but this was because of an off-the-job injury. Dr. Gallagher had released claimant to run a dryer at a lumber mill on November 15, 1979, but indicated that claimant could not work operating the spreader. Claimant returned to work feeding the dryer.

On March 5, 1980, the carrier requested a determination of the claimant's current disability. The Evaluation Division of the Workers' Compensation Department on May 1, 1980 recommended claimant be granted an additional temporary total disability compensation from December 7, 1977 through November 14, 1979 and additional compensation equal to 10% loss of the right foot.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted temporary total disability compensation from December 7, 1977 through November 14, 1979, less time worked, and compensation for 10% loss of the right foot. These awards are in addition to any previous awards for claimant's May 3, 1966 injury.

Claimant's attorney has already been awarded a reasonable attorney fee by the Own Motion Order of December 11, 1978. Claimant's attorney is also entitled to a fee equal to 25% of the increased compensation for permanent partial disability granted by this order, payable out of said compensation as paid, not to exceed $3,000.

WCB CASE NO. 78-10,210 May 16, 1980

ERVIN R. BROWN, CLAIMANT
Herbert A. Putney, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

The State Accident Insurance Fund (hereinafter referred to as the Fund) seeks Board review of the Referee's order which set aside its denial of December 14, 1978 and remanded the claim to it for acceptance and payment of compensation and other benefits and granted claimant's attorney a fee of $1,500.

FACTS

Claimant, a 30-year-old dryer off bearer for Koop Manufacturing Company, alleges that on November 10, 1978 he injured his low back when he slipped while putting wet veneer into a cart. Claimant's foreman indicated on the Form 801 that claimant had told him he had been sick, had coughed a lot over the weekend causing his back muscles to tighten up and he wanted to go home.

On November 17, 1978, Dr. N. J. Wilson reported claimant indicated he had low back pain and left leg pain which "came on during a cold when he did a lot of coughing". The diagnosis was a lumbosacral sprain or strain. Claimant recalled no other injury in the recent past. Dr. Wilson, on November 28, 1978 reported claimant later had remembered an on-the-job injury on November 10, 1978 when while operating the dryer he slipped and twisted his lower back. Claimant felt his present condition was related to this incident.

The Fund, on December 14, 1978, denied this claim. The basis of the denial was that it could not substantiate any on-the-job accident or injury while employed on November 10, 1978 with this employer.

On January 11, 1979, Dr. Nicholas Yamodis reported claimant had a discoloration of the low back. His examination showed an echymosis, greenish-brown discoloration, midline to left of the midline and iliac crest and on the right of the midline. Dr. Yamodis opined the echymosis was due to trauma.

The hospital chart notes, dated November 14, 1978, indicated claimant had had pain in the mid lumbar area for 24 hours. "Bilaterally - noted first while pulling drag at work yesterday". The nurse noted claimant complained of low back pain with some radiation down the left leg, but no known injury. The nurse indicated the pain increased after coughing.

A co-worker of claimant's said he did not remember the date, but the day claimant hurt his back he told the co-worker about it. The co-worker did not see claimant slip or fall, but saw him holding his back.

Claimant testified that he slipped and hit his back against a cart. He said he had been coughing "real bad" over the previous weekend.

Mr. Marvin Hackwell, the day-shift foreman, testified claimant came to him and said he had to go home because he had the flu. He said claimant told him he had been doing a lot of coughing and his back hurt.

Claimant testified the platform he was working on slipped out from under him and he fell back, hitting a cart. An investigator for the Fund testified claimant told him that he was pulling veneer from the dryer and he had grabbed three pieces of veneer and as he twisted his body, lost his footing; falling into a cart.

Mr. Robert Cole, foreman of claimant's shift, testified claimant came to him on November 12, 1978 and claimant told him he had the flu and his back was bothering him. He said claimant denied any job injury and indicated his back pain was related to his coughing.

The Referee found by a narrow preponderance of the evidence, that claimant's injury occurred as he alleged it did. Therefore, the Referee set aside the Fund's denial of this claim and remanded it to the Fund for acceptance of payment of compensation and other benefits and awarded claimant's attorney a fee of $1,500.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, reverses the Referee's order. The Board finds that the preponderance of the evidence does not support the compensability of this claim. There are many inconsistencies in the histories given to the various doctors and to claimant's foreman and others. The Board finds, based on all the evidence, that claimant has failed in establishing by the preponderance of the evidence that he sustained a compensable injury as alleged. Therefore, the Board reverses the Referee's order in its entirety.

ORDER

The Referee's order, dated November 16, 1979, is reversed in its entirety.

The State Accident Insurance Fund's denial, dated December 14, 1978, is restored and approved.

WCB CASE NO. 79-3995 May 16, 1980

LINDA COATES, CLAIMANT
Bischoff, Murray & Strooband,
Claimant's Attys.
Velure, Heysell & Popock, Employer's Attys.
Request for Review by Employer

The employer seeks Board review of the Referee's order which found that claimant sustained a compensable injury to her low back and awarded her compensation equal to 96° for 30% unscheduled disability for her back and right shoulder injury. The employer contends the low back condition is not compensable and that the award of compensation is excessive.

FACTS

Claimant, a 20 year-old off bearer with Forebura Lumber, on October 19, 1978, injured her right shoulder and allegedly her low back when while using a rachet to tie down a tarp on a truck she noticed pain in her right arm and shoulder. Dr. J W. Posner, D.C., diagnosed a cervical dorsal strain.

On December 15, 1978, Dr. Keith Woolpert reported that claimant advised him that she had the onset of pain and discomfort in her neck, shoulder and back in October 1978 while working. Claimant indicated she missed approximately two weeks of work due to these injuries. Dr. Woolpert's diagnosis was dorsal strain related to the industrial injury and pre-existing lumbar injury. He felt claimant should continue with heat treatments and massage for approximately two weeks and then she could return to work.

Dr. Stanley Young, in January 1979, indicated claimant had told him that she had sustained a right thoracic back injury in June 1978 while pulling on the green chain. Claimant, in his assessment, apparently recovered from this and returned to work but again in October 1978 injured herself when while pulling on the tie down straps on a truck, she felt a sharp pain in her right neck and shoulder. Claimant, at that time, was taking medication for her back and also for her headaches. After being given a corset, claimant's back condition improved. Dr. Young reported that claimant had a full range of motion in the cervical spine and lumbosacral spine. He felt that from claimant's history she apparently had suffered a cervical strain. Dr. Young felt that claimant should continue to be treated conservatively and should return to work as soon as possible. He felt there was some element of emotional overlay and that encouragement for return to her previous employment would probably be needed.

Dr. Woolpert, in March 1979, reported that claimant continued to have the same type of problems. He felt that claimant's back condition was unchanged. However, he felt that the claim could be closed since claimant's condition was stationary. Dr. Woolpert felt that claimant had a permanent partial disability in the mild range and that her work restrictions should be that of no lifting over 50 pounds, or repetitive lifting over 25 pounds or repetitive bending.

The claim was initially closed by a Determination Order, dated April 19, 1979, which granted claimant temporary total disability compensation and compensation equal to 32° for 10% unscheduled disability resulting from her neck and right shoulder injury. On April 30, 1979, Dr. Woolpert reported claimant could return to work, but felt she should not perform work requiring crawling, stair or ladder climbing, working in a kneeling position, or requiring lifting over 25 pounds. He felt claimant could not return to her job as an offbearer on the fishtail saw.

At the hearing, claimant testified that she has a high school education and has taken a few courses at a community college. Her prior work experience consisted of a series of jobs in restaurants and retail stores. Claimant described the work with Roseburg Lumber as heavy and requiring a lot of speed. She indicated she ceased performing this job because she is unable to do this work. She was able to perform light work which was not available through this employer. Since her injury, claimant said she has worked in a day care center performing various activities while working with children. She stated that after her original injury she began to experience pain in the lumbar area as well as the cervical and shoulder area. Since this injury claimant said she has not engaged in various sporting activities such as jogging, riding a bicycle, tennis or other vigorous recreational activities she used to enjoy. She said she is able to walk and sometimes able to walk as much as a mile. Her lifting ability, according to claimant, is limited to only 25 pounds. Claimant stated that she performed the job at the day care center until she was replaced by a more experienced person. She indicated she was able to perform the job without any apparent difficulty even though it involved lifting and cleaning up after the children.

The employer denied claimant's low back condition at the time of the hearing.

The Referee found that the low back condition was related to this industrial injury. Further, the Referee found that, based on claimant's current limitations and other relevant factors, that she was precluded from certain portions of the labor market. The Referee noted that claimant's symptoms were entirely subjective and that she was believed to perceive her difficulty as being somewhat more serious than they were. However, he felt that claimant had suffered 30% loss of wage earning capacity as a result of her compensable injury to her cervical, and lumbar spine and right shoulder. Therefore, he granted claimant an award of compensation equal to 96° for 30% unscheduled disability for her back and right shoulder injury in lieu of the previous award and granted claimant's attorney a fee equal to 25% of the increased award.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, reverses the Referee's order. The Board is unable to find any evidence in this case which relates claimant's low back injury to her accepted right shoulder injury. Dr. Young reports that claimant apparently suffered a right thoracic back injury pulling on the greenchain in June 1978 from which she apparently recovered without any residual difficulty. Dr. Woolpert, also, in his original diagnosis, indicated that claimant had a pre-existing lumbar injury. The injury occurring in October 1978 was to the right neck and shoulder area. Therefore, the Board would reverse the Referee's finding that the back condition is related to her accepted injury.

The Board finds that the Referee's award of compensation equal to 96° for 30% unscheduled disability in this case is excessive. The diagnosis is a cervical strain. Claimant has received only conservative treatment for this condition and it has been commented that she apparently feels her condition is worse than it actually is. Dr. Young indicated that there was some element of emotional overlay and that claimant would probably need encouragement to return to her previous employment. Dr. Young found that claimant had a full range of cervical and lumbar spine motion and had normal deep tendon reflexes and motor and sensory examination in both upper and lower extremities was normal. The claimant reported the pain she experiences is made worse by lifting and strenuous use of her upper extremities. She also testified that she was able to perform her job at the day care center without difficulty. She said that this job required her to do lifting, bending and general cleaning which apparently caused her very little pain. Therefore, the Board reverses the Referee's award of increased compensation and would reinstate the award granted in the Determination Order.

ORDER

The order of the Referee, dated November 14, 1979, is reversed in its entirety.

The Determination Order, dated April 19, 1979, which granted claimant an award of compensation of temporary total disability compensation and compensation equal to 32° for 10% unscheduled disability for her neck and right shoulder injury is restored and affirmed.

ROBYN L. GOODRICH, CLAIMANT
Velure, Heysell & Pocock, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant
Cross-appeal by the SAIF

Claimant and the State Accident Insurance Fund (the Fund) seek Board review of the Referee's order which affirmed the Fund's denial of claimant's low back condition and granted claimant compensation equal to 30° for 20% loss use of the right forearm. Claimant contends that she sustained a compensable back injury and that the award of compensation for loss of use of the right forearm is not adequate. The Fund contends that the Referee's affirming of its denial was correct and that the award of compensation for loss of use of the right forearm is excessive.

FACTS

Claimant, a 28-year-old secretary with the Jackson County Surveyor's Office, sustained a compensable injury to her right wrist on June 6, 1978 when she slipped on some stairs and fell. Dr. J. V. Fletcher diagnosed traumatic tendinitis of the right wrist. He did not feel this would cause any permanent impairment. Claimant was treated conservatively.

On July 27, 1978, Dr. R. E. James reported that claimant had continued to complain of wrist problems. He felt that claimant had a mild deQuervain's tenosynovitis. On July 31 he reported that claimant returned complaining of low back pain. She indicated on July 30, 1978 she experienced the rather acute onset of low back pain which had bothered her on and off "for a period of time". She indicated she had a similar episode in 1973 which had responded to conservative treatment. Claimant said that after her incident in July 1978 she experienced right and left lower extremity radicular type pain in the thigh. Claimant indicated her back had been bothering her since her fall when she injured her wrist. Dr. James diagnosed "Probably central herniated nucleus pulposus, probably at the L4-5 level".

In August 1978, Dr. H. Walter Emori reported that claimant complained of pain in her right wrist and back. He felt these two conditions were related to the injury when she slipped and fell.

Also, in August 1978, Dr. James reported that claimant's condition regarding her back had improved. He continued to treat claimant with conservative measures. In September 1978, he reported that claimant continued to improve slowly. She complained of low back pain with prolonged sitting and that she was unable to do any heavy lifting or prolonged and vigorous work. Claimant advised him she was walking approximately a mile to a mile-and-a-half per day and Dr. James advised her to increase this to 4 to 5 miles and return to him if she had any increasing problems.

On October 17, 1978, Dr. James reported that he felt claimant's condition regarding her wrist was medically stationary and that she had probably a 10% physical impairment secondary to mild tendinitis. He felt this would slowly resolve with time and doubted strongly that she was going to have any permanent physical impairment as a result of this injury. He felt that claimant did have a rather severe degenerative disc disease which had responded to conservative treatment, but was not, at that time, medically stationary. He felt claimant's back condition could not be construed as a work-related injury, "at least from this fall if the fall was during her job, although it is quite possible that her work has aggravated the pre-existing condition and it's quite likely from this standpoint it may be partially work related; however, this is very difficult to determine in retrospect".

On October 26, 1978, the Fund denied responsibility for claimant's low back condition.

On November 13, 1978, a Determination Order awarded claimant temporary total disability compensation for her wrist injury.

In February 1979, Dr. James reported that he did not believe either claimant's work or her accident aggravated the acute onset of disc herniation, but he noted there was no way he could honestly say whether either of these conditions may have aggravated her previous back problem. He noted that claimant had a history of previous back difficulty in 1973. Dr. H. Walter Emori concurred with this opinion.

Claimant testified that on July 16, 1978 she took a test to try and qualify to be a firefighter. The event was to carry a 60-pound hose 440 yards in a set amount of time. A fireman who was present at this test testified that claimant failed this test not because she could not carry the hose, but because she missed the set time by 1/10th of a second. Because claimant failed this first test, she could not complete the other seven parts of the test. Claimant further testified on July 30, 1978 she was talking on the phone and when she stood up, she experienced a sudden onset of severe low back pain.

Dr. James was deposed. He said he first saw claimant on June 10, 1978 with a history of a right wrist injury. He did not treat the claimant for low back problems, but an associate of his, Dr. Bolton, had treated claimant in 1973 for this condition. He indicated that the first mention of a low back problem to him occurred on July 31, 1978. He felt this condition was might have been related to the fall if claimant had complained of low back within a few days after the fall. He noted in this case there was some gap in time between the original injury and the claimant's complaints of back pain. Dr. James opined that claimant could have developed a herniated disc without any injury and that her condition could have come on spontaneously. From reviewing the notes of his examination, he noted that claimant had a marked list on July 31 to the left which she had not had before. His notes reflected that in June 1978 claimant had not complained of any back pain and he had not noticed anything clinically wrong with her back.

The Referee, after reviewing all the evidence, affirmed the Fund's denial of claimant's low back condition. Further, the Referee found that claimant was entitled to an award of compensation equal to 30° for 20% loss of use of her right forearm and granted claimant's attorney a fee out of this increased compensation.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, modifies the Referee's order. The Board concurs with the Referee's affirmation of the Fund's denial of claimant's low back condition. The evidence in this case does not establish by a preponderance of the evidence that claimant's low back condition is related to her accepted injury which resulted from her fall on June 6, 1978 while in the course of her employment.

The Board finds that the award of compensation granted by the Referee for loss of use of claimant's right forearm is not supported by the evidence. There is no evidence that claimant has sustained any loss of function of the right forearm. Dr. James opined, in October 1978, that claimant, at that time, had probably 10% physical impairment secondary to mild tendinitis. However, he also reported that this condition would slowly resolve with time and that he strongly doubted that claimant would have any permanent physical impairment from this injury. In subsequent reports and in his deposition, there is no indication that claimant sustained any loss of function to her wrist. The Board concludes the evidence in this case fails to establish that claimant has suffered any loss of function in her right forearm. Therefore, the Board reverses the Referee's award of compensation in this matter and would restore the Determination Order.

ORDER

The Referee's order, dated November 21, 1979, is modified.

That portion of the Referee's order which granted claimant compensation equal to 30° for 20% loss of use of the right forearm as a result of the industrial injury of June 6, 1978 and granted claimant's attorney a fee out of the increased compensation is reversed.

The Determination Order, dated November 13, 1978, is restored and affirmed.

The remainder of the Referee's order is affirmed.

WCB CASE NO. 79-4389 May 16, 1980

LEO D. JEFFERS, CLAIMANT
Malagon & Yates, Claimant's Attys.
J.W. McCracken, Jr., Employer's Atty.
Request for Review by Employer

The employer seeks Board review of the Referee's order which remanded claimant's claim to it for acceptance and payment of compensation to which he is entitled.

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 does not find that Weller v. Union Carbide Corp., 288 Or 27, 602 P2d 259 (1979), is applicable to this case. Dr. Hockey, in his December 1978 report, stated claimant's "condition was not caused entirely by his employment, but certainly was aggravated by the extremely hard work that he does and, of course, in this situation, the disc does degenerate more rapidly and therefore causes secondary osteoarthritis". Claimant's work, according to Dr. Hockey, did increase claimant's symptoms and hastened the disc degeneration. The evidence indicates claimant's work hastened the degeneration of his underlying condition.

ORDER

The order of the Referee, dated November 14, 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 carrier.

WCB CASE NO. 78-2439 May 16, 1980

JOHN PATRICK JUNGWIRTH, CLAIMANT
Olson, Hittle, Gardner & Evans,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

The State Accident Insurance Fund (hereinafter referred to as the Fund) seeks Board review of the Referee's order which remanded claimant's claim for a left knee condition to it; granted claimant 15% permanent partial disability compensation for a right knee condition; approved the denial by it of a left knee condition as related to an injury of February 24, 1977; and granted claimant's attorney a fee.

FACTS

Claimant, a 24-year-old body mechanic with Johnson's Body Shop, on February 24, 1977, contends he turned and tripped and his right "knee came out of joint". Dr. Thomas Sims diagnosed Pellegrini-Stieda's disease. He felt claimant's work made the condition worse.

In March 1977, Dr. Donald Paluska reported claimant had had difficulty in the past with his knee locking, clicking and giving out. After an arthrogram revealed a torn meniscus of the right knee, Dr. Paluska performed a medial meniscectomy surgery. Dr. Paluska opined claimant was medically stationary on June 1, 1977 and felt claimant had permanent partial disablity "due to removal of the medial meniscus for degenerative chondromalacia in the patellofemoral joint".

A Determination Order, dated July 12, 1977, awarded claimant temporary total disability compensation and compensation equal to 7.5° for 5% loss of his right leg.

In February 1978, claimant was enrolled at the Disability Prevention Center. At the time of admission to the Center, claimant complained that his right knee was sore and swelled on occasion and buckled. The knee condition was made worse by squatting, kneeling, walking over a mile, and going up and down stairs. Claimant said he had trouble with both knees since he was in the eighth grade. Claimant has an 11th grade education and had worked in the body and fender repair business for 7-1/2 years. Dr. Lewis Van Osdel felt claimant could perform heavy work, with no lifting over 100 pounds, no repetitive lifting over 50 pounds or repetitive squatting, kneeling, and the climbing of ladders or stairs.

In May 1978, Dr. Paluska reported claimant needed additional surgery to correct problems with subluxation of the patella. He indicated claimant had this condition in both legs and felt the right one should be repaired first. Dr. Paluska related the need for the surgery to the right knee to claimant's February 24, 1977 injury.

On June 26, 1978, Dr. Paluska operated on claimant's right knee; the surgery consisted of a Hauser procedure, release of the lateral extensor mechanics and recentralization of the patellar tendon.

In July 1978, Dr. Paluska requested permission to perform surgery on the left knee. On August 7, 1978, this request was denied by the Fund.

In September 1978, Dr. Paluska reported claimant felt his left knee condition was related to his job. Dr. Paluska felt claimant's job of crawling underneath automobiles aggravated a pre-existing condition.

A Second Determination Order, dated October 5, 1978, awarded claimant additional temporary total disability.

On October 11, 1978 claimant filed an occupational disease claim for his left and right knees, alleging his work and "crawling on concrete under automobiles, etc" was the cause of his condition.

The Orthopaedic Consultants, in November 1978, opined claimant had minimal loss of function of the right knee and none due to his injury. They were unable to substantiate any appreciable aggravation of claimant's left knee condition as a result of his work. They opined claimant's work did not cause the underlying knee disorder.

On December 14, 1978, the Fund denied claimant's claim for an occupational disease for a left and right knee condition due to his work at Johnson's Body Shop.

In May 1979, Dr. Paluska reported the left knee surgery should result in claimant's having a normal knee function. He felt claimant's work aggravated this condition. It was his opinion claimant also had chondromalacia of the patella which would prevent crawling, excessive bending and squatting.

In August 1979, Dr. William Moreno stated he had treated claimant from 1966 to 1972. In 1966 claimant had injured his right knee playing football. The diagnosis was a ruptured medial meniscus for which claimant was treated conservatively. In 1967, claimant twisted his left knee and the diagnosis was a possible ruptured cartilage of the left knee for which he received conservative treatment. Dr. Moreno, in 1968, advised claimant not to play football because of the left knee condition. He reported he saw claimant after that for problems with the right knee.

Dr. Paluska was deposed and stated he felt the injury to the right knee aggravated the condition of the left knee and both knees were aggravated by the type of work claimant was doing. He felt the chondromalacia had been present for some time, but had been aggravated by claimant's work.

Claimant testified he has had trouble with his knees since he was in high school. Other evidence indicates claimant was having trouble with his knees prior to his February 1977 injury. He says he cannot put weight on the right knee and is unable to move around cars as he should. He says the knee continues to swell.

After the first hearing, the Referee concluded claimant had established an occupational disease to the left knee and set aside the Fund's denial, remanded the claim to it for acceptance of payment of compensation and awarded an attorney's fee to claimant's counsel.

After an appeal, the Board remanded this case to the Referee. An Order on Remand was issued and is the matter before the Board. The Referee referred the left knee to the Fund as an occupational disease and ordered it to pay compensation of medical expenses and temporary total disability compensation effective August 14, 1978 until closed, setting aside the Fund's denial of that claim. The Referee approved the Fund's denial of the left knee condition on August 7, 1979 as related to the February 24, 1977 injury. The Referee granted claimant's attorney a fee and reinstated those portions of his first Opinion and Order which were not inconsistent with this order. The Referee affirmed the award of temporary total disability compensation. Further, the Referee granted claimant an award of compensation equal to 22.5° for 15% loss of the right leg.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, modifies the Referee's order. The Board does not find claimant has proved a left knee occupational disease claim. Dr. Paluska opines claimant's work aggravated this condition. However, the other evidence indicates claimant has a history of difficulty with his left knee. The Orthopaedic Consultants found no relationship between claimant's work and any aggravation of his left knee condition. The Board finds the preponderance of the evidence does not prove claimant's work either temporarily or permanently worsened the left knee condition. Likewise, there is no proof claimant's work resulted in a right knee occupational disease. Therefore, the Board would reverse the Referee on these findings and finds claimant failed to prove by the preponderance of the evidence a left knee occupational disease claim.

Regarding the issue of permanent partial disability, the Board finds the Determination Order which granted claimant compensation equal to 7.5° for 5% loss of function of the right leg was correct. Dr. Paluska in May 1979 indicated after surgery claimant should have normal knee function. Claimant has difficulty with swelling, placing weight on the knee and performing certain physical movements, some of which he had before this injury. The Orthopaedic Consultants opined claimant's loss of function in the knee was minimal and related to this injury none. The Board concludes he was correctly compensated by the Determination Order and reverses the Referee's increased award of compensation.

ORDER

The Referee's order, dated December 28, 1979, is modified.

That portion of the Referee's order which set aside the Fund's denial of December 14, 1978 as related the left knee as an occupational disease, order it to accept the claim; pay compensation of medical expenses and temporary total disability compensation commencing August 14, 1978 until the claim was closed and awarded claimant's attorney $800 (amending the previous award from $600 to $800) is reversed. Further, the Referee's awarding of compensation equal to 22.5% for 15% loss of function of the right leg being an increase of 15° for 10% loss function of the right leg and granted claimant's attorney a fee out of this increase is reversed. The Determination Order which awarded claimant compensation equal to 7.5° for 5% loss function of the right leg is restored and affirmed.

The remainder of the Referee's order is affirmed.

CLAIM NO. C 156512 May 16, 1980

BOB CARL LAUBER, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On November 16, 1968, claimant sustained a compensable injury when his left leg was amputated below the knee. This claim was closed and his aggravation rights have expired.

The State Accident Insurance Fund (Fund) advised the Board on May 5, 1980 it had received a report, dated April 15, 1980, from Dr. Robert McKillop who reported claimant had developed a loose fitting prosthesis, resulting in sores on his "stumps". Dr. McKillop recommended claimant stay off his feet. He felt claimant would be ready for casting and fitting of the new prosthesis in two weeks and would miss two weeks of work. The Fund did not oppose an Own Motion Order allowing the additional temporary total disability compensation.

The Board, after reviewing this information, finds it is sufficient to reopen this claim. Therefore, the Board orders this claim reopened effective the date claimant was taken off work for the treatment outlined by Dr. McKillop until closed pursuant to ORS 656.278.

IT IS SO ORDERED.

CLAIM NO. EC 74796 May 16, 1980

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

On May 31, 1967, claimant sustained a compensable injury to his spine and shoulder. This claim was initially closed on August 19, 1968 by a Determination Order which granted claimant compensation equal to 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 continued to have difficulty with his neck and shoulder injuries. On October 4, 1979, the Board entered an Own Motion Order reopening the claim as of the date of Dr. Curtis Hill's report on August 24, 1979 until it was closed. Dr. Hill, in that report, indicated that claimant should have a myelogram and possibly surgery consisting of an anterior decompression and fusion. He related claimant's problems of increasing head and neck pain and aching and burning of the right shoulder to his 1967 industrial injury. Dr. Hill, on September 18, 1979, performed an anterior cervical fusion at the C6 and the C7 level. After the surgery, claimant returned to work on November 19, 1979.

Dr. Hill, on January 15, 1980, reported that claimant's condition was medically stationary. He requested that claimant be evaluated and a disability determination be done by an independent examiner.

On March 13, 1980, Dr. Richard Berg reported that claimant's condition was stationary. It was his opinion that claimant could return to some form of light work, not requiring heavy lifting or straining. He opined that claimant had a moderately severe disability. Dr. Hill, on April 1, 1980, indicated he agreed with Dr. Berg and released claimant for his regular employment.

On April 7, 1980, the State Accident Insurance Fund requested a determination of claimant's current disability. The Evaluation Division of the Workers' Compensation Department, on April 30, 1980, recommended claimant be granted additional temporary total disability compensation from August 24, 1979 through April 1, 1980, less time worked, and an award of compensation equal to 10% unscheduled disability which would be in addition to previous awards.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted temporary total disability compensation from August 24, 1979 through April 1, 1980, less time worked, and compensation for 10% unscheduled disability for his May 31, 1967 industrial injury. These awards are in addition to all previous awards claimant may have been granted for this injury.

WCB CASE NO. 78-9826 May 16, 1980

IRENE V. PENIFOLD, CLAIMANT
Malagon & Yates, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

The State Accident Insurance Fund (the Fund) seeks Board review of the Referee's order which found: (1) claimant had proved a "dry" aggravation claim and remanded the claim to the Fund; (2) ordered it pay a penalty equal to 10% of the temporary total disability due claimant from January 11, 1978 to August 28, 1978 and 10% of various medical bills between February 15, 1979 and August 28, 1979; and (3) awarded claimant's attorney two attorney's fees equalling $1,000. The Fund contends claimant's dermatitis condition she experienced after the claim was closed was not caused by her work.

FACTS

On November 19, 1976, claimant, a 53-year-old nurse's aide, filed a claim for a breaking out on her hands related to soap used in bathing patients. The claim was accepted. Dr. C. B. Koch diagnosed this condition as contact dermatitis. On November 22, 1976 claimant was released for regular work and found medically stationary. Claimant returned to work on that date. Dr. Koch felt claimant would suffer no permanent impairment due to this incident.

A Determination Order, dated March 30, 1977, granted claimant one day of temporary total disability compensation.

In April 1977, Dr. Moyer reported claimant had been having trouble with her hands for the last five months. Claimant had red hands and forearms which he felt represented some degree of dyshidrosis and chemical irritation. Claimant said she had stayed off work for four days and the condition improved, but when she returned to work it worsened. Claimant's condition flared up again in September 1978.

In March 1979, Dr. Troy Rollins, a dermatologist, reported claimant said she had a hand dermatitis while working with another employer which cleared when she quit work. Claimant said she quit working three months previously. Dr Rollins reported she still had problems with her hands. He diagnosed chronic contact dermatitis with a secondary neurodermatitis. Claimant also reacted to wearing rubber gloves. Dr. Rollins noted claimant's dermatitis was "aggravated by contacts in her home" Testing revealed claimant was allergic to Balsam of Peru, Thiuram and Carba mix, Quanternium 15 and rubber gloves. In July 1979, Dr. Rollins indicated that if claimant returned to her regular work she had to be cautious of contacts with any of the above allergens and should wear plastic gloves with cotton liners. Claimant had been wearing rubber gloves at home. Dr. Rollins could not say claimant's work exposure had sensitized her to the various allergens.

Claimant testified she has a sixth grade education with a GED. She has worked in a lumber mill and in motels as a maid. According to claimant, she last worked on November 27, 1978 when she was laid off. Claimant stated she was offered a job as records clerk, which paid less than her regular job and would cause her to lose her senority, so she turned it down.

Mrs. Allen, director of personnel, testified she and claimant mutually agreed claimant should not perform nurse's aide work and claimant was laid off. In December 1978, Mrs. Allen advised claimant there were four job openings all of which paid as much as the nurse's aide job or more. She said claimant told her she wanted to have contact with patients and did not follow up on the other job offers since she wasn't interested.

The Fund admitted it had failed to pay medical bills which came after the claim was first closed and had not accepted or denied the aggravation claim. It was stipulated it had notice of the medical bills and treatment on February 15, 1979 and notice of the aggravation claim on January 11, 1979 and other medical treatment on August 28, 1979.

The Referee found claimant had proved a dry aggravation claim and remanded it to the Fund for payment of temporary total disability from January 11, 1979 to August 28, 1978; ordered a penalty equal to 10% of this temporary total disability compensation and 10% penalty on all unpaid medical bills between February 15, 1979 and August 28, 1979; and awarded claimant's attorney a total fee of $1,000. The Referee also granted claimant an award of compensation equal to 32° for 10% unscheduled disability representing her loss of wage earning capacity in this case.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, reverses the Referee's order. Claimant had stopped working in November 1978. Claimant had not worked for over two months when she was examined in February 1979 by Dr. Rollins. There is no evidence that claimant's condition as diagnosed by Dr. Rollins in February 1979 arose out of and in the course of her employment. Any aggravation of claimant's condition resulted from exposure to allergens away from work. The Board finds claimant failed to establish her aggravation claim by a preponderance of the evidence. Further, claimant is not entitled to any award of temporary total disability compensation or permanent partial disability compensation or the penalties as awarded by the Referee. There is no evidence this condition has resulted in claimant losing any function in her hands or forearms and especially no evidence of any loss of wage earning capacity. This condition only affects her hands and forearms and any disability would have to be confined to the scheduled area.

ORDER

The Referee's order, dated October 24, 1979, is reversed in its entirety.

WCB CASE NO. 78-7623 May 19, 1980

MARIE GILBERT, CLAIMANT
Samuel Hall, Jr., Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order Denying Reconsideration

On May 6, 1980, The State Accident Insurance Fund (Fund) requested the Board reconsider its Order on Review in this case. The Board affirmed the Referee's finding that claimant had failed to proved his aggravation claim and affirmed the denial issued by the Fund. However, the Board also found the denial of the Fund had denied continuing medical care and treatment related to claimant's original injury as authorized under ORS 656.245. Therefore, the Board modified the Referee's order and ordered that claimant was entitled to continuing medical care and treatment provided under ORS 656.245 for permanent residuals resulting from her industrial injury and granted claimant's attorney a fee. The Fund contends claimant's current condition is not the result of her specific injury and under ORS 656.245, it would be responsible to pay only for treatment of conditions which were the result of the industrial injury, not for treatment directed to and necessitated by the underlying disease process.

The Board ordered that the Fund was responsible for continuing medical care and treatment under ORS 656.245 for conditions related to claimant's compensable injury. The Board denies the Fund's motion for reconsideration.

ORDER

The State Accident Insurance Fund's Motion for Reconsideration is denied.

WCB CASE NO. 79-1485 May 20, 1980

PEGGY BROCKMAN, CLAIMANT
Doblie, Bischoff & Murray, Cliamant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

The State Accident Insurance Fund (hereinafter referred to as the Fund) seeks Board review of the Referee's order which set aside its denial of claimant's aggravation claim and ordered it to accept the claim and pay compensation as authorized by law until closed pursuant to ORS 656.268 and awarded claimant's attorney a $700 fee.

FACTS

Claimant, a 43-year-old production worker with Western Pulp Products Company, sustained a compensable injury to her back on February 18, 1977 while reaching to stack some pots coming off the production line. Dr. Eldon Erickson originally diagnosed this injury as an acute lumbar strain. However, on February 28, 1977, claimant went to Dr. Erickson complaining of severe headache and neck pain, sharp intermittent pain in the low back and both legs, along with a steady dull ache and shoulder pain extending to both arms with numbness in the left arm. His diagnosis was a lumbosacral sprain with associated strain, upper thoracic and cervical sprain with associated strain and radiculitis extending to the left lower extremity, and associated cephalgia.

The Orthopaedic Consultants, in October 1977, reported that claimant complained of pain in the low back which extended into both buttocks. They felt claimant's condition was stationary and rated the loss of function of her back as related to this injury as minimal.

In November 1977, claimant attended the Disability Prevention Center and was examined by Dr. Victoria Azavedo. Claimant complained of pain in her low back, headaches and shoulder pain which was intermittent and was increased with movements of both arms, but decreased with sitting, relaxation or a hot shower. Dr. Azavedo diagnosed a mild chonic lumbo-sacral strain, muslce tension or contraction headaches and moderate functional overlay.

The claim was initially closed by a Determination Order, dated February 6, 1978, which awarded claimant temporary total disability compensation. A Stipulation, dated July 13, 1978, granted claimant compensation equal to 48° for 15% unscheduled disability for her low back injury and additional temporary total disability compensation.

In September 1978, Dr. G. Knox, a neurologist, reported that claimant continued to complain of: "Chronic, recurrent, intermittent pain involving the neck and both upper extremities, more problem on the right than the left as well as the relatively recent onset of dizziness and near syncope." Claimant advised Dr. Knox that these symptoms began with her back injury which occurred in February 1977. Claimant told Dr. Knox she had transient episodes of sharp, but occasionally throbbing, pain commencing at the base of the neck and radiating into the right shoulder and right upper extremity, specifically into the right second and third fingers. This pain lasted from a few minutes to as long as an hour. Claimant indicated the pain was very often associated with numbness and tingling involving the right ulnar aspect of the right upper extremity as well as the third and fourth fingers of the right hand. Claimant also complained of weakness in the right upper extremity. Dr. Knox opined that claimant could suffer from a cervical disc syndrome with irritative C6-7 radiculopathy, or traumatic thoracic outlet syndrome, or multiple entrapment ischemic mononeuropathies involving the right upper extremity exacerbated by trauma or a psychophysiological musculoskeletal reaction. Claimant underwent EMG and nerve conduction tests. Dr. Knox opined that the results of these tests indicated that claimant had an apparent mild early mononeuropathy involving the right ulnar nerve at the elbow and/or a probable "superimposed C7, C8, T1 radiculopathy with distal segmental, mild neurogenic atrophy as well as evidence for segmental musculoskeletal irritability".

In January 1979, Dr. Robert Fry, who had been one of the original treating physicians in this case, reported that claimant, in August 1977, had mentioned "some numbness which started at the lateral condyle of the humerus and extended down into the hand, causing numbness of all the fingers".

Dr. Clifford Schostal, in January 1979, reported that after reviewing the records in this case, opined that claimant had neither a right tunnel compression, nor a right thoracic outlet compression. He did feel that the tests performed by Dr. Knox were consistent with the right ulnar neuropatny. However, he did not feel that there was firm proof, electrophysiologically, to implicate the right elbow as the site of the right ulnar nerve lesion. Further, he felt based upon the history given to Dr. Azavedo and the Orthopaedic Consultants, there was no relationship between claimant's injury on February 18, 1977 and the possible right ulnar neuropathy.

On January 16, 1979, claimant, by and through her attorney, requested her claim be reopened. This request was denied on February 7, 1979 by the Fund.

Also, in January 1979, Dr. Knox reported that he had been treating claimant since September 1978 for a chronic, recurrent, intermittent pain involving the neck and both upper extremities. He indicated it was his opinion that claimant experienced more than lumbosacral muscle strains as a result of her industrial injury in 1977. He felt that claimant undoubtedly experienced trauma to the thoracic outlet area with "exacerbation of the carpal tunnel syndrome". Dr. Knox indicated that claimant specifically gave him a history of trauma "incurred on February 18, 1977 with a very definite temporal relationship of her current symptoms to that date". He felt this claim should be reopened for additional care and treatment as well as additional temporary total disability compensation. He stated claimant was unable, at that time, to engage in any gainful employment because of her neurological condition.

In June 1979, Dr. Knox reported he did not concur with Dr. Schostal. He stated that claimant did have objective evidence of a C7-C8-T1 radiculopathy. He noted that Dr. Schostal spent a great deal of time discussing the carpal tunnel syndrome and that there was nothing in his report to suggest that claimant had any involvment in the carpal tunnel at all. He did not concur that patients with a thoracic outlet compression syndrome gave a clearcut history of sensory symptoms and as a matter of fact in his experience, many of these patient's symptoms were very vague and diffuse. He again indicated that claimant did have a very minimal slowing of the ulnar nerve of the elbow, but probably did have a very early ulnar neuropathy at the elbow.

There was no testimony taken at the hearing. The matter was submitted on the record.

The Referee noted there was a conflict between the two doctors. He felt that opinions expressed by Dr. Knox were more persuasive. He noted that he had treated claimant throughout the course of her problem. However, it was noted that neither Dr. Schostal nor Dr. Knox had treated claimant for the original injury. The Referee, after reviewing all the evidence, concluded Dr. Knox's opinion should be given more weight than the opinion of Dr. Schostal. Therefore, the Referee set aside the denial issued by the Fund and remanded the claim to it for acceptance and payment of compensation as authorized by law until closed pursuant to ORS 656.268 and awarded claimant's attorney a fee in the sum of $700.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, affirms the Referee's conclusions. The Board, like the Referee, finds Dr. Knox's opinion to be more persuasive than that of Dr. Schostal. Dr. Knox, even though he was not the original treating physician in this case, has followed the case more closely than Dr. Schostal. He expresses a clear opinion that claimant's current condition is related to her original injury. He indicated that claimant specifically gave him a history of trauma incurred in February 1977 with a very definite and temporal relationship between her current symptoms and that date. Therefore, the Board concurs with the Referee's conclusion and affirms his order.

ORDER

The Referee's order, dated December 12, 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 carrier.

WCB CASE NO. 77-7751 May 20, 1980

WALTER BROWN, CLAIMANT
Pozzi, Wilson, Atchison, Kahn
& O'Leary, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Order On Motion

On May 7, 1980, the Industrial Indemnity, by and through its attorney, requested the Board to dismiss the State Accident Insurance Fund's request for review in the above entitled matter based on the fact that the Board rules and the Workers' Compensation Law [ORS 656.295(5)] give the Board no authority to dismiss cases when the appellant does not file a brief. Although briefs are helpful in the review process they are not necessary for a de novo review of the case. Industrial Indemnity's request should be denied.

ORDER

Industrial Indemnity's motion to dismiss the State Accident Insurance Fund's request for review is hereby denied.

WCB CASE NO. 79-6874 May 20, 1980

BETTY LOUISE CAMPBELL, CLAIMANT
Welch, Bruun & Green, Claimant's Attys.
Schwabe, Williamson, Wyatt, Moore
& Roberts, Employer's Attys.
Request for Review by Employer

The employer seeks Board Review of the Referee's order which remanded this claim to it for payment of temporary total disability compensation from April 24, 1978 until closed pursuant to ORS 656.268; awarded a penalty equal to 25% of this compensation; ordered Dr. Peterson's and related medical bills, as well as transportation expenses be processed and paid and granted claimant's attorney a fee of $750. The employer contends this was in error.

FACTS

Claimant, a 46-year-old onion inspector with this employer, on March 26, 1976 injured her left shoulder. She was originally treated by Oregon doctors. She tried to return to work on April 6, 1979, but couldn't. She then sought treatment from a medical doctor in Walla Walla, Washington. Claimant resides in Milton-Freewater, Oregon.

On April 30, 1979, Dr. Keith Peterson of Seattle, Washington, examined claimant and diagnosed a cervical dorsal strain and nerve root irritation.

This claim was denied on May 24, 1979 by the employer. Claimant appealed the denial and the claim was found to be compensable in an Opinion and Order dated July 17, 1979 and remanded to the employer for acceptance and payment of benefits. The issue of treatment by non-Oregon doctors was not addressed at that hearing.

In August 1979, Dr. Peterson reported claimant had been disabled since April 24, 1979 and was still disabled.

The Workers' Compensation insurance carrier for this employer on August 7, 1979 denied responsibility for payment of Dr. Peterson's bills under ORS 656.245 since he was an out-of-state physician and such care was not authorized by statute.

Dr. Thomas Rosenbaum in August 1979, diagnosed chronic cervical-dorsal strain by history and minimal osteoarthritis changes of the cervical spine. He opined that claimant's condition was medically stationary and that she had mild permanent partial disability to this injury. Dr. Peterson disagreed and did not feel claimant was able to work.

Dr. R. W. Ruggeri of Walla Walla, Washington in late August 1979, reported claimant continued to complain of neck pain. Claimant said she had last worked on April 23, 1979 and then had gone to Dr. Peterson. Dr. Ruggeri felt claimant had a "probable cervical disc involving C8 root on the left". Claimant was referred to Dr. Donald Smith of Walla Walla.

In September 1979, Dr. Smith felt claimant should undergo a myelogram. The myelogram revealed: "E. Anterior and left lateral extradural compression at the C6,7 level. Anterior compression at the C5,6 level".

The carrier reimbursed claimant for her mileage and prescription on August 7, 1978 and had on July 31, 1979 paid claimant compensation for temporary total disabiity from "4-4-78 through 4-18-78" Claimant previously had been paid temporary total disability compensation on April 17, 1979 for the period of March 28, 1979 through April 3, 1979.

Claimant testified she received a booklet from her employer which it had obtained from the Workers' Compensation Department. This booklet advised injured workers that they were free to choose their doctors. No distinction was made between in-state and out-of-state doctors. The factual situation renders this case distinguishable from Rivers v. SAIF, decided by the Court of Appeals on April 28, 1980.

The Referee remanded the claim to the employer-carrier to pay temporary total disability compensation from April 24, 1979 until closed pursuant to ORS 656.268; ordered a penalty equal to 25% of this compensation; ordered payment of Dr. Peterson's bills and related bills; and awarded an attorney fee to claimant's counsel of $750.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, modifies the Referee's order. The Board concurs that the employer-carrier is responsible and has to pay the medical bill for claimant's treatment by Dr. Peterson. Claimant relied upon the booklet provided by the Workers' Compensation Department. However, she was advised on August 23, 1979 that Dr. Peterson's bill was being denied by the carrier. The Board finds claimant's acts up until this time were reasonable and based on her good faith reliance on the information she had. Therefore, the Board would affirm that portion of the Referee's order ordering payment of Dr. Peterson and related medical bills.

The Board does not agree with the Referee's ordering temporary total disability compensation from April 24, 1979 until the claim is closed. Claimant last worked on April 20, 1979. The Board finds that the preponderance of evidence does not establish that claimant is entitled to temporary total disability compensation from April 24, 1979, the date ordered by the Referee. Claimant was hospitalized on September 10, 1979 and underwent a myelogram which revealed defects in the cervical spine. Dr. Smith indicated this condition would require surgical treatment. The carrier refused to reopen this claim. The Board finds claimant is entitled to temporary total disability compensation from September 10, 1979 until the claim is closed pursuant to ORS 656.268. Further, the Board would award penalties equal to 25% of the temporary total disability compensation due from September 10, 1979 to October 15, 1979, the date of the Referee's order as a penalty for the carrier's unreasonable refusal to reopen the claim.

ORDER

The Referee's order dated October 15, 1979 is modified.

That portion of the Referee's order which remanded this claim to the employer-carrier for payment of temporary total disability compensation from April 24, 1979 until closed pursuant to ORS 656.268 and awarded a penalty equal to 25% of the temporary total disability from April 24, 1979 to October 15, 1979 is modified.

This claim is remanded to the employer-carrier for payment of temporary total disability compensation from September 10, 1979 until closed pursuant to ORS 656.268. Further, claimant is granted an amount equal to 25% of the temporary total disability compensation due for the period of September 10, 1979 to October 15, 1979, as and for a penalty due to the carrier's unreasonable refusal to reopen this claim.

The remainder of the Referee's order is affirmed.

CLAIM NO. 79-556 May 20, 1980

MILDRED M. CAUSEY, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

The State Accident Insurance Fund (the Fund) seeks Board review of the Referee's order which granted claimant an award for permanent total disability, effective August 17, 1978, and granted claimant's attorney a fee equal to 25% of the increased compensation, not to exceed $2,000. The Fund contends that this award is not supported by the evidence and is excessive.

FACTS

Claimant, a 47-year-old janitress with the Colony Inn, injured her back on March 29, 1976 while lifting a bucket full of water out of a sink. This injury was originally diagnosed as an acute lumbosacral strain with secondary muscle spasms. Claimant continued to have back problems and underwent a myelogram on April 22, 1976 which revealed multiple defects at both the L3-4 and L4-5 levels. However, Dr. Patrick Golden interpreted the myelogram as being within normal limits.

Claimant continued to have difficulty with her back and on November 18, 1976 Dr. Golden performed a lumbar laminectomy at the L5-S1 and L4-5 levels. The findings on surgery were negative for disc pathology.

In January 1977, Dr. Jack Norman, a psychologist, reported that claimant was experiencing distress and depression with somatic symptoms manifested by emotional conflict which appeared to include elements of secondary gain.

Dr. Golden hospitalized claimant on February 6, 1977 because of continuing back problems and headaches. A repeat myelogram was done which revealed no disc herniation. While hospitalized claimant was examined by Dr. Clifton Baker who felt that claimant had right trocanteric bursitis. Claimant stated her pain was aggravated by standing, sitting or lying on the right side in bed or by lifting. She said that coughing aggravated her back pain, but not her leg pain. In May 1977, Dr. Golden reported that claimant had a positive straight leg test on the right and that both ankle jerks were absent. He planned to re-examine claimant in June at which time he would decide whether she would need additional surgery.

On June 2, 1977, claimant was found to be ineligible for vocational rehabilitation. This was based on the fact that her handicap was too severe. Claimant indicated she was physically unable to return to employment and not interested in any vocational assistance until she was physically well. The vocational counselor noted that claimant had many subjective complaints and had advised him she was unable to do her own housework and could not consider re-employment.

In June 1977, Dr. Bruce Becker reported claimant had stated approximately 30% of her pain was relieved following surgery. However, she reported she continued to have back pain which was increased with heavy lifting activities and present in the morning and in the evening. Claimant had indicated she had not worked since the original injury. The diagnosis was a chronic mechanical low back pain. Claimant was treated with an out-patient program through the rehabilitation medicine section. This was not successful in reducing claimant's level of pain and claimant was referred to the Portland Pain Center.

In November 1977, Dr. J. Stephen Vizzard, a psychologist, associated with the Pain Center, reported that claimant complained of constant headaches which started in the area of her shoulder and worked up to her head, back pain and right leg pain. Claimant indicated these headaches had begun at the time of her first myelogram. She also indicated that her back and right leg hurt although she felt she could live with those difficulties if her headache problem was resolved. The only pain medication she was using at this time was aspirin. Claimant advised Dr. Vizzard that she was able to do her housework, crochet, care for her houseplants, walk and perform yard and garden work. However, claimant felt she occasionally "pushed herself too far". Claimant's work, prior to her children being born, included farm labor and employment as a janitress.

Claimant indicated that she had not worked while her children remained at home. Dr. Vizzard felt that claimant had a mild tendency to overfocus on her physical problems. His diagnosis was chronic tension headaches, mild reactive depression and psychophysical musculoskeletal reaction of moderate degree. Dr. Vizzard felt that if claimant could relieve her pain it was quite probable that she would return to her previous employment. He felt that she would be able to return to a light to medium work. Claimant, in a follow-up evaluation at the Pain Center stated that she continued to have pain at the same level she had prior to her admission to the Center, but that she was able to cope with the pain better by pacing herself. She also indicated that her attitude and outlook improved over that which it had been previously. She had accepted the fact that her problem was not going to be cured and that she had to live with it. A subsequent follow-up psychological examination, Dr. Vizzard reported claimant had adapted to a certain position within her family and felt that it was very likely she was receiving secondary gains as a result of her disability. He felt, considering her age and educational level (claimant has a third grade education), the likelihood of her changing this particular adaptation was quite small. He indicated that claimant continued to view herself as permanently and totally disabled. Dr. Vizzard felt that it appeared that claimant continued to suffer pain largely because of her psychological makeup. However, he said that she did have some organic basis for pain, but the fluctuating level of pain suggested that it served some kind of unconscious purpose in her relationship with other people. He felt that the likelihood of her return to any gainful employment was minimal. Dr. Golden concurred with these reports and recommendations.

A Determination Order, dated August 17, 1978, ordered claimant temporary total disability compensation and compensation equal to 50% unscheduled disability for her low back injury.

In March 1979, Dr. Robert Anderson reported claimant continued to complain of low back and right leg pain. Claimant said this was constant and was increased by bending, stooping, or lifting activities. She indicated she was doing only minimal amounts of housework. According to claimant, she also experienced numbness in her right foot. Dr. Anderson felt that claimant's condition was stationary. He felt that claimant could return to some type of gainful activity that would not require heavy stooping, bending or lifting activities. However, he felt that based on her age, educational experience, and work background, it would be difficult to fit claimant into any type of job. He rated the total loss of function of the lumbosacral spine as related to this injury as mild to moderate.

On April 20, 1979, Dr. Golden requested authorization to reopen the claim and perform another myelogram. This request was based on claimant's persistent complaints of pain in the right lower extremity and her low back. Claimant was hospitalized on June 26, 1979 for additional treatment by Dr. Golden. A myelogram was performed on June 27, 1979 and was normal. In July 1979 Dr. Golden opined that claimant should be referred to the Vocational Rehabilitation Division since she was only partially disabled and should be able to engage in some type of work. He felt that she had chronic pain which was not likely to be resolved with additional treatment.

Claimant testified she currently resides with her husband who is disabled because of open heart surgery. She said she had been a housewife for 20 years prior to her employment with this employer. Prior to her marriage she had worked in cotton fields and performed general custodial work. Claimant said she had to quit school in the third grade to help at home. She has learned to read and write. Claimant stated that she continues to experience chronic pain in the low back which radiated to the right leg and down to the bottom of her foot. Further, she said she has headaches which are chronic. Her pain is aggravated or increased by sitting, walking, lifting, and performing normal household chores. She is unable to vacuum, dust and clean lower parts of windows and has difficulty sleeping and climbing stairs. Since her injury, claimant says she has not sought any work, since she does not know any type of a job she could do. She has not consulted any employment services or filed any job applications or gone to any job interviews since her injury.

The Referee concluded claimant was permanently and totally disabled. His finding was based on her right leg, low back, headaches and psychological problems considered with her age, education and work experience. The Referee found that medical evidence alone established that claimant was totally disabled and that her failure to search for work should not be weighed against her. Therefore, the Referee granted an award of compensation for permanent total disability effective August 17, 1978 and granted claimant's attorney a fee out of the increased compensation not to exceed $2,000.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, modifies the Referee's order. The Board disagrees with the Referee's conclusion that the medical evidence alone establishes that claimant is entitled to permanent total disability. The preponderance of medical evidence in this case indicates that claimant can perform light to medium work. In cases where the medical evidence alone does not establish permanent and total disability or total incapacity, the Board must consider other relevant factors such as claimant's age, training, aptitude, condition of the labor market, adaptability to non-physical labor and emotional condition. Claimant is now 50 years old and has a third grade education. Prior training consists mainly of manual work. The Board finds that considering all the relevant factors in this case that claimant's injury though severe is not such that it can be said that regardless of motivation that claimant is likely not to be able to engage in gainful and suitable employment. The Board notes that claimant has not attempted to return to work and has not attempted to find any work other than reading the help wanted advertisements in the newspaper. The Board finds, based on all the evidence in this case, claimant is not permanently and totally disability. However, the Board finds, based on this evidence, that claimant is entitled to an award of compensation equal to 208° for 65% unscheduled disability for low back injury. This award is in lieu of any previous awards granted.

ORDER

The Referee's order, dated August 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 previous awards of unscheduled disability for this injury. The remainder of the Referee's order is affirmed.

WCB CASE NO. 78-5295 May 20, 1980

ROBERT FRANKLIN, CLIAMANT
George N. Gross, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order Denying Extra-Ordinary Attorney Fees

On May 8, 1980, claimant's attorney requested the Board grant claimant attorney fees for extraordinary services. The sole issue at the hearing was claimant's entitlement to have certain medical care, in the sum of $88.00, paid for by the State Accident Insurance Fund. Claimant's attorney, in his affidavit, states this case involved the taking of a deposition, a hearing, an appeal, and other effort on his part to prevail for his client. The Referee awarded claimant's attorney a fee equal to 25% of the amount of the medical bill the attorney had relieved claimant from paying.

The Board does not find claimant's attorney is entitled to an additional fee in this case. Claimant's attorney prevailed at the Board level, but did not file a brief and so is not entitled to a fee. If claimant's attorney felt he was entitled to a larger fee at the hearing level, he should have requested it from the Referee. Therefore, the Board denies claimant's request for extra-ordinary services.

IT IS SO ORDERED.

WCB CASE NO. 78-5295 May 20, 1980

ROBERT FRANKLIN, CLAIMANT
George N. Gross, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order Denying Request For Reconsideration

On May 13, 1980, the State Accident Insurance Fund (Fund) requested the Board reconsider its Order on Review which affirmed and adopted the Referee's Opinion and Order. The Referee found claimant was entitled to have the Fund pay for treatment rendered by Dr. Schmidt from March 22, 1979 and granted claimant's attorney a fee. The Fund contends there was a failure of medical proof of causation.

The Board finds no reason to reconsider its order and so would deny the Fund's request for reconsideration.

IT IS SO ORDERED.

WCB CASE NO. 78-7623 May 20, 1980

MARIE GILBERT, CLAIMANT
Samuel Hall, Jr., Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Amended Order On Review

On April 21, 1980, the Board entered its Order on Review affirming the Fund's denial of claimant's aggravation claim but ordering that that portion of the denial which denied any continuing medical care and treatment under the provisions of ORS 656.245 be reversed. On April 28, 1980, claimant, by and through her attorney, requested that an attorney's fee be granted for partially prevailing before the Board on review. After looking over this matter, the Board agrees that this should be done.

The following paragraph should be added under the "Order" portion on page four:

"Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $150, payable by the carrier.

The remainder of the Board's order is affirmed.

IT IS SO ORDERED.

WCB CASE NO. 79-2404 May 20, 1980

JOE C. JANSSENS, CLAIMANT
Allen T. Murphy, Claimant's Atty.
Bullard, Korshoj & Smith,
Employer's Attys.
Request for Review by Employer

The employer seeks review by the Board of the Referee's order which set aside its denial and remanded claimant's claim to it for acceptance as a non-disabling compensable injury.

FACTS

Claimant has been employed many years by Portland General Electric and in 1977 worked for a short time at the Trojan Nuclear Plant. Claimant testified starting February 1978 he worked as a line foreman who had a project at Trojan. He ran a crew engaged in repairing and repacking valves. In some work areas there was danger of contamination and he wore all of the protective gear.

Upon arrival at Trojan in February 1978 he had the required body scan test. This test was repeated in May 1978 when the project was completed.

Claimant testified the radiation technician who performed the May 1978 test "looked alarmed". Claimant then, in June, 1978, had another body scan test performed.

Claimant's radiation exposure was to Cesium 134 and 137. Cesium is the most electropositive of all elements. It ignites in air and is a product of fission.

Claimant testified he became concerned and talked to the boss of the radiation technicians about his test results. He was told that "it wouldn't hurt him" and the test results were within the allowable levels set by the Nuclear Regulatory Commission. Claimant testified he wasn't satisfied because this man didn't tell him what "it" (meaning the radiation) would do to his body. Claimant testified he finally sought out doctors to give him "peace of mind" and that is exactly what they did. Claimant further testified there was nothing physically wrong which made him seek out a doctor. He suffered no injury or disease or illness at Trojan and was disabled in no way and lost no time from work. Claimant didn't file his claim for seven months, i.e. until December 29, 1978.

Mr. Walt, the radiation protection supervisor, testified that Cesium 137 exposure comes from eating deer meat and fowl which has been contaminated from radiation fallout. Claimant's internal exposure was 86 milligrams and the government's standard maximum is 3,000 milligrams. The body naturally eliminates Cesium.

Mr. Walt testified that claimant's radiation exposure levels were close to being insignificant. He testified he had two long discussions with claimant and felt that claimant had understood his explanation.

Dr. Gates, a director of nuclear medicine, testified after sitting throughout the entire hearing and examining claimant's personal exposure history and test results. He said that there are two injuries which occur with high levels of radiation, i.e., genetic and sematic. He felt claimant received a miniscule amount of radiation so low as to be insignificant. In fact, claimant's exposure level was 1/15th of that expected after a normal bone scan. Further, he stated that claimant's exposure caused no injury, no disease and no disability. There was no requirment or need for the claimant to seek medical services. Claimant should only have had to consult the radiation safety officer if he had any questions or fear as the radiation safety officer was an expert.

On January 24, 1979, the carrier issued its denial.

The Referee found the increased levels of Cesium 134 and 137 were a result of work exposure which constituted an injury and not an occupational disease. the Referee found claimant seeking medical services was reasonable and, therefore, remanded the claim to the employer for acceptance and an attorney fee of $500.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, reverses the Referee's order. The preponderance of the evidence in this case does not establish claimant suffered any injury, disease, infection, disability or adverse affect at all from his employment in this case. Dr. Gates testified that the medical probabilities were that claimant would not suffer any adverse affects from the very low level of exposure claimant had received. Therefore, the Board reverses the Referee's order in its entirety and approves the employer's denial.

ORDER

The Referee's order, dated November 1, 1979, is reversed in its entirety.

The employer's denial, dated January 24, 1979, is restored and affirmed.

WCB CASE NO. 79-1432 May 20, 1980

ARDIE McKELLIP, CLAIMANT
James D. Vick, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Claimant seeks Board review of the Referee's order which affirmed the Determination Orders and granted claimant no additional relief. Claimant contends her claim was prematurely closed, she is entitled to penalties and attorney's fees, and additional compensation for permanent disability.

FACTS

On October 3, 1978, claimant was working on the belt line pulling corn for Dalgety Foods Cannery when she slipped on the stairs in her work area. She reached behind her and grabbed the rail with her left hand causing her to jerk. Claimant did not fall nor did she bump any part of her body on the stairs or railing. She suffered a strain to the muscles and ligaments in her shoulder and neck area.

On October 4, 1978, Dr. Steven DeShaw commenced chiropractic treatment. He reported on November 6, 1978 that no permanent impairment would result from the injury.

Dr. DeShaw and the State Accident Insurance Fund's (Fund) medical consultant, Dr. Much, differ on the type and frequency of treatment being provided to the claimant by Dr. DeShaw.

Dr. Robert Anderson examined claimant at the Fund's request and found claimant medically stationary on January 11, 1979. The objective evidence upon examination and x-rays showed no impairment of function of the dorsal lumbar spine, cervical spine or left shoulder.

This claim was initially closed by a Determination Order, dated February 8, 1979, which granted claimant temporary total disability compensation.

On February 14, 1979, Dr. DeShaw reported he did agree with Dr. Anderson that claimant was medically stationary. However, he felt the prognosis was quite good that claimant would have no residuals as the result of her injury.

A Second Determination Order, dated March 13, 1979, affirmed the first Determination Order.

Dr. David Sonner, D.C., on April 4, 1978, indicated claimant's condition was not medically stationary. He felt it was premature to determine whether claimant would have any permanent disability.

Dr. Anderson was deposed and reaffirmed his prior report.

The Referee gave Dr. Anderson the greater weight based on his examination on January 11, 1979 and reinforced by the deposition on April 9, 1979. The Referee found that the usual weight given to the opinions of the treating doctors, Dr. DeShaw and Dr. Sonner, was neither justified nor reasonable in the absence of objective evidence. The Referee found there was no premature closure, there was no permanent disability, and there was no justification for further treatment. The Referee found that claimant had failed to establish by a preponderance of the evidence a need for further medical treatment, additional temporary disability, or additional permanent partial disability. The Referee also found, based on the subjective history given by the claimant and her witness in the transcript, claimant's testimony was not credible. The Referee opined that the Evaluation Division had adequately compensated claimant. The Referee failed to specifically address the issues of penalties and attorney's fees. Therefore, the Referee affirmed the Determination Orders.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, affirms the Referee's order. The Board notes the Referee failed to address the issue of penalties and attorney's fees for the Fund's alleged unreasonable refusal to pay medical bills. A dispute arose in this case between Drs. DeShaw and Much. In December 1978, Dr. Much wrote Dr. DeShaw indicating it was felt Dr. DeShaw's billings were high. Dr. DeShaw did not respond to this letter until February 9, 1979, delaying any resolution of the problem. The Board finds that such a situation does not give rise to a finding that the Fund unreasonably refused to pay medical bills. Part of the delay was caused by Dr. DeShaw. The Board finds nothing in this record to justify the awarding of penalties and attorney's fees on this issue.

ORDER

The Referee's order, dated November 30, 1979, is affirmed.

WCB CASE NO. 78-8085 May 20, 1980

GEORGE RATTAY, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Claimant seeks Board review of the Referee's order which found the State Accident Insurance Fund's (Fund) offset in this case was proper and remanded claimant's claim for a broken leg and back injury to it for acceptance and payment of compensation. Claimant contends he is entitled to a penalty based upon the medical expense and temporary total disability compensation incurred as a result of his compensable injury and a penalty for the Fund's unreasonable delay and denial of the payment of compensation.

FACTS

Claimant, in this case, has been granted an award of permanent total disability. On December 14, 1978, claimant filed claims for an alleged injury to his left and right leg and back due to attacks of vertigo, which caused him to lose his balance and sustain injuries to these portions of his body. Claimant's original injury had consisted of a hearing loss.

A Determination Order, dated October 3, 1977, granted claimant compensation for temporary total disability and compensation equal to 74.38° for 38.74% loss of binaural hearing resulting from 38.74% loss of hearing in the left ear and 38.74% loss of hearing in the right ear. A Stipulation, dated February 15, 1978, reopened the claim as of January 25, 1978 and claimant entered a vocational rehabilitation program. Claimant completed this program and a Second Determination Order, dated June 22, 1978, granted claimant an additional award of temporary total disability from January 25, 1978 through April 6, 1978. A Stipulation, dated August 22, 1978, reopened the claim for temporary total disability compensation commencing on April 6, 1978, and continuing until the claim was again closed. Further, the Stipulation provided that claimant was to receive medical care and treatment as necessary for the treatment of his condition, including psychological conditions, arising out of his injury on July 9, 1976 and further provided that permanent partial disability award paid by the Fund since April 6, 1978 would be offset against back temporary total disability payable and this offset was subject to payment on account of any additional permanent partial disability awarded that claimant may receive upon a determination.

In December 1978, Dr. Scott Struckman reported that claimant had Meniere's disease with episodes of "fainting, etc." Claimant advised Dr. Struckman that because of his fainting episodes he had fallen, injuring his knees. Claimant stated that in July 1978 he had fallen on some steps of a sidewalk and struck his left knee which resulted in pain which radiated up his back and down into his foot. Claimant also reported that pain began into his back and radiated into his buttocks and down his left leg to the knee. These two pains developed at the same time. Dr. Struckman felt that claimant was experiencing degenerative changes in his back which was accounting for the majority of his symptoms.

The doctors at the Psychology Center, in February 1979, reported that Dr. Hickman of that Center in September 1978 had reported that claimant on one occasion experienced a seizure-like reaction which Dr. Hickman felt was most likely an acute hysterical reaction. Dr. Hickman noted that claimant, while in his office, because irrational, mumbled, then swore, his dentures fell out of his mouth, his color became pale, he was unable to stand or walk and Dr. Hickman felt claimant was on the verge of violence. Dr. Hickman reported that there was a period of unconsciousness and that this attack lasted for approximately 15 minutes. In February 1979, claimant had another similar episode during a therapy session in which he appeared disoriented and laid down for approximately 10 minutes, during which time he did not

respond to his name. It was reported that claimant continued to have difficulties with "seizures" during the remainder of 1978. He reported at times he was dizzy, disoriented, experienced vertigo, lost his balance, had difficulty hearing and sounds became jumbled. He also reported that he became very fearful and nauseated.

On February 15, 1979, Dr. C. Conrad Carter, at the University of Oregon Health Sciences Center, reported that claimant continued to complain of episodes of confusion and progressive impairment of his hearing, tinnitus and episodes of vertigo. Claimant reported that his episodes of vertigo had been diagnosed as Meniere's disease and that they appeared if he did not take his Valium regularly. Claimant also advised Dr. Carter that increases in tinnitus, anger, disappointment, or being too happy or frustration, would cause him to lose control of his speech, and sometimes caused him to experience dizziness. Claimant reported on occasions he fell and would lose consciousness. Claimant reported in the fall of 1978, while in a crowded restaurant, he had an episode where his legs went out from underneath him and he fell, fracturing his right lower leg. EMG studies and EEG studies were normal.

Dr. A. J. Schleuning, in March 1979, reported that often a patient, after a traumatic accident, would develop symptoms similar to Menieres. He felt that in claimant's case, the vertigo was not caused by his hearing loss.

Also, in March 1979, Dr. Carter reported that he did not feel claimant's episodes of becoming lost, mental confusion, vertigo, or amnesia were actually epileptic seizures. He suspected that they all are emotional in origin. He felt if claimant continued to have "spells" or other symptoms which might cause someone to think that they should reassess the possibility of an organic brain lesion as the cause of these symptoms.

On April 11, 1979, the Fund denied claimant's claim for the leg injury and the back injury. This was based on the fact that it did not feel that the claim for these injuries was related to his hearing loss.

On May 21, 1979, Dr. Edward Colbach, a psychiatrist, reported that after he examined claimant and as claimant was leaving his office, claimant experienced one of his "spells". Dr. Colbach indicated that during this period claimant babbled somewhat incoherently and was fairly unresponsive. This lasted approximately five to ten minutes. Dr. Colbach felt that claimant was suffering from a hysterical personality which meant that the claimant was very suggestible, dramatic, and oversensitive. He noted that claimant did suffer some actual hearing loss and from Meniere's disease with some

intermittent vertigo. Dr. Colbach felt that claimant did suffer from hysterical neurosis manifested by a type of psychological seizures as well as possible complications to his actual organic hearing loss. He felt that hysteria was brought about by the demise of his working abilities partially due to this hearing loss. He felt claimant had a 50%-95% impairment of the whole man. Dr. Colbach opined that claimant's current deteriorated emotional state was closely tied to his industrial injury. He reported that claimant apparently functioned adequately until his hearing reached a point where he could no longer work. Since his termination of work, Dr. Colbach reported that claimant's condition had steadily deteriorated.

A Determination Order, dated June 28, 1979, granted claimant temporary total disability from April 6, 1978 through May 21, 1979 and an award for permanent total disability effective May 22, 1979.

The claims filed in December 1978, for claimant's low back and right leg injury were not denied by the Fund until April 11, 1979. Claimant, however, was receiving temporary total disability compensation at that time, and had accumulated medical bills which were not paid by the Fund. Claimant contended he is entitled to penalties and attorney's fees for the Fund's unreasonable refusal to pay medical bills and for the unreasonable resistance to the payment of compensation. Claimant also contended that he is entitled to penalties and attorney's fees for the Fund's offseting of awards. Claimant had been drawing his permanent partial disability award and on February 15, 1978 the Stipulation reopened his claim for vocational rehabilitation commencing on January 25, 1978. The Fund commenced payment of temporary total disability compensation and did not stop the payment of permanent partial disability compensation. This resulted in claimant being overpaid $1,353.28. The Fund offset this amount in the next Determination Order which granted claimant permanent total disability. The Second Determination Order granted claimant additional temporary total disability compensation from January 25, 1978 through April 6, 1978. The Stipulation, in August 1978, reopened the claim as of April 6, 1978 for treatment of a psychological condition and authorized the offseting of permanent partial disability compensation against the back temporary total disability then due.

The Referee found that the Fund was entitled to the offset for that period of time it paid temporary total disability benefits from May 22, 1979 through July 3, 1979 because it was an adjustment pursuant to statute and further the stipulation of August 1978 provided the case should be reopened for the payment of temporary total disability commencing April 6, 1978 and to continue until the claim was closed. The stipulation specifically provided that the amount the Fund paid as permanent partial disability since April 6, 1978 should be offset against back temporary total disability payments. Therefore, the Referee concluded that the Fund's offset was proper. He found the payment of concurrent benefits was in error by the Fund and was aware of no opinion that any hardship would should fall upon the claimant and his family by reason of the Fund's mistake. Upon being asked to reconsider his order, the Referee found that claimant's back and right leg injury were related to claimant's psychological condition as a result of his compensable injury. Therefore, the Referee set aside the Fund's denial of this condition and remanded it back to it for acceptance and payment of compensation until the claim was closed and granted claimant's attorney a fee.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, modifies the Referee's order. The Board concurs with the findings and conclusions made by the Referee in this case, however, the Board feels that claimant is entitled to an amount equal to 25% of the unpaid medical bills relating to his low back and right lower leg injury as a penalty and an attorney fee for the Fund's unreasonable resistance to the payment of these bills.

ORDER

The Referee's order, dated October 23, 1979, and as amended by the order, dated October 26, 1979, is modified.

Claimant hereby is granted a sum equal to 25% of the medical bills related to his low back and right lower leg injury as and for a penalty for the Fund's unreasonable refusal to pay these bills. 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 $50, payable by the Fund.

WCB CASE NO. 79-3790 May 20, 1980

KEVIN SAHNOW, CLAIMANT
J. Davis Walker, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order On Motion

On May 7, 1980, the claimant, by and through his attorney, requested the Board to dismiss the State Accident Insurance Fund's request for review in the above entitled matter based on the fact that the Fund had failed to file its brief in a timely manner. The Board rules and the Workers' Compensation Law [ORS 656.295(5)] give the Board no authority to dismiss cases when the appellant does not file a brief. Although briefs are helpful in the review process they are not necessary for a de novo review of the case. Claimant's request should be denied.

ORDER

Claimant's motion to dismiss the State Accident Insurance Fund's request for review is hereby denied.

WCB CASE NO. 78-2682 May 20, 1980

NICK SCIARAFFO, CLAIMANT
Ronald E. Rhodes, Claimant's Atty.
Roger Hill, Employer's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Employer

The employer seeks review by the Board of the Referee's order which found Terra Northwest Industries was a non-complying employer within the meaning of the Workers' Compensation law during the period December 21, 1977 through January 25, 1978.

Terra Northwest had appealed a March 1978 Compliance Department's proposed order that it was a non-complying employer during the period December 21, 1977 through January 25, 1978 during which time claimant sustained an on-the-job injury.

FACTS

Mr. Goldbeck formed his own company, Terra Northwest Industries, on July 7, 1977, to build houses. At that time Mr. Goldbeck owned all of the stock and was president. Mr. Hill was secretary and attorney. In late 1977, because of the workload, Mr. Goldbeck needed assistance and incorporated.

Claimant testified, in November 1977, Mr. Goldbeck asked him if he'd like to go to work for him. Mr. Goldbeck was quite excited about his corporation. Claimant was to be paid $1,200 per month and given, in time, a company truck. On December 15, claimant and Mr. Goldbeck drove around job sites for about four hours. On December 16, they went to the Brentwood site and there claimant met Mr. Humpston and Mr. Pitkins. Claimant testified that at the Brentwood site, Mr. Goldbeck discussed generally his plans for the corporation and that he intended, in the future, to make claimant a stockholder, if things worked out, but that claimant was on a 90-day probation. Claimant testified there was no discussion about the corporation not wanting to hire employees nor was he told that he was issued any stock certificates.

Mr. Goldbeck testified that at that time they had a round table discussion with all the corporate officers present except his wife wherein he discussed the philosophy of the company and claimant's potential for coming to work for them. He testified that the corporation wanted no employees and only management and was only hiring corporate officers. The work would all eventually be done by sub-contractors, but in the beginning each would have to pitch in and do the work. He testified that claimant's area of responsibility was siding and framing contracting and that he would supervise and hire the subcontractors. All of the members and corporate officers were expected to do the laboring work in the beginning to learn the business.

On January 24, 1978, claimant was helping to frame a house and severed three fingers of his hand.

Mr. Humpston was a corporate officer in charge of production and also the son-in law of Mr. Goldbeck. He testified that at the Brentwood meeting, Mr. Goldbeck discussed what was expected of them and that they were in a learning phase. He did testify that M . Goldbeck said he didn t want any employees at that time. He tes ified he personally dug ditches, built decks, put up siding an painted. Eventually the job did become supervisory in nature.

Mr. Pitkins was an officer of the company and vice-secretary of production and handled all phases of the production. He testified at the Brentwood meeting capabilities were discussed and all persons present were to hold a management level position in the company. All were to get stock and there was no question that all persons present were to be corporate officers. It was also clear that Mr. Goldbeck wanted no employees. He also testified that they had meetings periodically at Sambo's and claimant was present at these meetings. He felt that there was no doubt in his mind that claimant knew what his position in the company was.

Mr. Hill, the corporation lawyer, testified that Mr. Goldbeck wanted all members to do all phases of construction before they supervised others and had more responsibility. Even though the minutes of the meeting were typed up in his office, they were not held in his office nor was he ever present.

The Referee found that despite Mr. Goldbeck's testimony that all the people were hired as managers and the work that they did was merely to train them for future jobs, he found that claimant was hired to do general labor work, and that claimant took instructions from either Mr. Goldbeck or one of the other men and was paid a salary with general withholdings and did not take part in supervising anyone.

The Referee further found that claimant was not told he was a corporate officer or a stockholder. The Referee concluded that he believed claimant's testimony over that of Mr. Goldbeck and that Mr. Goldbeck was a non-complying employer at the time of claimant's injury on January 24, 1978.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, affirms the Referee's order. The corporate records in this case are not credible. They were prepared by a person not present at the corporate meetings, which were not held in his office. It is clear claimant was serving in a dual purpose as a corporate officer and as a laborer. While performing in his laborer role claimant suffered the injury to his fingers. At that time, claimant was working as an employee of the corporation and, as such, was a subject worker. Terra Northwest Industrial was his employer and was a non-complying employer. Therefore, the Board affirms the Referee's order.

ORDER

The Referee's order, dated August 29, 1979, and as amended on September 14, 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. 78-9598 May 20, 1980

VERN SHAW, CLAIMANT
David Vandenberg, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

The State Accident Insurance Fund (the Fund) seeks Board review of the Referee's order which granted claimant an award of compensation equal to 45° for 30° loss of use of his left leg, such award in lieu of the previous award, and granted claimant's attorney a fee out of the increased compensation. The Fund contends the evidence does not support the increased award of compensation.

FACTS

Claimant, a 23-year old truck tire repairman with Schulze Tire Service sustained various compensable injuries on March 17, 1978 when a tire rim assembly exploded. Claimant's injuries were diagnosed as open fracture of the left knee including a minimal displaced fracture of intercondylar of the left knee, a fracture of the lateral femoral condyle of the left knee, a fractured nose, extensive facial lacerations and a fractured maxilla. These were surgically repaired by Dr. Benjamin F. Balme. Claimant also required treatment from Dr. Kenneth Tuttle and Dr. Lester Brookshire, DMD.

In June 1978, Dr. Balme reported claimant's range of motion of the knee was from approximately 10° to 110°. Later, in June, he reported that x-rays revealed excellent healing of the fractures. He reported that claimant had nearly full range of motion of the knee. In July 1978, Dr. Balme reported that claimant was given a tentative return to work date of August 14, 1978. He indicated that claimant had full range of motion in the knee. Claimant stated he had minimal pain.

On October 24, 1978, Dr. Balme reported that x-rays revealed good healing of the lateral femoral condylar fracture fragment as well as the intercondylar fracture. He opined that claimant's condition was medically stationary and that claimant was in need of no further treatment at that time. However, he did feel that claimant could have further trouble with the knee because of location of the fracture.

The claim was initially closed by a Determination Order, dated November 20, 1978 which awarded claimant temporary total disability compensation and compensation equal to 5% loss of his left leg.

In January 1979, Dr. Tuttle reported that he had last seen claimant in March 1978 at which time claimant's lacerations were well healed. He opined that the lacerations would not result in a permanent damage or impairment.

In February 1979, Dr. William Nygren, DDS, reported that claimant's fractured maxilla had satisfactorily healed and that claimant would need to have certain teeth replaced.

Also, in February 1979, Dr. Balme reported that claimant had returned to work and complained of occasional aching type pain in his knee. He found that claimant had full range of motion in the knee with no effusions and that the ligaments were intact. He indicated there had been good healing of the lateral femoral condylar fracture fragment as well as the intercondylar fracture. He advised claimant that he could possibly develop arthritis because of the location of the fracture. In July 1979, Dr. Balme reported that claimant advised him that the physical therapy he was engaging in increased his knee pain. Claimant also advised him for the last month or so his ankle had been giving way and ached. Dr. Balme diagnosed left ankle pain and feelings of instability of an undetermined etiology.

At the hearing, claimant testified that he returned to his work with this employer on August 14, 1978 and performed his regular job duties until the last week of July 1979 when he quit. Claimant said he had occasional pain in his knee.

He left the employment with this employer because he was offered a job which paid more. Claimant is currently working as a construction laborer installing new power line in rough terrain. Claimant indicates this requires him to climb up and down ladders, in and out of holes, shoveling, lifting, carrying and other heavy labor type activities. Claimant indicated that while shoveling, engaging in prolonged walking or prolonged standing or kneeling on his knee or any other situations which involve stress of the knee, causes knee pain. He said he currently uses aspirin several times a day to relieve his pain. Since his injury claimant testified that he has given up his tennis playing because the short, quick burst of running and quick stops increased his pain. Claimant also said that he has given up dancing. While employed with Schulte Tire Service claimant indicated that he handled tires weighing up to 600 pounds and utilized various equipment. He said his knee has a tendency to hyperextend, but he feels he has lost 60% of the strength in his knee when he is required to repetitively use it. Further, he indicates that the left knee fatigues more rapidly than the right with continued activity. If he bumps his knee or otherwise strikes it, claimant stated that he experiences real pain. Claimant said he has missed no time from work because of his left knee condition since he returned to work in August 1978.

Claimant's supervisor at Schultze Tire Service testified that claimant never complained of any difficulty with his knee and required no help in performing his job. He indicated that claimant's job required him to frequently go to the field to change tires on vehicles. Further, he said that he often saw claimant playing tennis during the summer.

The Referee, after reviewing all the evidence in this case, found that based on the preponderance of the evidence, claimant suffered a 30% loss of use of his left leg. Therefore, he awarded claimant compensation equal to 45° for 30% loss of use of the left leg due to this injury, such award in lieu of the previous award and granted claimant's attorney a fee out of the increased compensation. The Referee further stated that his decision in this case in no way disposed of the issue of whether or not claimant has suffered a compensable injury to his left ankle.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, reverses the Referee's order. In this case, the Board does not find that the medical evidence establishes that claimant sustained any more loss of function than that which he was granted by the Determination Order. Dr. Balme, in February 1979, indicated that the knee had full range of motion with no effusion and that the ligaments were intact. Further, there had been good healing of the lateral femoral condylar fracture fragment as well as the intercondylar fracture. Claimant was complaining of occasional achiness in the knee. Further, after being released to work claimant returned to his regular job and eventually took a job in construction. Claimant has been able to work both these jobs with minimal difficulty. Therefore, the Board finds, based on all the evidence, that the award of compensation granted by the Determination Order correctly reflects claimant's loss of function of his left leg. The Board, therefore, reverses the Referee's award of compensation and restores the award of compensation granted by the Determination Order.

ORDER

The Referee's order, dated November 16, 1979, is reversed in its entirety. The Determination Order, dated November 20, 1978, is restored and affirmed.

CLAIM NO. C 214030 May 20, 1980

WILBUR M. SLATER, CLAIMANT
Galton, Popick & Scott, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On April 25, 1980, claimant, by and through his attorney, requested the Board exercise its own motion jurisdiction to reopen his claim for his October 27, 1969 left knee injury. This claim had been initially closed by a Determination Order, dated May 6, 1971, and had been reopened and closed by subsequent Determination Orders and by an Own Motion Determination. Claimant's aggravation rights have expired. Attached to claimant's request was a report, dated April 14, 1980, from Dr. Robert Manley. In that report, Dr. Manley stated claimant had severe degenerative osteoarthritis, involving his left knee. Dr. Manley performed an arthroscopy on claimant's left knee on February 26, 1980. Dr. Manley stated: "It is medically probable that this man's current problem is directly related to his previous injuries . . . It is my opinion that this man's current treatment is a continuation of his previous injuries and surgeries". He felt "time loss" benefits should commence on February 26, 1980.

The State Accident Insurance Fund (Fund), on May 3, 1980, advised the Board claimant had been hospitalized on April 23, 1980 for a total knee replacement. The Fund indicated it did not oppose an Own Motion Order reopening this claim as of April 23, 1980.

The Board, after reviewing the evidence presented, finds it is sufficient to reopen the claim. Therefore, the Board orders that this claim be reopened effective April 23, 1980 for payment of compensation and other benefits claimant is entitled to under law 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. 76-573 May 23, 1980

ALAN B. BANKS, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Order On Remand

On July 24, 1979, the Board issued an Order on Review in this case which modified the Referee's order, dated November 2, 1978. The Board ordered the following: (1) that the State Accident Insurance Fund (Fund) pay for the medical services rendered to claimant by Dr. Dunn; (2) that claimant's [sic] partial denial, dated May 13, 1976, was to be approved; (3) awarded claimant's attorney a fee for prevailing on the issue of responsibility for payment of the medical bills submitted by Dr. Dunn and the issue of termination of temporary total disability compensation; and (4) awarded claimant compensation equal to 80° for 25% unscheduled disability (in lieu of the 60% unscheduled disability award granted by the Referee) and affirmed the rest of the Referee's order. Claimant timely appealed this order contending he had proven that his headaches and blackout spells denied by the Fund on May 13, 1976 were related to his industrial injury and the award of permanent partial disability was not adequate to compensate him for this loss of wage earning capacity.

On March 10, 1980, the Court of Appeals issued an opinion and order in which the Court held that the Referee had correctly evaluated the evidence and that those symptoms, the headaches and blackout spells, were properly included in arriving at the extent of disability. The Court held that the Board should not have reduced the award and reversed the Board's order. The Board, on May 8, 1980, received the Judgment and Mandate in this case from the Court.

The Board, in compliance with the Judgment and Mandate of the Court of Appeals hereby amends its Order on Review as follows:

The Referee's order, dated November 2, 1978, is affirmed.

IT IS SO ORDERED.

WCB CASE NO. 78-8820 May 23, 1980

KIMBERLY BRADFORD, CLAIMANT
Blackhurst, Hornecker, Hassen
& Brian, Claimant's Attys.
Velure, Heysell & Pocock, Employer's Attys.
Request for Review by Employer

The employer seeks Board review of the Referee's order which set aside its denial of certain medical treatment, granted claimant compensation equal to 80° for 25% unscheduled disability for back injury and granted claimant's attorney a fee. The employer contends its denial is correct and that award of compensation is excessive.

FACTS

Claimant, a 21-year-old automotive cashier with this employer, on February 7, 1977, filed a claim that her work had caused her back to hurt.

Dr. Thomas Bolton, in January 1977, reported claimant had been advised to have her back checked five years previous. X-rays had revealed scoliosis. Dr. Bolton opined claimant had a postural low backache based on her scoliosis and prolonged standing she did at work.

In March 1977, Dr. Jan Votruba, D.C., reported that since January 1977 claimant had had severe exacerbation with occasional remission of back pain. He released claimant for light work on March 7, 1977. He felt claimant would suffer no permanent disability.

Dr. John Gilsdorf, in June 1977, opined claimant had structural low back pain as a result of "work activity superimposed upon longstanding postural problem of idiopathic scoliosis, which is mild and stable". He felt claimant's condition was stationary and she would consistently experience variable degrees of low back pain.

In January 1978, Dr. Gilsdorf reported claimant was working in the pharmacy for this employer. This required sustained standing. Claimant reported she still had days of severe pain, but had not missed any work. Dr. Gilsdorf felt a job change into one that did not require sustained standing or repetitive bending or stooping or significant lifting would be beneficial. He felt claimant's condition was still stationary, but noted with additional conservative treatment it would be less symptomatic.

A Determination Order, dated June 2, 1978, granted claimant temporary total disability compensation.

In September 1978, Dr. Neil Towne, D.C., reported claimant had no prior history of low back pain, even though she had a pre-existing condition of scoliosis. He felt she had returned to her pre-injury status.

The insurance carrier for this employer, on October 12, 1978, denied payment of further medical and time loss benefits based on claimant's receiving treatment related to her scoliosis condition.

In April 1979, Dr. Gilsdorf indicated he felt "that the aggravating circumstances described . . . were aggravating only in that they produced a period of symptoms and did not structurally change underlying anatomic conditions".

Dr. W. A. Carr, in June 1979, reported claimant had no prior history of back pain. Claimant said her work involving heavy lifting and prolonged standing resulted in the gradual development of back pain. The diagnosis was chronic back strain and mild scoliosis. Dr. Carr did not feel claimant's back pain was related to her scoliosis and felt she should avoid any bending and lifting, except when absolutely necessary. In July 1979, Dr. Carr indicated he felt claimant's pain was primarily the result of claimant's chronic strain.

Claimant testified she has a ninth grade education and a GED. She worked in a fast food restaurant, convalescent home, cabinet shop, paper products mill, and in retail sales stores. Claimant said she still is able to engage in various recreational activities but not as frequently as before this incident.

The Referee reversed the carrier's denial, finding that all the medical evidence indicated claimant's continuing symptoms were due to her work activity superimposed on a mild strain. Further, the Referee found claimant had sustained a loss of wage earning capacity and granted her an award of compensation equal to 80° for 25% unscheduled disability for her low back injury. The Referee granted claimant's attorney a fee on overcoming the denial and out of the increased compensation.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, modifies the Referee's order. The Board agrees with the Referee's conclusion setting aside the denial of the carrier and would affirm that portion of the order. However, the Board does not agree with the Referee granting the award of compensation he did. Claimant is now 23 years old, has a GED and experience in many jobs. She cannot return to employment requiring sustained standing, repetitive bending or stooping or significant lifting. The Board finds claimant is entitled to an award of compensation equal to 48° for 15% unscheduled disability representing her loss of wage earning capacity. This is in lieu of all previous awards of unscheduled disability for this incident.

ORDER

The Referee's order, dated November 20, 1979, is modified.

Claimant is hereby granted an award of compensation equal to 48° for 15% unscheduled disability for her low back injury. This is in lieu of all previous awards of unscheduled disability for this incident.

The remainder of the Referee's order is affirmed.

WCB CASE NO. 78-9212 May 23, 1980

DAVID CARTER, CLAIMANT
Merri L. Souther, Claimant's Atty.
E. Kimbark MacColl, Employer's Atty.
Request for Review by Claimant

Claimant seeks Board review of the Referee's order which found claimant had failed to establish a job-connected disability and affirmed the denial.

FACTS

On September 29, 1978, Dr. Richard Schwarz reported claimant said he had awakened about a year previously and the right side of his face did not feel right. This was followed by a headache. Dr. Schwarz indicated four weeks ago claimant reported while driving he said he felt a sharp gravely feeling on the right side of his head. Claimant had a history of skull fracture in 1966 and two episodes of paralysis of the right side of his body related to eating some nose inhaler and over-indulgence in alcohol. Dr. Schwarz felt claimant had a "probable migraine". A CT brain scan was normal.

On October 20, 1978, claimant filed a claim for an injury occurring on September 15, 1978 when a 3/4" nut was dropped by another worker and struck him in the neck. Dr. Donald Sanders diagnosed a cervical spine strain.

The employer-carrier denied this claim on November 20, 1978 on the basis that: (1) the claim was not timely filed and (2) it did not feel claimant's current disability arose out of and in the course and scope of his employment.

Dr. Jerry Becker, in January 1979, felt claimant had a contusion sprain to the cervical spine, with resolving symptoms. He found no evidence of functional overlay. Dr. Becker felt the claim could be closed and claimant had minimal residual impairment from his injury.

In February 1979, Dr. Steven DeShaw, D.C., reported claimant's condition was "stabilized" and felt did not have any permanent impairment from his injury.

Dr. Sanders, in August 1979, reported he had referred claimant to a neurologist in the past. He felt claimant's problem was a variant of migraine headaches. He indicated Dr. Schwarz did not mention any injury in his September 1978 report.

Various medical reports indicate claimant has a history of chest, stomach, and head pain dating back to at least 1975. In September 1977, Dr. Sanders reported claimant had had a headache for five days. A brain scan and EEG were normal. Dr. Sanders diagnosed migraine headaches and peptic disease of the upper intestinal tract.

At the hearing, claimant testified he told his co-workers and shop steward of the September 1, 1978 incident. Claimant said he was told to complete an accident report by the shop steward, but did not. He said he felt neck pain, headaches and dizzy spells. Claimant indicated he continued to work for three weeks, until he was terminated because he was unable to continue to do an adequate job. On December 28, 1978, claimant returned to his regular work. He said he has recurring headaches when tired, but is able to work without particular difficulty.

The Referee found claimant had failed to prove by the preponderance of the evidence he suffered a job-connected disability and affirmed the denial.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, affirms the Referee. Claimant filed his claim for his September 1, 1978 injury on October 20, 1978 even though the shop steward told him to do so on the day of the injury. Claimant did not file his claim within 30 days of his injury. Therefore, his claim is barred because it was not timely filed. The employer-carrier did not make any payment of compensation and did not have knowledge of the injury. Claimant also failed to establish good cause for his failure to give notice of his injury to the employer-carrier within 30 days after his injury. Therefore, the Board finds this claim is barred.

Even if it had been timely filed, the Board finds as the Referee did that claimant failed to establish a medical causal connection between his headaches or cephalgia and any incident arising out of his employment. Therefore, the Board affirms the employer-carrier's denial.

ORDER

The Referee's order, dated September 4, 1979, is affirmed.

WCB CASE NO. 79-4575 May 23, 1980

MAYSELLE B. COLLINS, CLAIMANT
Lekas & Dicey, Claimant's Attys.
Schwabe, Williamson, Wyatt, Moore & Roberts, Employer's Attys.
Request for Review by Claimant

Claimant seeks Board review of the Referee's order which affirmed the denial of her claim.

FACTS

Claimant, a 49-year-old waitress, alleges that on March 30, 1979 she injured herself when while carrying two bowls she slipped and fell. Dr. David Duncan diagnosed multiple contusions and muscle strains of the back and left foot. X-rays did not reveal any fractures.

This claim was denied on April 30, 1979 by the employer. The basis of the denial was that the evidence indicated claimant did not fall as she alleged.

In May 1979, Dr. David Waldram reported claimant told him on March 30, 1979 she had slipped and rolled over on the floor. Claimant said she had persistent upper and lower back pain since then. Claimant had a previous history of neck, upper back and low back pain. Dr. Waldram diagnosed a suspected acute spine strain with underlying arthritic changes. Claimant was released for "all" work as of May 15, 1979 by Dr. Waldram.

Claimant testified that at the time of her injury she was in the process of filling the salad bar and had two crocks of radishes in her hands. She said she slipped on some lettuce, fell forward and did a complete sommersault, injuring her left toe, neck and shoulders. After this incident claimant left on a planned fishing trip and spent 3-4 days at the coast. She did not fish because of her pain. On April 5, 1979, claimant said she returned to this employer and asked for an accident report. The employer refused to give her one and claimant was terminated.

The manager testified claimant was supposed to work on April 4, 1979, did not, and was terminated.

The assistant manager testified that at the time of the accident he was in his office and heard a commotion. He went out of his office and saw claimant and another waitress picking up radishes. He said claimant told him she had turned a sommersault, but was not hurt.

The other waitress testified she saw the accident. She said she was walking past the salad bar heading towards claimant head on. She saw claimant slip, take a couple of running steps forward and catch herself on a divider. She said claimant did not fall or do a sommersault.

Mr. Dawes, a friend of claimant's who went on the fishing trip with her, testified claimant complained of pain in her neck and shoulders.

The Referee found claimant had an accident on March 30, 1979 which did not result in a compensable injury. Therefore, the Referee affirmed the denial. The Referee found claimant was not credible.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, affirms the Referee's order. The Board finds that claimant did slip, but did not fall or do a sommersault resulting in any injury to her. Therefore, the Board affirms the Referee's order.

ORDER

The Referee's order, dated December 5, 1979, is affirmed.

CLAIM NO. C604-14077 REG May 23, 1980

JOSEPH DAVIS, CLAIMANT
Welch, Bruun & Green, Claimant's Attys.
Souther, Spaulding, Kinsey, Williamson & Schwabe, Employer's Attys.
Own Motion Order

Claimant has suffered the following injuries on: September 25, 1972, a strained left hand-elbow, on August 8, 1974, a left arm and elbow injury; on January 21, 1975 a right testicle injury; and on January 24, 1975 a back strain. The 1972 injury was closed by a Determination Order, dated February 12, 1973, which granted claimant Temporary Total Disability compensation. A stipulation, in February 1976, granted claimant an award of compensation equal to 42% of the left arm.

The employer-carrier denied responsibilities for the right testicle problem and degeneration of claimant's spondylosis condition and peripheral neuropathy. It accepted the back injury. On October 13, 1976, the parties stipulated claimant was permanently and totally disabled, but disagreed as to whether the permanent and total disability was due to the industrial injury of January 24, 1975 or other non-compensable impairment. It was agreed by the parties claimant would be awarded compensation equal to 64 for 20% unscheduled disability for his low back injury and claimant agreed to accept $17,020 in settlement of the disputed right testicle claim and disputed portions of the back claim.

Another stipulation, in September 1978, settled a dispute over various medical care and treatment claimant had received.

On March 6, 1979, a stipulation provided claim No. C 604-14077, the hand strain of September 1972 was reopened for additional medical care and treatment and that the request for hearing was dismissed.

Claimant, by and through his attorney, on April 30, 1980, requested the Board exercise its own motion jurisdiciton and reopen his claim for the September 25, 1972, left hand injury. In March 1980, Dr. Richard Zimmerman reported claimant's left elbow was worse since his recent treatment, which was an arthroplasty of the left elbow. Dr. Zimmerman felt claimant was totally disabled for any type of work because of his arm.

The employer-carrier, contends claimant's request is barred based on the March 6, 1979, stipulation, which reopened the claim for medical care and treatment under ORS 656.245. Claimant's request

for hearing, settled by that stipulation, included the issues of additional Temporary Total Disability and Permanent Partial Disability but was dismissed by the stipulation. The employer-carrier noted it was stipulated claimant has been Permanently and Totally Disabled since October 13, 1976; it admitted it was responsible for payment of continuing medical care and treatment under ORS 656.245.

The Board, after reviewing the material in this case, finds it would be in the best interest of the parties if this case was referred for a hearing to determine the following issues: 1) Has claimant's left hand-elbow condition worsened since the last award or arrangement of compensation; and 2) If it has, did claimant waive his right to request additional Temporary Total Disability and Permanent Partial Disability for that condition by entering into the March 6, 1979 stipulation and order of dismissal. The Referee, after conducting a hearing, shall cause a transcript of the proceedings to be prepared and forwarded to the Board together with other evidence introduced at the hearing and a recommendation on the issues to be resolved.

IT IS SO ORDERED.

WCB CASE NO. 79-1497 May 23, 1980

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

Claimant seeks Board review of the Referee's order which affirmed the State Accident Insurance Fund's (Fund) denial of claimant's certain dental bills and responsibility for a "TMJ" syndrome.

FACTS

Claimant, a 38-year-old psychiatric caseworker with Multnomah County Juvenile Court, on January 24, 1978, was involved in a motor vehicle accident. Her injuries were diagnosed as an acute musculoligamentous sprain to the cervical dorsal spine. Claimant complained she had a "knot in her back and neck". On February 1, 1978, claimant returned to part-time work.

In May 1978, Dr. David Noall reported claimant said she occasionally experienced dizziness and pain in her neck. He felt claimant was medically stationary as of May 8, 1978.

Dr. Don Walker, N.D., in June 1978, indicated claimant continued to complain of pain in the back of her neck. He diagnosed an acute traumatic cervical myofascitis associated with cephalgia and bilateral paresthesia.

A Determination Order, dated October 26, 1978, awarded claimant temporary total disability compensation and temporary partial disability compensation.

In October 1978, Dr. Gary McGaughey, D.M.D., reported claimant had suffered facial trauma in her motor vehicle accident. He indicated "her occlusion was disrupted causing teeth to not function properly, resulting in TMJ syndrome". He said this was not an uncommon occurrence following trauma to the mouth.

Dr. Curtis Boulet, in November 1978, reported prior to claimant's accident her crown work and bridge work and tempromandibular joint alignment were normal.

On November 22, 1978, Dr. McGaughey sent the Fund a bill for $5,157 for treatment provided claimant as the result of her motor vehicle accident. The Fund, on February 14, 1979, denied responsibility for any dental treatment based on its investigation which did not reveal any facial trauma.

In June 1979, Dr. M. P. DeStefanis, D.D.M., after examining claimant, reported she had complained of a buzzing in her ears after the accident. He could not say whether or not the "rehabilitation" dental work should have been done. In order to do so, Dr. Stefanis indicated he mounted models of claimant's mouth before and after anything had been done would have to be examined.

Also, in June 1979, Dr. McGaughey opined claimant's TMJ dysfunction was caused during her motor vehicle accident. He felt the mechanics of this injury were probably an anterior displaced disc causing the teeth to improperly occlude.

Dr. McGaughey was deposed. He stated TMJ stood for tempromandibular joint, the joint which connects the lower jaw. Symptoms of TMJ were pain in the head, teeth, shoulder, ear, and just an uncomfortable awareness of the teeth. He said it was sometimes one to two months before people with TMJ syndromes become aware of them.

Claimant testified that at the time of her injury she was turned towards the rear and when struck lurched forward and back. She said she felt a "snap, crackle and pop" in the back of her head and a sharp pain. Later in the day, she said she experienced a headache and ringing in her ears. Claimant said she does not remember hitting anything with her head.

The Referee found the medical evidence was not sufficient to establish medical causation between claimant's injury and the TMJ syndrome. The Referee concluded claimant had failed to carry her burden of proof. Therefore, the Referee affirmed the Fund's denial.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, reverses the Referee's order. The actual mechanics of claimant's injuries related to her motor vehicle accident are not clear. However, Dr. McGaughey's opinion relating claimant's TMJ syndrome to this accident is uncontroverted. The two other dentists do not express any opinion that the TMJ syndrome may or may not be related to her motor vehicle accident. Dr. Boulet reported prior to this incident claimant's tempromandibular joint alignment was normal. Dr. McGaughey, after the accident, found it required treatment to correct the TMJ syndrome. Based on this evidence, the Board finds claimant has proven by a preponderance of the evidence that her TMJ syndrome is causally related to the motor vehicle accident. Therefore, the Board reverses the Referee's order and the Fund's denial of this condition and remans it to the Fund for acceptance and payment of compensation and other benefits.

ORDER

The Referee's order, dated October 11, 1979, is reversed.

The State Accident Insurance Fund's denial, dated February 14, 1979, is set aside and the claim for the TMJ syndrome and related expenses is remanded to it for acceptance and payment of compensation and other benefits provided under the Oregon Workers' Compensation law 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 $750, payable by the Fund.

IRENIO V. GOMEZ, CLAIMANT
Harold W. Adams, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Claimant seeks Board review of the Referee's order which found he was not permanently and totally disabled, however, granted claimant an award of additional compensation equal to 112° for 35% unscheduled disability for his back injury. Claimant contends he is permanently and totally disabled.

FACTS

Claimant, a 32-year-old maintenance man with Woodpecker Trucking of Ontario, sustained an injury to his back on June 11, 1973 when he slipped on some oil. Claimant had injured his back in a previous motor vehicle accident in 1968. The 1973 injury was diagnosed originally as a severe lumbosacral strain. Claimant underwent a myelogram and was released for regular work in August 1973. The claim was initially closed by a Determination Order, dated October 12, 1973, which granted claimant temporary total disability compensation.

Claimant continued to have difficulty with his back and was treated conservatively. In October 1975, Dr. W. Gnuechtel reported that claimant had undergone a myelogram in September 1975 which had revealed a defect at the L4-L5 level. On November 14, 1975, claimant underwent a hemilaminectomy and discectomy at the L4-5 level on the left side. This claim was reopened.

In May 1976, Dr. Gnuechtel reported that claimant could return to a medium type of work. He reported the recurrence of low back pain would be expected if claimant continued in a line of work which required heavy lifting from a stooped position or heavy lifting above the waistline and head. He suggested claimant undergo vocational retraining to enable him to perform work not requiring any of these movements.

A Second Determination Order, dated July 14, 1976, awarded claimant additional temporary total disability compensation and compensation equal to 32° for 10% unscheduled disability for his low back injury.

In August 1976, claimant returned to Dr. Gnuechtel complaining of severe back pain. Dr. Gnuechtel performed another myelogram which was interpreted as being insufficient so as to require additional surgery.

In March 1977, claimant began treating with Dr. Howard Johnson. Dr. Johnson treated claimant with a plastic jacket which immobilized the back area. In May 1977, Dr. Johnson opined claimant should have additional surgery to the back and consideration should be given to a spinal fusion. The claim was again reopened.

On June 20, 1977, claimant underwent another myelogram which revealed "poor root sleeve filling at L5-S1 on the left of marginal significance in the presence of previous surgery. No other lesion seen". Claimant was hospitalized with a diagnosis of nerve root impingement, mechanical instability of the back secondary to degenerative disc disease. On June 21, 1977, Dr. Johnson performed a lumbar laminectomy and lumbar fusion.

In March 1978, Dr. Johnson reported that when claimant was active throughout the week he did very well. He reported that claimant was essentially pain-free at that time except for occasional aching. He concluded that claimant's fusion was solid.

Claimant attended the William Callahan Center in June 1978. While at the Center, he was evaluated and tested by various medical doctors. Upon his discharge from the Center, Dr. Lewis Van Osdel, medical examiner, opined that claimant's vocational impairment was moderate due to physical disability and at least moderate due to intrinsic psychological disability. He suggested that claimant had the capacity for moderate work. Dr. Van Osdel felt that claimant should do no lifting over 50 pounds or repetitive lifting over 25 pounds or repetitive bending, stooping, or twisting. Claimant stated that he had worked basically as a field laborer for approximately 20 years, performed work as a janitor and also had worked on an assembly line. While at the Callahan Center, Dr. Louis Loeb, a psychologist, reported that claimant was unable to do even the reading samples and could not apparently comprehend the statements of the tape recorded Minnesota Multiplasic Personality Inventory. It was his impression that claimant was rather content with his lot in life and with his current level of income and he should be regarded as psychologically type 3 and an unlikely candidate for return to gainful employment.

Claimant was referred for re-employment assistance in September 1978 by the Field Services Division. He was referred to Comprehensive Rehabilitation Services, Inc.

In October 1978, Dr. Johnson reported that the examination and EMG studies were normal and showed a solid fusion. He felt that claimant needed retraining or re-education into lighter work.

A Third Determination Order, dated October 30, 1978, awarded claimant additional temporary total disability compensation and compensation equal to 10% unscheduled disability for his back injury. This Determination Order was re-evaluated and an Order on Reconsideration, dated January 18, 1979, awarded claimant additional compensation resulting in claimant receiving a total award of compensation equal to 96° for 30% unscheduled disability for his back injury and 7.5° for 5% loss of the left leg.

In November 1978, Dr. F. A. Short reported that claimant complained of steady pain in the low back, which was not severe most of the time. Claimant indicated that sitting in his car sometimes aggravated his pain as did lifting or driving. Dr. Short opined that claimant's condition was stationary and that treatment should be discontinued. He estimated the disability claimant had was in the 35-40% range. Dr. Short felt that vocational assistance was needed because claimant had a problem of lack of education and poor motivation.

In an interview with the rehabilitation coordinator, claimant stated that he had a third grade education. He also indicated he had worked as a molder and also as a maintenance supervisor for short periods of time in addition to working in the fields. He indicated that he had continuing back pain. Testing revealed that claimant understood and could speak English, however, he could not read or write English. Likewise, claimant spoke Spanish but could not read or write it.

At the hearing, claimant testified that he was placed in a light duty job at a community college doing lawn maintenance work. However, he said he had to terminate this employment after one-and-a-half days because the physical activity was too strenuous for him. Claimant further testified that he had attempted to work in the spring of 1979 for his uncle performing field work. He indicated this originally was to be a supervisory job, but claimant alleged that he could not accomplish the job, as it required too much walking, and he terminated after one week because of his back pain.

The Referee found that claimant had not proven he was permanently and totally disabled. He found that all the examining physicians felt that claimant was capable of light work activities. The Referee noted that claimant had made a good recovery from his two back surgeries although he had a serious and permanent restriction in the use of his back. The Referee felt that claimant had resisted rehabilitation efforts and had not given them an opportunity to find him a job. Nevertheless, the Referee concluded that claimant had a severe loss of earning capacity inasmuch as he was foreclosed from any and all moderately heavy work activities, which included field work. Therefore, the Referee awarded claimant additional compensation equal to 112° for 35% unscheduled disability for his low back injury in addition to his previous awards.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, reverses the Referee's order. The Board has been given de novo review powers in these cases. In the normal case, the Board relies upon and it is incumbent upon the parties to frame the issues which they desire the Board to review. In this case, the State Accident Insurance Fund requested the Board affirm the Referee's order. However, the Board, in exercising its de novo review power, finds that the award of the Referee is excessive and is not supported by the evidence in this case.

The Board notes as did the Referee that the majority of the doctors concurred that claimant could perform light to moderate work. Claimant has not cooperated to the furthest extent with the rehabilitation efforts offered to him. While it is true that claimant is barred from any other forms of work he had previously done, the Board does not find claimant has established that he is permanently and totally disabled or that he is entitled to an award of compensation granted by the Referee. The Board, after reviewing all the evidence in this matter, finds that the Determination Order of January 18, 1978 correctly compensated claimant for his loss of wage earning capacity. Therefore, the Board orders that Determination Order be reinstated and affirms that Determination Order.

ORDER

The Referee's order, dated August 27, 1979, is reversed in its entirety.

The Determination Order, dated January 18, 1978, which granted claimant an additional award of 10% unscheduled disability, making a total award of compensation in this matter equal to 96° for 30% unscheduled disability for claimant's low back injury is restored and affirmed.

DONALD HOLLENBECK, CLAIMANT
Flaxel, Todd & Nylander, Claimant's Attys.
Velure, Heysell & Pocock, Employer's Attys.
Request for Review by Claimant

The claimant seeks Board review of the Referee's order which affirmed the award of compensation granted by the Determination Order. Claimant contends he is entitled to an increased award of compensation for permanent partial disability.

FACTS

Prior to this injury claimant had been treated by Dr. Robert Chiapuzio for a stiff neck problem a number of years. Claimant also was treated for an inner ear problem and low back trouble, which he had for 20 plus years. This problem was increased by bending and lifting. Dr. Chiapuzio diagnosed degenerative disc disease of the cervical and lumbar spine, rheumatoid arthritis and probable Meniere's syndrome. Claimant also had difficulty with his right shoulder which was diagnosed as tendinitis of the long head of the right biceps and bursitis of the right shoulder.

Claimant, a 52-year-old beer driver salesman with Ralph Thrift, Inc., on January 6, 1978, injured his back when while putting kegs of beer on a shelf he slipped. This injury was diagnosed as an acute lumbar strain. Dr. Chiapuzio released claimant for regular work on January 25, 1978 and found his condition medically stationary on that same date.

A Determination Order, dated March 30, 1978, awarded claimant temporary total disability compensation.

In July 1978, Dr. J. K. Bert reported claimant had a history of back pain increased with lifting, bending and driving a truck. Claimant indicated this back pain had become more severe recently. Dr. Bert diagnosed spondylosis of the lumbar spine with an acute injury. Claimant failed to improve with conservative care and after a myelogram, claimant, on August 3, 1978, underwent a laminectomy at L4-L5 bilaterally. In November 1978, Dr. Bert concurred with claimant he could not return to his previous job.

Dr. Bert, on January 12, 1979, reported claimant's back had a good range of motion. He felt this claim could be closed on the basis of moderate impairment based on pain. Dr. Bert felt claimant was permanently restricted from heavy lifting, stooping or bending.

A Second Determination Order, dated February 6, 1979, awarded claimant additional temporary total disability compensation and compensation equal to 32° for 10% unscheduled disability for his back injury.

In August 1978, claimant experienced breathing difficulties. Claimant had a history of smoking cigarettes. In April 1979, Dr. Chiapuzio indicated claimant was advised not to work due to his lung condition.

Claimant continued to complain of back pain after the issuance of the Second Determination Order. In March 1979, Dr. Bert had opined claimant's condition was medically stationary and he could perform light to light-moderate work, with no lifting of over 20 pounds, no frequent stooping or bending, and no prolonged standing or sitting.

On May 1, 1979, claimant, with assistance from a private agency, obtained a job as an estimator for an electric company. Claimant was required to drive a vehicle and perform supply clerk duties. Claimant continued to complain of difficulty with his back. Claimant continued to wear a back brace and use pain medication for his back pain.

Claimant testified he has a high school education and has worked as a longshoreman, truck driver, service station attendant, sawmill worker and beer salesman. He said he has constant low back pain which extends into his right hip and leg and is increased by activity. Claimant also has a service connected disability for rheumatism in his foot and lower leg. In his current job as an estimator, he works for his brother and does estimating, delivers parts, performs clerical duties and checks workers on various job sites.

The Referee, after considering all the evidence, found claimant had not suffered greater permanent partial disability from his industrial injury than awarded. Therefore, the Referee affirmed the Determination Order.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, modifies the Referee's order. The evidence indicates claimant had several pre-existing problems, but was still able to perform his job. After his injury in January 1978, he could no longer perform his job. Further, subsequent to this injury, Dr. Bert placed the following limitations on claimant: no lifting over 20 pounds, no frequent stooping or bending, no prolonged standing or sitting. No limitations had been placed on claimant prior to this injury. The Board finds that the evidence in this case establishes claimant has suffered more loss of wage earning capacity than awarded. Therefore, the Board grants claimant an award of compensation equal to 80° for 25% unscheduled disability for his low back injury, representing his loss of wage earning capacity.

ORDER

The Referee's order, dated October 12, 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 all previous awards of unscheduled disability granted for this injury.

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. 76-4242 May 23, 1980

JOSEPH JENSEN, CLAIMANT
Yturri, Rose & Burnham, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Claimant seeks Board review of the Referee's order which affirmed a Determination Order which granted temporary total disability compensation through June 30, 1975. Claimant contends he is entitled to temporary total disability from June 30, 1975 through July 24, 1978. It was stipulated at the hearing the the claim was reopened as of July 24, 1978.

FACTS

Claimant, a 51-year-old teacher with Adrian Public School, sustained a compensable injury on May 8, 1973 to his back when he fell on some steps. This injury was diagnosed as a herniated disc at the L4-L5 level. Claimant underwent a myelogram and on May 31, 1973 a laminotomy with excision of the lumbosacral disc.

In January 1974, Dr. Augustus Tanaka reported claimant had developed numbness in both hands. He felt claimant developed ulnar pressure neuritis possibly from leaning on his elbows while recovering from his back surgery. Claimant also had a hernia which had developed after he had tripped over a hose in May 1973.

Dr. Howard Johnson, in May 1974, related claimant's nerve loss had gradually increased in severity. He felt this problem was related to pressure on the nerves which developed while claimant was hospitalized and related to the hospitalization for treatment of claimant's back injury. Dr. Thomas Henson opined claimant had bilateral ulnar nerve palsys which were due to pressure or traction.

On June 4, 1974, the State Accident Insurance Fund (Fund) denied responsibility for this condition.

Dr. Al H. Kuykendall, on October 26, 1974, performed a transplant of the left ulnar nerve.

On November 15, 1974, a stipulation provided the Fund accepted the left inguinal hernia and the bilateral tardy nerve condition and pay temporary total disability compensation from November 23, 1973 until the claim was closed. In December 1974, the hernia was surgically repaired and the right ulnar nerve at the elbow was transplanted on June 3, 1975 by Dr. Kuykendall.

On November 13, 1975, Dr. Kuykendall reported claimant had mild trouble with the right hand and no trouble with the left hand. He felt claimant had a permanent disability rating of 10% loss of the right hand at the wrist.

A Determination Order, dated February 27, 1976, granted claimant temporary total disability compensation from May 16, 1973 through June 30, 1975 less time worked, compensation equal to 48° for 15% unscheduled disability for his back injury and compensation equal to 15° for 10% loss of the right forearm.

In November 1976, Dr. Johnson opined claimant's problem was generalized arthritis of the lumbar spine due to degenerative disc disease. He advised claimant do isometric exercises and use aspirin.

Claimant attended the William Callahan Center in July 1978. Dr. Daniel Halferty, medical examiner, reported claimant continued to complain of right leg and low back pain. He felt claimant's residual back and leg pain were due to degenerative arthritis. Dr. Halferty felt claimant should engage in "low stress activity if he could vary the amount of continuous time that he is on his feet".

In October 1978, Dr. Johnson reported claimant had an "acute flare-up" of his condition while at the Callahan Center. A stipulation, dated April 11, 1978, reopened the claim effective July 24, 1978 for this exacerbation of claimant's back symptoms.

Claimant testified he worked full time as a school teacher from August 1974 through the end of the school year in May 1975. He was offered a job as a teacher for the 1975-76 school year, but turned it down because the standing increased his back and leg pain. Claimant did teach as a substitute teacher and was working full time at the end of the school year in 1976. Claimant said he performed no work from June 1976 to July 1978.

The Referee found the evidence did not indicate claimant was entitled to additional temporary total disability. Therefore, the Referee affirmed the Determination Order.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, modifies the Referee's order. There is no evidence in this case to support the termination of temporary total disability compensation on June 30, 1975. Dr. Kuykendall, on November 13, 1975, reported claimant had mild trouble with his right hand and no trouble with his left hand. He felt the claim could be closed. The Board finds claimant is entitled to additional temporary total disability compensation from June 30, 1975 through November 12, 1975.

The Board finds that claimant is not entitled to any additional temporary total disability disability compensation beyond November 12, 1975. The evidence indicates claimant worked during the 1975-76 school year. There is no medical evidence he was unable to work after November 12, 1975 because of his back impairment.

ORDER

The Referee's order, dated May 11, 1979, is modified.

Claimant is hereby awarded additional temporary total disability compensation from June 30, 1975 through November 12, 1975.

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 $750.

WCB CASE NO. 78-2884 May 23, 1980
WCB CASE NO. 78-4942

MARION H. KIZER, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Attys.
Thomas Cavanaugh, Employer's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

The State Accident Insurance Fund (Fund) and claimant seek Board review of the Referee's order, as amended, which set aside the Fund's denial of his claim and remanded claimant's claim to it for payment of all benefits he is due, granted an attorney fee and approved the denial of Underwriters Insurance Company. The Fund contends claimant's injury and the related expense is the responsibility of Underwriters Insurance Company. Claimant contends the Referee correctly decided this case and if he didn't, the claim is compensable as a new injury and is the responsibility of Underwriters Insurance Company.

FACTS

The facts leading up to this claim are set forth in a stipulation attached to this order.

On March 8, 1978, claimant, a 48-year-old automobile dealer-trade driver, employed by Guarantee Chevrolet and insured by Underwriters Insurance Company, sustained injuries to hip, ribs and head when he "passed out" driving a vehicle and went off the road. Claimant was hospitalized and he had a pacemaker inserted. At the hospital, claimant was unable to remember exactly what had happened to cause him to "go off the road". Dr. Robert Bender felt claimant could possibly have had a Stokes-Adams attack. Testing revealed claimant demonstrated evidence of sinus bradycardia with intermittent periods of asystole.

In June 1978, Dr. Bender opined claimant's loss of consciousness while driving and the resulting motor vehicle accident and injuries were due to a heart block or slow heart rate. Claimant had a history of dizziness and lightheadedness. Dr. Bender did not feel claimant's previous myocardial infarction itself had caused the heart block, but felt it might be due to coronary artery disease.

On September 14, 1978, the Fund denied responsibility for this incident. It had been denied by Underwriters on April 11, 1978.

In September 1978, Dr. Eldon Erickson stated it was impossible to state with certainty whether or not claimant's heart disease caused him to lose consciousness and thus the resulting motor vehicle accident. However, he felt based on events occurring before and after the accident it was highly likely that the syncope leading to the motor vehicle accident was the result of arteriosclerotic coronary artery disease which also had caused the 1970 myocardial infarction.

In December 1978, Dr. Herbert Griswold opined that while claimant was hospitalized after his accident, he had periods of cardiac arrest and felt this probably was the cause of him losing consciousness prior to his accident.

The Referee, after reviewing all the evidence, found the Fund was responsible for this claim. The Referee concluded that claimant's "blackouts" resulted from his initial industrial heart condition. The Referee relied upon the reports of Drs. Erickson, Carter and Griswold.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, reverses the Referee's order. An employer takes a worker as he finds him. In this case, Guarantee Chevrolet hired claimant with his heart and psychiatric condition. Claimant, at the time of the motor vehicle accident, was within the course and scope of his employment driving a vehicle for Guarantee Chevrolet. Under the rationale of Massachusetts-Michigan or last injurious exposure rule, it is apparent that claimant's injuries from the motor vehicle accident are the responsibility of Guarantee Chevrolet. It hired claimant with his existing problems and hired him as a driver, placing him in a position of greater risk to injury because of his history of heart problems and blackout spells. Claimant's injury is directly traceable to his work with Guarantee Chevrolet and, therefore, arose out of that employment. The Board finds the denial issued by the Fund was correct and would restore and approve it. Therefore, the Board reverses the denial issued by Underwriters Insurance Company and remands this claim for the injuries as a result of the March 8, 1978 incident to it for acceptance and payment of compensation and other benefits provided by law.

ORDER

The Referee's order, dated November 21, 1979, as amended on November 30, 1979, is reversed.

The State Accident Insurance Fund's denial of this claim is restored and approved.

Underwriters Insurance Company's denial is set aside and this claim for injuries as a result of the March 8, 1978 incident is remanded to it for acceptance and payment of compensation and other benefits provided for under the Workers' Compensation laws of Oregon. Further, it is ordered to reimburse the State Accident Insurance Fund for any payments the Fund has made pursuant to the Referee's order.

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 Underwriters Insurance Company.

EXHIBIT IN THE CASE OF MARION H. KIZAR

The following will serve as the stipulation of facts by and between the parties.

The claimant, Marion H. Kizer, is 49 years of age; 6'2" and weighed approximately 390 pounds.

On May 14, 1970, he was employed by the Benton County Sheriff's Office and had been so employed at the Benton Counth Sheriff's Office for 9 1/2 years. On May 14, 1970, he was serving a woman with a subpoena on an incline terrain. She attempted to elude service, which resulted in the claimant chasing the woman up an inclined hill to make service. At that time he sustained a myocardial infarction both anteriorly and posteriorly, and came under the care of Dr. Eldon Erickson. He was off work until August 1, 1970. He then returned to duty and was able to engage in all of his prior activities with the exception of some extertional shortness of breath upon climbing long flights of stairs or other strenuous activities such as long walks at a rapid pace, or similar activity. However, he was able to elk hunt, deer hunt and engage in his normal patrol duties. He was suffering no angina or other symptomatology.

On November 10, 1971, a Determination Order was issued awarding to claimant 10%, equal to 32° for unscheduled heart disability, and time loss to August 3, 1970.

A Request for Hearing was filed from the Determination Order, which was settled by Settlement Stipulation dated February 24, 1972, awarding to claimant an additional 32°, equal to 10% unscheduled disability, making a total award for unscheduled disability equal to 20%.

The claimant's condition, commencing in approximately 1974, commenced deteriorating, until September 27, 1975 when he was operating his own vehicle to meet his wife at a Philomath restaurant preparatory to his going on duty as a deputy sheriff. He drove his car into Philomath and was talking to a city police officer of the city of Philomath, Julian Horning. Officer Horning realized that the claimant was in a daze or stupor and contacted the claimant's wife, who was in the restaurant. The claimant then drove home without talking to his wife. He related that there was a 30 minute period where the events were rather foggy. However, he did not lose control of his vehicle or suffer any physical injury on that occasion. He was then admitted to the Good Samaritan Hospital on the 27th of September, 1975 under the care of Dr. Eldon Erickson and was discharged on the 29th of September, 1975. He continued under Dr. Erickson's care and was subsequently retired on a medical basis on the 13th of February, 1976.

He was seen by Dr. Bruce Williams in consultation and by Dr. Peter H.V. Winters.

A hearing was held on November 18, 1976 and an Opinion and Order was issued on the 17th of January, 1977 by Hearing Referee, Douglas W. Daughtry. A copy of the Opinion and Order is attached hereto, marked Exhibit "A" and by this reference made a part hereof, and the findings of the Referee are incorporated by this reference herein and are stipulated to.

The claimant did not work at all from February 13, 1976, except for the 3 days hereinafter set forth. During this period of February 13, 1976 to March 6, 1978, claimant's activities had been limited by his extertional shortness of breath and slight angina, but the angina being no real problem, the major limiting factor being shortness of breath and energy being sapped with very little physical exertion and lack of stamina.

The period of February 13, 1976 through November 20, 1978, claimant was paid temporary total disability benefits by the State Accident Insurance Fund, and was being seen periodically by Erickson, and also was being seen, at the request of the Corvallis Rehabilitation Office, by Dr. Alan F. Scott, a psychiatrist in Eugene, Oregon.

Following the episodic confusion event on September 27, 975, claimant had experienced no sequel or event similar. He as on occasion bothered by light-headness and dizziness, hich were very transient in duration and usually associated ith exertion, such as bending, walking or other activities ausing him to become short of breath. He had at no time ost his recall of any events, or unable to be aware of his urroundings or had what might be termed amnesia or had any blackout spells".

On March 6, 1978, Leonard Burns, an employee of Guaranty hevrolet in Junction City, Oregon, contacted claimant elative to his working for Guaranty Chevrolet in transporting ew vehicles on what is termed "dealer trade basis" and he as to be paid $10.00 per trip, plus expenses. The defendant, niversal Underwriters Insurance Co. and Guaranty Chevrolet ave stipulated on the record that Marion Kizer was an mployee of Guaranty Chevrolet on March 8, 1978.

The first trip was made on March 6, 1978, when Mr. Burns ransported the claimant, together with other drivers, to stacada and they drove new vehicles from Estacada to the uaranty Chevrolet lot. On the 7th of March, 1978, Mr. Burns gain transported the drivers to Redmond, and again the vehicles ere picked up and driven by the claimant and the other drivers ack to the Guaranty Chevrolet lot in Junction City. On March , 1978, the said Leonard Burns transported the claimant, ogether with four other drivers, to Bend, and the claimant as assigned a 1978 Chevrolet pickup to drive from Bend to the uaranty Chevrolet lot at Junction City. They stopped at Sisters n the way to Bend and had lunch at approximately 12:00 noon. The laimant had felt fine in the morning and felt fine during the ntire day and had no exertional shortness of breath, angina or ny other symptoms whatsoever, and had not had any type of problems xcept for exertional shortness of breath for many months and elt that his condition was at least not deteriorating, if not aving a better mental outlook upon it. They finished lunch and roceeded to Bend. He was driving the last vehicle in the line f five vehicles consisting of two cars and three pickups. They ook Highway 20 to the Clear Lake cutoff and then followed Route 26, which is popularly known as the McKenize River Highway.

Claimant, during the approximately 1 hour and 30 minutes that it took the drivers to drive from Bend to the scene of the accident, was experiencing no symptoms whatsoever, and felt good. The highway near the Leaburg Dam is a two lane highway with small shoulders and gradual curves. The weather was light rain and traffic was light. The claimant's vehicle left the highway on the righthand side of the road a short distance before a left curve. There was no evidence of braking prior to the vehicle leaving the road. The vehicle left the road and went into a ditch on the righthand side of the road, traveled approximately 150 feet until it struck a tree or group of trees. A fellow driver, Jackie Albright, noticed that the claimant was not behind him, turned around and came back and discovered the claimant, who at that time was in a confused state, not knowing exactly where he was, or that the accident had occurred or what his surroundings were.

The claimant had no recollection of driving the vehicle from Blue River to the scene of the accident, which is a distance estimated at 15 to 20 miles. There was no observation of any erratic driving, however, by the other drivers who were immediately in front of him and everything seemed to be normal to them prior to the accident. Claimant was unconscious for a period and then following the initial period of consciousness, had periods of consciouness and then unconsciousness until he was removed from the pickup and taken to McKenzie-Willamette Hospital in Springfield, Oregon, where he was attended by Doctors Carter, an orthopedic surgeon and Bender, an internist. The injuries and disgnoses are contained in the medical reports.

The terrain of Highway 126 between Blue River and the scene of the accident are curves and narrow shoulders.

The claimant was paid the sum of $28.18 for his three days of driving, which amounted to $30.00 less F.I.C.A. of $1.52.

Prior to the accident, the claimant had no feeling of impending light-headedness, pain and in fact was quite mentally alert and was feeling well.

WCB CASE NO. 77-7356 May 23, 1980
WCB CASE NO. 78-1021

DONALD MOE, CLAIMANT
Carney, Probst & Cornelius,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Order On Remand

On January 24, 1979, the Board entered its Order on Review in this case which reversed the Referee's order, dated June 14, 1978, and (1) reversed the denial of the State Accident Insurance Fund (SAIF) dated October 21, 1977 on behalf of Ceiling Systems Inc. of claimant's claim for a cervical problem and remanded it to the Fund for acceptance and payment of compensation effective September 19, 1977 until closed; (2) ordered Johnson Acoustics to pay temporary total disability compensation from December 2, 1977 to February 3, 1978, less temporary total disability compensation paid, and a penalty equal to 25% of the amount due and reduced the attorney fee awarded by the Referee against Johnson Acoustics from $500 to $250 for its unreasonable failure to pay compensation within 14 days of the claim; (3) awarded claimant's attorney a fee of $750 for overcoming the Fund's denial.

The Fund appealed and claimant cross-appealed the Board's order and the Court of Appeals, in an opinion and order entered February 11, 1980, ruled that claimant had failed to establish a causal nexus between his employment and his disease and that the Board should not have reduced the award of attorney's fees granted to claimant's counsel by the Referee.

The Board, in compliance with the judgment and mandate of the Court of Appeals issued April 23, 1980 reverses that portion of its order which set aside the Fund's denial and remanded this claim to it for acceptance and payment of compensation commencing on September 19, 1977 until closed, reduced the attorney's fee awarded claimant's attorney payable by Johnson Acoustics to $250, and awarded claimant's attorney a fee of $750 for prevailing on the issue by the Fund.

The Board approves the denial issued by the Fund on October 21, 1977 of claimant's cervical problems and affirms the Referee's award of an attorney fee of $500 payable by the Fund on behalf of Johnson Acoustical and Supply Company.

The remainder of the Board's order is affirmed.

IT IS SO ORDERED.

WCB CASE NO. 79-1578 May 23, 1980

NESTOR O. PERALA, CLAIMANT
Olson, Hittle, Gardner & Evans,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

The State Accident Insurance Fund (the Fund) seeks Board review of the Referee's order which granted claimant an award of compensation equal to 96° for 30% unscheduled disability for a psychiatric condition and granted claimant's attorney a fee out of the increased compensation. The Fund contends this award is not supported by the evidence.

FACTS

Claimant, a 55-year-old teacher with the Parkrose School District, filed a claim on April 17, 1978 for a nervous breakdown due to pressures of his job. He indicated he had worked for this employer for approximately 24 years and last worked on October 14, 1977. This claim was accepted.

Claimant was treated by Dr. Geraldine Price, a psychiatrist, who indicated claimant had severe symptoms of depression and anxiety resulting from what appeared to be unfair criticism and unusual harassment from his superiors at work.

In July 1978, Dr. Parvaresh, a psychiatrist, reported claimant had taken some courses at a community college in subjects other than teaching. Claimant said he had been considering an alternative form of employment because he no longer felt capable of teaching. Claimant has a bachelor of arts degree from Arizona University and a Masters degree from Colorado State College. He indicated he had worked for Parkrose School District for 26 years before his retirement. Dr. Parvaresh felt that claimant displayed clinical signs and symptoms which were compatible with anxiety neurosis, superimposed on a personality disorder. He did not feel that claimant had sufficient psychiatric impairment at that time to preclude him from employment as a teacher or "other employment settings" for which claimant had skills and training. Dr. Parvaresh felt that claimant's condition was medically stationary.

Dr. Price, in August 1978, indicated she agreed with Dr. Parvaresh that claimant suffered from an anxiety neurosis. However, Dr. Price did feel that claimant would have difficulty resuming his teaching at a primary level because of the trauma of the harassment he suffered at work. Dr. Price indicated it was possible that claimant might teach at some other level, but he was not qualified to do so. In November 1978, Dr. Price reported that claimant was released for work other than primary school teaching as of October 2, 1978. Dr. Price felt that claimant could teach adults on a short-term basis with a slow pace or in other similar situations. In her opinion, claimant was impaired from other types of employment in which there were similar pressures and anticipated claimant would experience similar problems if faced with the situation where someone else set the pace of his work. Dr. Price felt that claimant could perform jobs where he set his own pace or where there was "alternation of the setting, such as counseling". She felt claimant had several talents and skills which would enable him to find some type of employment, but that he might require additional training. Dr. Price felt that the remaining impairment was that an exacerbation of symptoms could be expected in high stress conditions.

In January 1979, Dr. Deena Stolzberg reported that claimant could return to teaching if he were in a less pressured environment and received more support. Dr. Stolzberg felt claimant's personality disorder was permanent and not job-related. She felt claimant had both anxiety and depressive types of symptoms which at that time were largely resolved and recommended that claimant return to employment.

A Determination Order, dated January 31, 1979, recited that there was conflict on whether claimant's condition was medically stationary, but that the preponderance of the evidence indicated it was and, therefore, the claim was closed. This order granted claimant temporary total disability compensation.

Dr. Price, in July 1979, reported that claimant had permanent disability related to the acute depression anxiety that he was experiencing when he was first treated in May 1977 by her. Dr. Price indicated that claimant had been left an inherent weakness or susceptibility to stress related to his emotional breakdown. Dr. Price found that claimant was disabled from performing work where he would encounter similar stress situations including his regular work as a teacher and many other types of environment where mental stress could be part of the job. She stated that claimant's functional capacity had not returned to his pre-injury level equivalence and that this condition was permanent.

At the hearing, claimant testified that he last worked in October 1977 as a teacher. He stated he attempted to work in 1978 as a substitute teacher for a half day, but became so nervous that he visibly shook in class. He felt his depression had improved, but his ability to concentrate or work in stressful situations had not improved. After stopping work as a teacher he enrolled in a community college to brush up on certain secretarial skills, but had to drop out of this because of the stress he anticipated regarding the taking of tests. Claimant has also taken classes in jewelry making and metal smithing. Claimant stated he felt he could work if he set his own pace. Claimant also has done volunteer work at a church and taken counseling courses. At the time of the hearing claimant was attempting to establish a rack merchandising business in grocery stores. He indicated that he had invested large sums of money, but the income from it failed to cover the expenses. He said he was unable to perform the selling portion of the business because it was too stressful for him. Further he said he had not made any formal applications for work, but sought it on an informal basis through various acquaintances without success.

The Referee, after reviewing all the evidence in this case, found that claimant had residual ability which would qualify him for many fields of employment, however, the Referee further found that claimant's industrial injury had permanently precluded him from a large segment of the labor market and granted claimant an award of compensation equal to 96° for 30% unscheduled disability for a psychiatric condition.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, modifies the Referee's order. Claimant is 56 years old and has a masters degree with additional training. His primary training has been in the field of education, but he has training in counseling. The evidence indicates that claimant has never performed physical labor and has performed non-physical types of employment. Claimant testified that his emotional condition has improved, but his ability to handle stress has not. The evidence further indicates that claimant cannot return to his primary occupation of 20 some years of teaching. The Board, however, after considering all the relevant factors in this case, including claimant's age, training, aptitudes, adaptability to non-physical labor, and education, finds that the award of compensation granted by the Referee is excessive. The Board finds that claimant is capable of performing many occupations and that his loss of earning capacity is not as severe as found by the Referee. Therefore, the Board would grant claimant an award of compensation equal to 32° for 10% unscheduled disability.

ORDER

The Referee's order, dated October 4, 1979, is modified.

Claimant is hereby granted an award of compensation equal to 32° for 10% unscheduled disability for his psychiatric condition. This award of compensation is in lieu of any previous awards of unscheduled disability for this condition. The remainder of the Referee's order is affirmed.

WCB CASE NO. 78-8989 May 23, 1980

DWIGHT R. WEBB, CLAIMANT
Pozzi, Wilson, Atchison, Kahn
& O'Leary, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

The State Accident Insurance Fund (the Fund) seeks Board review of the Referee's order which granted claimant additional compensation equal to 80° for 25% unscheduled disability for his head injury and granted claimant's attorney a fee out of this increased compensation. The Fund contends this award is excessive.

FACTS

Claimant, a 42-year-old clean-up man with Coos Head Timber Company, on April 15, 1978, sustained an injury to his head and left shoulder when he was struck by a "lift". Claimant also developed trouble with his right leg. Dr. Curtis Adams diagnosed a torn medial meniscus of the right knee, which was surgically repaired.

In January 1978, prior to this injury, claimant was treated by Dr. Carl Albertson for headaches affecting the right side of his head and for difficulty remembering things. After this injury, Dr. Albertson reported claimant began having trouble with his right eye and "blackouts".

In May 1978, Dr. Clifford Schostal examined claimant because of continuing complaints of headaches and dizziness. The diagnosis was moderately-severe post-traumatic headaches. Claimant complained of blurred vision, scintillations,

unsteadiness, vertigo and nausea. The severity of the headaches increased with movement of the head or activity. By July 1978, the headaches were occurring at the rate of 2-3 per week. An EEG test was normal. Dr. Schostal opined claimant was totally disabled due to his headaches at that time. By July 1979, Dr. Schostal reported the headaches were being controlled with medication. Claimant continued to complain of dizziness and nausea.

On September 25, 1978, Dr. Schostal indicated claimant's improvement reached a plateau. He referred claimant to the Portland Pain Clinic. In October 1978, claimant was released for "light" work.

In November 1978, claimant attended the Northwest Pain Center. The diagnosis beside this injury was chest and abdominal pain and stenosis of the right ear canal. Dr. Richard Newman, a psychologist, felt claimant had moderate to severe hysterical conversion reaction and compensation neurosis with significant secondary gains. Claimant was found to have high-average intelligence, low self-esteem and passive-dependent personality.

On January 8, 1979, Dr. Schostal released claimant to return to his regular work. Claimant returned to work, but reported his right knee continued to give him trouble. He also continued to complain of headaches and scintillations. In February 1979, claimant was complaining of increasing dizziness, nausea and brief "blackouts".

Dr. Kevin Sullivan, in March 1979, diagnosed post-traumatic headaches and "winging" of the left scapula secondary to a traumatic nerve injury.

In May 1979, claimant began to complain of confusion and difficulty remembering things and incoordination on the left side of his body. Claimant had boxed when he was younger. A carpal tunnel scan was normal. EEG tests were normal.

On May 25, 1979, claimant was involved in a motor vehicle accident in which he was thrown off of his motorcycle and suffered a lateral plateau fracture of the right knee.

Dr. Sullivan, in June 1979, reported claimant's condition was medically stationary. He felt claimant has some permanent nerve damage related to his industrial injury which caused winging of the left scapula. Further, he felt claimant had post-traumatic headaches, but felt the "psychogenic factors" were becoming more pronounced as time went by. Dr. Sullivan did not feel claimant could return to his usual occupation and should avoid loud noises and stress which aggravated his headaches.

A Determination Order, dated July 25, 1979, awarded claimant temporary total disability compensation and compensation equal to 32° for 10% unscheduled disability for his head and left shoulder injury and compensation equal to 7.5° for 5% loss of his right leg.

Claimant testified he continues to have headaches which are accompanied by dizziness, nausea, and vision problems. Claimant said his headaches are caused by or increased by loud noises or physical exertion. These headaches last for 5-6 hours per day depending on his activity. Claimant has worked as a service manager and as a gas station attendant-mechanic. Claimant has a high school education and has received training in aircraft mechanics, hydraulics, and diesel mechanics. Claimant indicated he feels he could return to service managing work and wants to do so. According to claimant, he can ride his motorcycle and a "cat" in clearing some land.

The Referee found claimant's preclusion from returning to mill work resulted in a loss of wage earning capacity equal to 112° for 35% unscheduled disability for his head and shoulder injury.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, modifies the Referee's order. Claimant cannot return to mill work. However, his primary form of employment has been service work or managing service work. Claimant says he can still perform this type of employment. Claimant is now 43 years old, has a high school education, plus other training, and has a desire to perform service management work. The Board, based on all the evidence, finds the award of compensation granted by the Referee is excessive. Based on the same evidence, the Board concludes claimant is entitled to an award of compensation equal to 64° for 20% unscheduled disability for his head and shoulder injury. This award is in lieu of all previous awards.

ORDER

The Referee's order, dated November 21, 1979, is modified.

Claimant is hereby granted an award of compensation equal to 64° for 20% unscheduled disability for his head and shoulder injury. This 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. 78-592 May 28, 1980

JOSE ALZURI, CLAIMANT
Welch, Bruun, Green & Caruso,
Claimant's Attys.
Cheney & Kelley, Employer's Attys.
Order of Dismissal

A request for review, having been duly filed with the Workmen's Compensation Board in the above-entitled matter by the claimant, and 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. 78-8340 May 28, 1980

WILLIAM D. BEEBE, CLAIMANT
Schwabe, Williamson, Wyatt, Moore
& Roberts, 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. C 42295 May 28, 1980

GERALD BOCHSLER, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On April 7, 1980, claimant requested that his claim for his September 6, 1966, back injury be reopened. Claimant's aggravation rights have expired. Claimant provided the Board with the report dated April 11, 1980, from Dr. Robert Corrigan. Dr. Corrigan indicated he had been treating claimant for a number of years for his low back problems which consisted of a chronic, recurrent lumbosacral strain and sciatic pain. He indicated that claimant had reached a point where he had been missing work and was able to return to work only on a half day basis. Dr. Corrigan felt that claimant's condition had worsened to the point that he suggested claimant change his employment. He felt that claimant should enter into a lighter form of employment.

On May 2, 1980, the Board advised the State Accident Insurance Fund (Fund) of claimant's request that his claim be reopened under its own motion jurisdiction. The Fund on May 12, 1980, advised the Board that it opposed an Own Motion order reopening this claim for time loss as it was felt claimant's activity selling real estate and his earnings precluded him from time loss benefits. An investigator for the Fund reported that claimant had been missing substantial time from work with employer the State of Oregon. Claimant told the investigator that some of the time he was allegedly off work for physical therapy or to see doctors, he was in fact performing paper work for a trucking firm in which he had an interest. Claimant also indicated that he'd been working part-time as a real estate sales person.

On April 11, 1980, Dr. Corrigan had advised the Fund that claimant's low back and lower extremity sciatic pain had worsened and aggravated to the point that he was forced to request that claimant change jobs to lighter work. He stated that was the reason for the statement he had made in a previous letter placing claimant on a status of half-day work for two months and phasing him out of this present employment prior to his quiting. Claimant had continued to work for the State Highway Department. Dr. Corrigan ask that the claim be reopened.

The Board, after reviewing the evidence in this case, finds it is sufficient to warrant a reopening of claimant's claim at this time under its own motion jurisdiction. The Board orders the claim reopened effective April 11, 1980, for the payment of compensation and other benefits required by law until closed pursuant to ORS 656.278.

IT IS SO ORDERED.

WCB CASE NO. 78-6081 May 28, 1980

ALICE CELVER, CLAIMANT
Bloom, Ruben, Marandas, Berg, Sly
& Barnett, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Claimant seeks Board review of the Referee's order which affirmed the State Accident Insurance Fund's (Fund) denial of her diplopia eye condition.

FACTS

Claimant, a 54-year-old employee of the Portland Public Schools, alleges her work caused her to develop double vision. On November 2, 1977, claimant filed a workers' compensation claim for this condition.

Dr. Canfield Beattie, in January 1978, reported claimant had myopia and presbyopia which had been corrected by glasses for many years. However, he noted for the past 6-8 months, claimant had developed an occular problem due to on-the-job environmental changes over which she had no control and which she could not adjust to or tolerate. The occular problem he found was severe extra-occular muscle imbalance which Dr. Beattie felt was the direct result of the emotional trauma claimant sustained on the job.

In February 1978, Dr. Gordon Leitch, an ophthalmologist, reported claimant said she had had double vision since September 1977. He diagnosed "myopic refractive error with an esophoria-tropia". Claimant felt this was "mental in nature", which Dr. Leitch agreed it could be.

Dr. George Harwood, medical consultant for the Fund, in March 1978, opined claimant's condition was not related to her work.

Dr. Guy Parvaresh, a psychiatrist, in April 1978, felt claimant displayed clinical signs and symptoms of a psychiatric disorder compatible with involutional psychosis. He felt claimant had this condition for a number of years. Dr. Parvaresh opined claimant's basic psychiatric disorder created the interpersonal disorder in her work, led to her suspiciousness of her co-workers and supervisor and her eventual leaving the school, rather than the process being in reverse.

In May 1978, Dr. Leitch opined claimant's employment with this employer was not a material contributing factor to the worsening of any pre-existent eye condition.

The Fund, on June 9, 1978, denied this claim.

In September 1978, Dr. Lendon Smith reported he had known claimant for a number of years. He indicated claimant felt her co-workers were not mature. He felt claimant was in a stress situation at work. Dr. Smith stated claimant had developed double vision in the fall of 1977 due to job stress. He called claimant's condition "conversion reaction: anxiety from stress becomes a symptom".

Dr. Joseph Paquet, in December 1978, indicated he had treated claimant for 22 years. He concurred with Dr. Beattie that claimant's diplopia was secondary to her job environmental problems.

Drs. Rebekah Bond and Paul Metzer of the Psychology Center, in February 1979, reported they diagnosed: psychophysiologic musculoskeletal reaction affecting claimant's occular systems, incipient schzophrenic developments, paranoid in nature and significant personality decompensation. They opined claimant's personality problems were chronic, but had been aggravated and exacerbated by her job situation. They felt the diplopia could be categorized as a physical reaction to stress.

In September 1979, Dr. David Dine indicated that claimant's double vision was real and "certainly emotional components can exacerbate such a symptom". Dr. Dine had treated claimant in early 1978 and had diagnosed diplopia of uncertain etiology.

Claimant testified she felt she was harassed and subjected to stress at work which produced the diplopia condition. She was demoted in her job and said she was criticized by her superiors. After a transfer she developed a personality conflict with a new supervisor. Claimant resigned from her job with this employer on November 1, 1977.

The Referee, after reviewing all the evidence, found the opinion of Dr. Parvaresh to be more persuasive. The Referee concluded claimant's psychopathology pre-existed her work exposure and her near paranoid reaction was self-induced which caused the interpersonal problem rather than her work causing her problems. Therefore, the Referee affirmed the Fund's denial of this claim.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, affirms the Referee's order. The Board finds the opinions of Drs. Parvaresh and Leitch to be more persuasive in this case. Dr. Leitch is an ophthalmalogist and Dr. Parvaresh is a psychiatrist. The Board finds that their opinions, as specialists in their respective fields, are entitled to more weight than the opinions of the other doctors in this case. This is a case which requires expert testimony to relate claimant's diplopia to her conditions of employment. The preponderance of the evidence, in the Board's opinion, does not support claimant's claim. Therefore, the Board would affirm the Referee's order.

ORDER

The Referee's order, dated November 8, 1979, is affirmed.

WCB CASE NO. 76-6736 May 28, 1980

GEORGE CLARK, CLAIMANT
Flaxel, Todd & Nylander, Claimant's Attys.
Keith D. Skelton, Employer's Atty.
Order On Remand

On April 15, 1978, the Board issued an Order on Review reversing the Referee's finding in this case. The Board found the claim was compensable. Its order was timely appealed to the Court of Appeals which reversed the Board's order and denied recovery. The case was then appealed to the Supreme Court.

In an Opinion and Order, filed January 2, 1980, the Supreme Court held that it could not say as a matter of law whether the claimant should or should not recover. The Court found that there was dispute in the evidence that the employer expressly or impliedly allowed the conduct which lead to the claimant's death in this case. Therefore, they remanded this case to the Court of Appeals for further proceedings consistent with its opinion. The judgement and mandate was entered by the Supreme Court on February 14, 1980, reversing the decision of the Court of Appeals and remanding this case to the Court of Appeals for further proceedings consistent with its opinion.

On May 12, 1980, The Court of Appeals remanded this case to the Board for further proceedings consistent with the Supreme Court's opinion.

The Board, on May 14, 1980, received the judgment and mandate issued by the Court of Appeals. In compliance with this the Board feels that due to the conflict in evidence it must refer this matter to the Hearings Division for hearing. The issue to be decided at this hearing is whether the employer expressly or impliedly allowed the conduct, placing of hot lunches on hot glue press, which lead to claimant's death.

At the conclusion of the hearing the Referee shall cause a transcript of the proceedings and forward it to the Board along with other exhibits admitted at the hearing and his recommendation on this issue.

IT IS SO ORDERED.

CLAIM NO. CC 155294 May 28, 1980

LEONARD COBB, CLAIMANT
Edwin S. Nutbrown, Cliamant's Atty.
Schwabe, Williamson, Wyatt, Moore & Roberts, Defense Attys.
Own Motion Order

On May 1, 1980, the Board set aside its Own Motion Order in this case, dated October 4, 1979, which had ordered this claim re-opened. The Evaluation Division had advised the Board this claim had been voluntarely reopened in 1976, by the employer-carrier. The employer-carrier requested a hearing on the October 4, 1979 Own Motion Order. The evidence indicated the reopening was for payment of medical bills. Therefore, the Board sets aside its Own Motion Order dated May 1, 1980, and republishes its Own Motion Order dated October 4, 1979.

IT IS SO ORDERED.

WCB CASE NO. 79-5855 May 28, 1980

ALBERT CROOK, CLAIAMNT
James Patrick O'Neal, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

The State Accident Insurance Fund seeks Board Review of the Referee's order which granted claimant an award of compensation equal to 15° for 10% loss of the left hand. The Fund contends this award is not supported by the evidence.

FACTS

Claimant, a 22-year-old tail spotter with Westbrook Wood Products, on December 22, 1978 while putting a log in a lathe, the log already in the lathe "blewup" and hit claimant's left hand. The diagnosis was a bruised hand.

Drs. P. T. Wolfe and J. W. Brazier examined claimant after this injury and reported swelling over the second MP joint dorsally. The diagnosis was a contusion injury of the knuckles of the left hand, 3rd, 4th and 5th fingers. Claimant was released for work as of January 5, 1979. Xrays revealed no bony abnormalities.

In January 1979, Dr. Kenneth Freudenberg reported claimant had gone back to work, but had to quit because of pain. He diagnosed a probable contusion to the 3rd MCP joint of the left hand with residual scarring in the tendon itself and possible post-traumatic arthritis.

Dr. Curtis Adams in April 1979 reported claimant continued to complain of pain in the hand. He diagnosed a blunt injury to the dorsum of the hand with no significant residual disability. Dr. Anderson felt claimant could return to work and had "pretty normal functioning long finger of his left hand and his complaints " . . . are out of proportion to his actual function when you look at the hand".

This claim was initially closed by a Determination Order dated June 19, 1979, which granted claimant temporary total disability compensation.

In July 1979, Dr. Anderson repeated his findings and opinions. He felt claimant had suffered a blunt contusion to the MP joint of the long finger and had no significant residual disability.

Claimant testified he returned to work for this employer pulling on the green chain until he was terminated in March 1979. He said he has not seen a doctor or taken medication for his hand for some time.

The Referee interpreted Dr. Anderson's report to indicate claimant suffered a minor disability and therefore some permanent loss of function of the hand. The Referee evaluated this at 10% and so granted claimant an award of compensation equal to 15° for 10% loss of the left hand and granted claimant's attorney a fee out of the increased compensation.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, reverses the Referee's order. There is no evidence in this case to support an award of loss of function of the left hand. The evidence indicates claimant's injury was to his long finger. Dr. Anderson opined claimant had no significant residual disability in it. The Board interpretes this, in the light of the other medical reports, as indicating claimant has no impairment or loss of function of the finger. Therefore, The Board reverses the Referee's order in is entirety.

ORDER

The Referee's order dated December 21, 1979 is reversed in its entirety.

The Determination Order dated June 10, 1979 is restored and affirmed.

CLAIM NO. C 153689 May 28, 1980

HAROLD E. CURRY, CLAIMANT
Welch, Bruun, Green & Caruso,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

On October 25, 1968, claimant sustained an injury to his back. Claimant underwent a laminectomy and fusion. The claim was originally closed by a Determination Order, dated January 19, 1970, which awarded claimant temporary total disability compensation and compensation equal to 144 degrees for his injury. A second Determination Order, dated February 11, 1975, granted claimant additional temporary total disability compensation and and additional compensation equal to 32 degrees for 10% unscheduled disability for his back injury. Claimant's aggravation rights have expired.

Claimant's original fusion had to be repaired in June of 1974. On February 3, 1979, claimant underwent additional back surgery involving a fusion and also a removal of a large prolasped inverterbal disc at the L4-5 level.

The Board, in an Own Motion Order dated June 5, 1979, found that claimant's present condition was related to his original injury and his subsequent treatment for such injury. The Board concluded that claimant's request to reopen his claim under the Boards own Motion jurisdiction was medically justified. Therefore, the Board ordered the claim reopened, effective February 3, 1979, until the claim was closed pursuant to ORS 656.278. Claimant's attorney was also granted an attorney fee out of an increased temporary total disability compensation.

Claimant was examined on March 28, 1980, by the Orthopedic Consultants. It was their opinion that claimant's condition was medically stationary in regards to his October 1968 injury. They do not feel that claimant could return to his same occupation even with limitations, but felt he could perform light or sedentary work. They estimated the impairment of the lumbosacral spine, as it existed at that time, was moderate and attributed all of the loss of function of the lumbosacral spine to the October 1968 injury.

On April 29, 1980, Dr. Howard Cheney reported that he did not feel this claim could be closed until claimant had either been placed in a light job or had been given training which would demonstrate that he could earn a living at some occupation. He felt that if claimant could be retrained or could go to a light job, he agreed that claimant's disability was moderate. However, he felt if claimant could not be retrained or perform a light job that claimant's disability would be "that of permanent total disability".

The Fund, on May 5, 1980, requested a determination of claimant's current disability. The Evaluation Division of the Workers' Compensation Department, on May 8, 1980, recommended the claim be closed with an award of additional temporary total disability compensation from February 3, 1979 through March 28, 1980 and with no additional award for low back disability.

The Board concurs in this recommendation. The Board, in this case, would urge that the Vocational Rehabilitation services of the Workers Compensation Department be offered to claimant and that the Field Services Division contact claimant to assist him to the fullest of their abilities.

ORDER

Claimant is hereby granted temporary total disability compensation from February 3, 1979 through March 28, 1980, less time worked.

Claimant's attorney has already been granted a reasonable attorney fee by the Board's Own Motion Order, dated June 5, 1979.

WCB CASE NO. 79-5322 May 28, 1980

LEO W. FLITCRAFT, CLAIMANT
Merten & Saltveit, Claimant's Attys.
Schwabe, Williamson, Wyatt, Moore & Roberts, Employer's Attys.
Request for Review by Employer

The employer seeks Board review of the Referee's order which granted claimant an additional award of compensation equal to 160° for 50% unscheduled disability. The employer contends this award is excessive.

FACTS

Claimant, a 57-year-old service technician with Sears, Roebuck & Company, filed a claim in January 1975 alleging his work had caused difficulty with his shoulders.

In October 1974, Dr. L. R. Langston reported he had been treating claimant since June 1974 for pain in both shoulders and in his neck. He indicated claimant's job required repetitive lifting, pulling or pushing and heavy work which resulted in chronic bursitis in both shoulders. Dr. Langston felt claimant should avoid employment requiring lifting or pulling. Claimant initially received conservative treatment.

Dr. F. L. Goodwin, in January 1975, diagnosed chronic synovitis and bursitis of both shoulders and probably an old partial rent in the left rotator cuff and also on the right rotator cuff.

On January 21, 1975, Dr. Langston hospitalized claimant and performed a Neer procedure on the left shoulder which required resection of the coracoacromial ligament and the anterior portion of the acromion.

Dr. Donald Smith, in January 1976, reported claimant was hospitalized for evaluation of a continuing neck-shoulder-arm pain problem associated with cervical occipital headache. X-rays revealed a degenerative grade III spondylosis at C5-6 and C6-7. Dr. Smith opined claimant had a cervical spondylosis with possible nerve root compression. A myelogram did not reveal any nerve root compression.

Dr. Smith, in July 1976, reported claimant was recovering from cataract surgery. He felt claimant's cervical spondylosis was related to his industrial injury on the basis of aggravation of a pre-existing condition.

In February 1978, Dr. Michael Mason hospitalized claimant for additional tests. A myelogram revealed minimal degenerative changes in the mid-cervical spine. After being released from the hospital, claimant received out-patient treatment.

The Orthopaedic Consultants, in April 1979, opined claimant's condition was stationary. They rated his permanent partial disability in his neck as minimal and in each shoulder as mildly moderate. They did not feel he could return to his previous occupation.

A Determination Order, dated June 14, 1979, granted claimant temporary total disability compensation and compensation equal to 48° for 15% unscheduled disability for his shoulder and neck injuries.

Dr. A. Gurney Kimberley, a member of the Orthopaedic Consultants, in October 1979, felt claimant could try medium work, but if he couldn't do it, then he could do light work.

Claimant testified he has had surgery on both shoulders. Claimant has the equivalent of a high school education and has taken courses in electricity and bookkeeping. Currently, claimant said he is unable to use either arm or shoulder because the pain is too severe when he attempts to use either upper extremity. He feels he could not return to his previous work. Claimant worked for this employer from 1946 to 1974. He has not worked since 1974. According to claimant, he still does various household chores, yard work, and pursues his hobby of fishing.

The Referee, based on all the evidence, granted claimant additional compensation equal to 16° for 5% unscheduled disability for his neck injury, 80° for 25% unscheduled disability for his right shoulder injury and 112° for 35% unscheduled disability for his left shoulder injury; being an increase of 160° for 50% unscheduled disability.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, modifies the Referee's order. The Board disapproves of the Referee's adding together of various awards of compensation for loss of wage earning capacity. The Workers' Compensation Act contemplates the "whole man" concept when rating unscheduled disability. The determination to be made is, taking into consideration all relevant factors in each case, what is the overall loss of wage earning capacity the injured worker has suffered.

Regarding the Referee's awards in the case, the Board finds they are excessive. Claimant has the equivalent of a high school education and has taken other courses. He is now 62 years old and has not sought work because of a non-related cataract problem. The Orthopaedic Consultants feel claimant could return to moderate work. Claimant's only work experience was with this employer as an appliance serviceman and he cannot return to that job. The Board, after considering these factors along with all the other evidence in this file, concludes claimant is entitled to an award of compensation equal to 160° for 50% unscheduled disability for his neck injury and the injury to both of his shoulders. This is in lieu of any previous awards.

ORDER

The Referee's order, dated December 20, 1979, is modified.

Claimant is hereby granted compensation equal to 160° for 50% unscheduled disability for his injury to the neck and shoulders. 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. 78-3505 May 28, 1980

ROBERT J. HANEY, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Claimant seeks Board review of the Referee's order which granted him an award of additional compensation equal to 128° for 40% unscheduled disability in lieu of the award of 30% unscheduled disability granted by the Determination Order, dated April 10, 1978. Claimant contends he is permanently and totally disabled.

FACTS

Claimant, a 42-year-old highway maintenance man with the Oregon State Highway Division, on June 10, 1974, was injured in a motor vehicle accident in which his vehicle was rear-ended by another vehicle. He suffered multiple bruises and a fracture of the sternum. Claimant developed back pain and Dr. Gerald Reimer opined claimant had a lumbar strain and recommended conservative treatment.

In September 1974, Dr. Robert Corrigan indicated he felt claimant had suffered a "diffuse lumbosacral sprain and strain". He suggested more conservative treatment.

Claimant was hospitalized in October 1974 and underwent a myelogram. This revealed a "grade I spondylolisthesis of L5". Claimant was released for restricted work on December 1, 1974, and was to engage in no heavy lifting and no repetitive bending.

Claimant went to the Disability Prevention Center in May 1975. Dr. Daniel Halferty, medical examiner, diagnosed chronic lumbosacral strain, obesity and increased lumbar lordosis and moderate functional overlay. Dr. Michael Fleming, a psychologist, reported claimant complained of a dull backache. Claimant said he had completed the 8th grade. Claimant stated he had worked with heavy equipment for 26 years, including working as a logger and driving truck. Dr. Fleming felt claimant was experiencing moderate psycho-physiological reaction and depression, moderate anxiety reaction and depressive-aggressive personality. Claimant was found to be functionally illiterate and with few job skills. Claimant was referred to a rehabilitation service coordinator for employment assistance upon his discharge.

Dr. Ray Miller, on June 21, 1975, opined claimant's degenerative disc disease in his low back was stationary. He did not feel claimant needed surgery.

The Orthopaedic Consultants, in August 1975, diagnosed chronic lumbosacral sprain with some functional overlay, chronic cardiovascular hypertension disease and diabetes. It was their opinion claimant's condition was stationary and he could return to his previous job. They rated the loss of function of claimant's back as related to this injury as minimal.

A Determination Order, dated August 28, 1975, awarded claimant temporary total disability compensation.

On October 14, 1975, claimant returned to a modified job as a truck driver. Part of his job required claimant to cut brush and perform other activities requiring bending and heavy lifting. This resulted in increasing back pain and claimant was hospitalized in January 1976 by Dr. Samuel Toevs. This claim was reopened as of January 1, 1976.

Claimant, on May 1, 1976, was released to try light work. Dr. Toevs felt claimant should not lift over 25 pounds or walk on rough terrain. However, claimant was rehospitalized in early June 1976 and placed in traction. Dr. Toevs reported claimant's right leg got numb if he sat and "KK& AJ absent bilaterally". Claimant was released for restricted work on August 16, 1976 with no bending or lifting over 25 pounds.

Dr. Theodore Pasquesi, in December 1976, reported claimant continued to complain of back pain. Claimant was interested in returning to work. Dr. Pasquesi felt claimant's condition was stationary and he could work as long as he was not required to sit or to stand throughout an eight-hour shift without being able to change positions, or being required to lift over 20 pounds, and limited his rotation, flexion and twisting of the trunk. He felt claimant had 30% impairment. Dr. Toevs concurred with this report.

A Second Determination Order awarded additional temporary total disability compensation and compensation equal to 96° for 30% unscheduled disability for his low back injury.

Claimant was referred in May 1977 for vocational rehabilitation. The vocational counselor, in June 1977, felt based on claimant's physical complaints, reported physical limitations, lack of vocational aptitudes and poor educational skills the chances for successful rehabilitation appeared marginal. No application was taken and vocational rehabilitation was terminated on August 23, 1977.

Dr. Toevs suggested claimant should not lift over 20-25 pounds and should avoid extended bending, twisting or jarring of his back.

The Orthopaedic Consultants re-examined claimant in November 1977 and felt claimant's condition was stationary. However, they did not feel claimant could return to the same occupation with or without limitation. They felt claimant needed job placement assistance and rated claimant's impairment as mildly-moderate, although they found an "excess of voluntary interference".

Dr. H. Hale Henson, a psychiatrist, in January 1978, diagnosed a "personality disorder, passive aggressive dull normal intellectual functioning". He opined claimant, at that time, was incapacitated for return to any employment.

A Third Determination Order, dated April 10, 1978, awarded claimant additional temporary total disability and additional compensation equal to 32° for 10% unscheduled disability for his back injury.

Claimant testified at the hearing he had not returned to work. He continues to receive treatment from Dr. Toevs, uses a home traction device, and wears a back brace. He said he follows the limitation placed on him by Dr. Toevs. Claimant has not fully explored work opportunities in his area.

The Referee, after reviewing all the evidence, found claimant was not permanently and totally disabled. The Referee found claimant had lost 80% of his earning capacity as a result of his injury and granted him an award of compensation for that amount.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, modifies the Referee's order. Claimant is 47 years old and has an eighth grade education. Claimant cannot perform jobs requiring lifting over 20-25 pounds, prolonged sitting, bending, twisting, or jarring of his spine. The consensus of the medical doctors is that claimant can perform light work. Claimant has failed to fully explore his work opportunities in his area. The Board, after considering all the evidence, concludes claimant is not permanently and totally disabled. The medical evidence alone does not establish claimant is permanently and totally disabled. Considering other relevant factors in this case, such as claimant's age, education, adaptability to non-physical laboring jobs, psychological condition, prior work experience, attitude and motivation to return to work, the Board does not find claimant has proven he is entitled to an award for permanent and total disability. However, based on this same evidence, the Board finds claimant is entitled to an award of compensation equal to 192° for 60% unscheduled disability for his low back injury. This is in lieu of all previous awards of unscheduled disability.

The Board strongly urges that the Field Services Division contact claimant or that he contact them and that together a strong effort be made to find claimant employment through job search efforts or re-employment assistance.

ORDER

The order of the Referee, dated November 5, 1979, is modified.

Claimant is hereby granted compensation equal to 192° for 60% unscheduled disability for his 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 472958 May 28, 1980

KARL D. HOGANSEN, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

On October 25, 1973, claimant suffered compensable injuries to his left arm and hand. These injuries were surgically repaired. This claim was initally closed by a Determination Order, dated June 10, 1974, which granted claimant an award of compensation for temporary total disability and an award of compensation equal to 124.8 degrees for 65% loss of his left forearm. Claimant's aggravation rights have expired. Subsequent to this closure the claim was reopened for removal of some plating which had been inserted in 1974. It was found that the ulna had not healed correctly, however, subsequently it did heal. The second Determination Order, dated October 23, 1975, granted claimant an award of additional temporary total disability compensation.

A stipulation, dated March 11, 1980, provided that Dr. Monte Ellison was recommending further surgery for claimant's compensable injury and that claimant's condition had worsened and he was in need of surgery. Claimant and the State Accident Insurance Fund (Fund) requested the Workers' Compensation Board approve reopening of the claim provided for the payment of further medical care and treatment for the compensable condition and for payment of temporary total disability. Commencing on January 24, 1980, until closed by the Workers' Compensation Board. The Stipulation also provided claimant's attorney was to receive a fee equal to 25% of the retroactive and prospective payable temporary total disability compensation, limited to a maximum attorney fee of $500. This stipulation was approved by the Workers' Compensation Board.

In January 1980, Dr. Ellison had reported that he felt claimant had a carpal tunnel syndrome of the left arm. He recommended a surgical depression of the carpal tunnel. Dr. Ellison related this condition to claimant's original left arm injury. Decompression of the left carpal tunnel was performed on March 10, 1980. On April 14, 1980, Dr. Ellison reported that claimant had not been cooperative with him in his post-operative care. He noted that claimant was to return to see him three weeks from March 18, 1980, but had failed to do so. Dr. Ellison no longer desired to treat claimant and felt that the closing of the claim as of April 1, 1980, was legitimate. He did not anticipate any further disability as a consequent of the most recent operative procedure.

On May 7, 1980, the Fund requested a determination of claimant's current disability. The Evaluation Division of the Workers' Compensation Department, on May 15, 1980, recommended this claim be closed based on the evidence it had before it and that claimant be awarded additional temporary total disability compensation from January 24, 1980 through April 7, 1980, since Dr. Ellison had released claimant for work effective April 8, 1980.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted an award of additional temporary total disability compensation from January 24, 1980 through April 7, 1980.

Claimant's attorney was granted a reasonable fee by the March 11, 1980 stipulation.

CLAIM NO. 03-71-1007 May 28, 1980

WILLIAM B. HOWELL, JR.,CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On January 15, 1971, claimant sustained a compensable injury to his head when a tire blew off of a rim and struck him in the face and head. This claim was initially closed by a Determination Order, dated October 14, 1971, which granted claimant an award of temporary total disability compensation and compensation equal to 80 degrees unscheduled head disability and an award equal to 15 degrees for loss of the binocular vision because of a 5% loss of vision in the right eye and 5% loss of vision in the left eye. Claimant's aggravation rights have expired. Claimant, on March 21, 1980, requested the Board reopen his claim under its own motion jurisdiction.

Dr. Arthur Hockey, in March 1980, had reported that claimant had a status post-open depressed skull fracture in the frontal area with a cranioplasty and now a fistula from the area of the injury to the left supraorbital ridge. He felt the claimant would need exploration of the area which could entail a complete removal of the cranioplasty.

The Board requested the insurance carrier advise it of its position with respect to claimant's request for reopening of his claim. On May 1, 1980, United Pacific Insurance Co. reported to the Board that it had no objection to the Board ordering a reopening of the claim.

The Board, after reviewing the file on this case, found the evidence is sufficient to warrant a reopening of claimant's claim at this time. The Board orders this claim reopened the date claimant begins to lose anytime from work due to his conditions as reported by Dr. Hockey or until he is hospitalized for the surgery suggested by Dr. Hockey until the claim is closed pursuant to ORS 656.278.

IT IS SO ORDERED.

CLAIM NO. B 53115098 May 28, 1980

RICHARD METHVIN, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On December 1, 1966, claimant suffered a compensable injury to his left leg and various internal injuries. Claimant underwent a splenectomy. This claim was initially closed by a Determination Order dated February 29, 1968 which awarded claimant temporary total disability and permanent partial disability compensation and compensation equal to 15% loss of use of his left leg. Claimant's aggravation rights have expired.

Dr. Allen Ferrin in March 1980, reported claimant had an incisional hernia. He recommended surgical repair of the hernia. Dr. Ferrin related this hernia and the need for surgery to claimant's original injury.

Employers Insurance of Wausau on April 25, 1980, advised the Board it did not oppose a reopening of this claim.

The Board finds the evidence sufficient to warrant a reopening of this claim under its own motion jurisdiction and orders this claim reopened as of the date claimant was hospitalized for the surgery recommended by Dr. Ferrin and until closed pursuant to ORS 656.278.

IT IS SO ORDERED.

WCB CASE NO. 79-6698 May 28, 1980

CLARICE M. MONROE, CLAIMANT
Gary Jones; Rhoten, Rhoten & Speerstra, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Order Denying Remand

On May 13, 1980, claimant by and through his attorney, requested the Board remand this case to the Referee so that complete and sufficient consideration of all the evidence could be made. This was based on new and additional evidence consisting of medical reports from doctors in Colorado which were received by claimant's attorney after the hearing. Claimant had attempted to have these same reports considered by the Board earlier, but the Board rejected them because they were not part of the record and the attorney for the State Accident Insurance Fund would not stipulate to their being received and considered by the Board.

The Board does not find that this case was improperly, incompletely, or otherwise insufficiently developed or heard by the Referee and denies claimant's motion to remand this case to the Referee.

ORDER

Claimnat's request that Board remend this case to the Referee is denied.

WCB CASE NO. 79-2870 May 28, 1980

ROBERT LEON MOORE, CLAIMANT
Charles D. Maier; Malagon
& Yates, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Claimant seeks Board review of the Referee's order which affirmed the denial of his claim for an injury allegedly occuring on or about June 8, 1978.

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 claimant failed to timely give notice of his injury to his employer. Because of this late filing, the employer has been prejudiced.

ORDER

The order of the Referee, dated November 19, 1979, is affirmed.

CLAIM NO. TODC 5594 May 28, 1980

LAWRENCE S. NELSON, CLAIMANT
SAIF, Legal Services, Defense Atty.
Amended Own Motion Determination

On May 13, 1980, the Board entered its Own Motion Determination in the above entitled case. It has been brought to the Board's attention that an error should be corrected on page two of said order. In paragraph two and five the words "24.25 degrees" should be changed to read "20.25 degrees". The remainder of the order is affirmed.

IT IS SO ORDERED.

CLAIM NO. C 54410 May 28, 1980

RAY C. PIEFER, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On December 21, 1966, Claimant sustained a compensable injury to his right knee. The claim was closed and claimant's aggravation rights have expired.

On April 17, 1980, Dr. Robert Steele reported claimant should have a proximal tibial osteotomy of the right knee. He related the need for this surgery to claimant's original injury. Dr. Steele requested this claim be reopened and claimant undergo the requested surgery.

The State Accident Insurance Fund (Fund) on May 8, 1980, indicated it would not oppose an Own Motion Order reopening this claim as of the date of the surgery.

The Board finds the evidence in this case is sufficient to warrant reopening of this claim under its own motion jurisdiction. The Board orders this claim reopened as of the date claimant is hospitalized for the surgery recommended by Dr. Steele and until it is closed pursuant to ORS 656.278.

IT IS SO ORDERED.

CLAIM NO. C 8972 May 28, 1980

WALTER VAN HOOSER, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

On March 13, 1966, claimant suffered a compensable injury to his back and right leg when he was involved in a motor vehicle accident. Claimant missed about three weeks of work and claim was closed. Claimant's aggravation rights have expired.

On May 22, 1979, Dr. Thomas Bachhuber reported that claimant said he was having increasing difficulty with his back. Dr. Bachhuber felt that claimant had a chronic lumbar sprain. However, when claimant failed to improve with conservative treatment and developed right leg pain, he was hospitalized and, on June 20, 1979, underwent a myelogram. This revealed defects at the L4-5, L5-S1 level. On June 25, 1979, Dr. Bachhuber performed a laminectomy at both levels. He felt it was possible there was an underlying bulging or pathology of the disc at that level dating from the motor vehicle accident in 1966. The Orthopedic Consultants concurred that claimant's current problems were related to his industrial injury of 1966.

The Board on December 17, 1979, entered an Own Motion Order reopening the claim effective June 9, 1979, the date claimant had last worked, and finding that he was entitled to benefits of compensation and other benefits required by law until the claim is closed pursuant to ORS 656.278.

Claimant returned to his employment on September 10, 1979.

Dr. Bachhuber, on April 8, 1980, reported that claimant's condition was stationary. He felt claimant had minimal permanent impairment as a result of the lower lumbar nerve root compression which had been surgically treated.

On April 21, 1980, the State Accident Insurance Fund requested a determination of claimant's current disability. The Evaluation Division of the Workers' Compensation Department, on May 7, 1980, recommended that claimant be granted an award of additional temporary total disability compensation from June 9, 1979 through September 9, 1979 and an award of compensation equal to 10% unscheduled disability of the low back.

The Board concurs in this recommendation.

ORDER

Claimant is hereby granted an award of Temporary Total Disability compensation from June 9, 1979, through September 9, 1979 and an award of compensation equal to 10% unscheduled disability for his low back injury. These awards of compensation are in addition to the previous awards granted claimant.

CLAIM NO. ZA850947 May 28, 1980

LEROY VAUGHN, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

On March 10, 1961 claimant suffered a compensable injury to his left eye. This claim was originally closed by a final order dated March 30, 1962, which awarded claimant compensation equal to 67.5 degrees or 67.5% loss of vision of his left eye. Claimant's aggravation rights have expired.

Claimant requested the State Accident Insurance Fund (Fund) to reopen his claim based upon Dr. Daniel Benson's statement to him that he had a detached retina in the left eye and that corrective surgery was required. On September 19, 1979, Dr. Benson performed this surgery.

Dr. Frank W. Johnson, in October 1979, advised the Fund that in September 1979 it was found that the claimant's left eye had no light perception because of the retinal detachment. He felt it was reasonable to assume that the retinal detachment was a delayed secondary affect of the industrial injury and the resulting cataract extraction which had been done in November of 1961 by Dr. McCallum.

In an Own Motion Order, dated November 13, 1979, the Board reopened the claim as of September 18, 1979, the day claimant entered the hospital in preparation for surgery performed by Dr. Benson the following day, and ordered the claim remain open until closed pursuant to ORS 656.278.

In April 1980, Dr. Benson reported that claimant had returned to work on October 3, 1979. He indicated that claimant's vision before the detachment in the left eye had been 20/30 and that after the surgery it was 20/400.

On April 23, 1980, the Fund requested the determination of claimant's current disability. The Evaluation Division of the Workers' Compensation Department on May 8, 1980 recommened that claimant be granted additional Temporary Total Disability compensation from September 18, 1979 through October 2, 1979 and additional Permanent Partial Disability compensation equal to 32.5 degrees for 32.5% loss of the vision of the left eye for a total of 100 degrees for 100% loss of vision in the left eye.

The Board concurs in this recommendation.

ORDER

Claimant is hereby granted temporary total disability compensation from September 18, 1979, through October 2, 1979 and compensation equal to 32.5 degrees for 32.5% loss of vision of the left eye. These awards are in addition to any awards claimant has previously been granted for his March 10, 1961, industrial injury.

CLAIM NO. C 267826 May 30, 1980

DARRLYN I. ARMSTRONG, CLAIMANT
C.H. Seagraves, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

On September 16, 1970, claimant sustained a compensable injury to his head. This claim was originally closed by a Determination Order, dated May 21, 1971, which granted claimant temporary total disability compensation. A Second Determination Order, dated April 6, 1977, granted claimant additional temporary total disability compensation and compensation equal to 16 degrees for 5% unscheduled disability resulting from injury to his central nervous system. Claimant's aggravation rights have expired.

Claimant continued to have frequent headaches and seizures. By stipulation this claim was reopened, effective December 12, 1977, for the payment of temporary total disability and further medical care and treatment.

In May 1978, Dr. John Melson reported that claimant had had several minor seizures and a major motor attack in February 1977, but had had no further seizures since that time. He felt that claimant should not work in high places or around machinery where lapses of consciousness would endanger claimant or others. He noted that claimant had lost his motor vehicle drivers license.

On July 21, 1978, the Board issued an Own Motion Determination which granted claimant additional temporary total disability compensation and compensation equal to 96 degrees for 30% unscheduled disability for his injury to the central nervous system in addition to the awards previously made.

A stipulation, dated September 22, 1978, provided claimant's condition was not stationary and that temporary total disability benefits would commence on August 14, 1978 and continue until closed. The stipulation further provided the "Determination Order" of the Board was set aside.

In July 1979, claimant began working with Comprehensive Rehabilitation Services Inc. They indicated he had not worked since 1975. Claimant's main work expierence had been in the logging industry working as a log truck driver, cat driver and back hoe operator. Testing revealed claimant had an average intelligence.

In February 1980, claimant reported that he was having difficulty with his family and his wife indicated claimant was having difficulty with alcohol. This organization closed its file for lack of cooperation from claimant.

...erson reported that claimant had post-trau...
...m a head injury he suffered in September 1970. ...ed he had treated claimant since 1974 when the seizures ...peared. Dr. Melson felt that if claimant would take his anti-convulsants and avoid alcohol he probably could be gainfully employed. He reported claimant had had several seizures in the past years and that they were usually associated with non-compliance of medication or with alcohol abuse." He did not feel that claimant was totally and permanently disabled.

In April 1980, the Orthopaedic Consultants reported they found claimant's condition to be stationary. They felt claimant should make an effort to take his medication as subscribed by Dr. Melson and avoid the use of alcohol. They did not feel that claimant could return to truck driving or timber falling, but that he was capable of some other occupation in the medium work category. They felt claimant's total impairment, was related to his head injury and post-traumatic seizure disorder, was in the mild to moderate range. They noted claimant also had a shoulder sprain which was a direct result of his seizure and considered his impairment for this condition to be in the minimal range. In conclusion, they noted claimant's seizure disorder was permanent in nature, however felt should respond to medical treatment.

On April 24, 1980, the State Accident Insurance Fund requested a determination of claimant's current disability. The Evaluation Division of the Workers' Compensation Department, on May 13, 1980, recommended that claimant be granted additional temporary total disability compensation from December 12, 1977 through April 2, 1980 and additional compensation equal to 96 degrees for 30% unscheduled disability for injury to the central nervous system.

The Board concurs with this recommendation.

ORD...

...laimant is hereby granted an award of additional temporary ... disability compensation from December 12, 1977 through April ... 0 and an award of compensation equal to 96 degrees for 30% ...luled disability of the central nervous system. These awards ... addition to any awards granted. Claimant's attorney is ... as a reasonable attorney fee an amount equal to 25% of the ... d temporary total disability compensation not to exceed ...

CLAIM NO. A 444674 May 30, 1980

LOIS CHARD, CLAIMANT
Coons & Anderson, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

On August 27, 1954, claimant sustained a compensable injury to her left leg. This claim was closed by an order dated, September 24, 1957, which awarded claimant compensation equal to 60% loss of function of the left leg and temporary total disability compensation. Claimant's aggravation rights have expired.

Claimant continued to have difficulty with the left leg. The Board, by its Own Motion Order, dated December 19, 1978, reopened this claim effective July 12, 1978, until closed pursuant to ORS 656.278 less time worked and awarded claimant's attorney a fee.

On February 4, 1979, Dr. Keith Woolpert performed a total left knee replacement. On April 21, 1980, Dr. Woolpert reported claimant's condition was medically stationary since her condition had not changed appreciably over the past several months. He reported she continued to do well in respect to her knee and considered it had very good results from her surgery. He rated claimant's impairment in the moderately severe catagory.

On April 29, 1980, the State Accident Insurance Fund requested a determination of claimant's current disability. The Evaluation Division of the Workers' Compensation Department, on May 19, 1980, recommended that claimant be granted additional temporary total disability compensation from July 12, 1978 through April 21, 1980 and, based on their finding that claimant's condition improved with surgery, recommended that no additional permanent partial disability be granted.

The Board concurs this recommendation.

ORDER

Claimant is hereby granted an award of additional temporary total disability compensation from July 12, 1978 through April 21, 1980, less time worked. Claimant's attorney was granted a reasonable fee by the Board's Own Motion Order, dated December 19, 1978.

CLAIM NO. C 403443 May 30, 1980

WILLIAM C. CRAIG, CLAIMANT
Malagon & Yates, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On April 24, 1980, claimant by and through his attorney, requested the Board exercise its own motion jurisdiction and re-open his claim for his October 23, 1972 back injury. That claim had been closed by a Determination Order, dated December 6, 1972. Claimant's aggravation rights have expired. The State Accident Insurance Fund (Fund) had denied claimant's aggravation claim for this injury because claimant's aggravation rights had expired, and a hearing is pending on the Fund's denial. Claimant also had filed an aggravation claim for a November 14, 1977 back injury with the Fireman's Fund (Fireman). Fireman had denied that claim and a hearing is pending on that denial.

In October 1979, Dr. Harold Rockey reported claimant's condition, related to November 1977 injury, had reached a "plateau." Earlier Dr. Rockey reported claimant had suffered a low back injury in 1977, and degenerative arthritis. He could not apportion these conditions. Claimant had experienced severe exacerbation of back pain while brushing his teeth in August 1979.

In January 1980, claimant was hospitalized. Dr. Donald Smith stated that claimant's condition was not stationary, "that he has had aggravation of his previous condition and that his case should be re-opened for hospitalization and restudy with a myelogram to be performed." The myelogram revealed a herniated disc at the L4-5 level on the right. In March 1980, Dr. Smith opined claimant had a retained herniated disc at the L4-5 level for the past three years which was at that time, in all probability, continuing to be symptomatic.

The Fund on May 13, 1980, advised the Board it opposed reopening this claim under the Boards own motion jurisdiction. This was based on claimant's subsequent injuries, which it felt relieved it of responsibility in this case.

The Board, after reviewing all the evidence submitted to it, finds that it would be in the best interest of the parties if this claim was remanded to the Hearings Division to be joined with the pending hearings on WCB Case No. 79-8087 and WCB Case No. 80-530. The Referee shall decide whether claimant's current condition is related to the October 23, 1972 injury and has worsened since his last award or arrangement of compensation in that case or is related to the November 14, 1977 injury or other causes. Upon the conclusion of the hearing, the Referee shall cause a transcript of the proceedings to be prepared and forwarded to the Board along with the other exhibits introduced at the hearing and his recommendation on the Own Motion case. The Referee shall make and enter appropriate orders in the other cases.

IT IS SO ORDERED.

CLAIM NO. C 378279 May 30, 1980

STEARNS CUSHING, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On April 28, 1980, claimant requested his claim be reopened for a June 12, 1972 injury to his hips under the Boards own motion jurisdiction. This claim had initially been closed by a Determination Order, dated March 11, 1974, which granted claimant an award of temporary total disability compensation and compensation equal to 64 degrees for 20% unscheduled disability for injury to claimant's right pelvis. Claimant's aggravation rights have expired.

On March 27, 1980, Dr. Darrell Weinman requested authorization from the State Accident Insurance Fund (Fund) to perform a total hip revision, including a removal of the "femoral component and methylmethacrylate and the insertion of a long stem prosthesis with more methylmethacrylate". He noted that claimant had undergone a total hip replacement of the right side for degenerative joint disease of the right hip in March 1973. Dr. Weinman reported that this condition had been aggravated by his industrial injury of June 12, 1972 which had been accepted by the carrier. In April 1980, Dr. Weiman reported that claimant was scheduled for the hip revision surgery on May 2, 1980 and that on April 30, 1980 he would be hospitalized in preparation for this surgery.

The Fund, on May 8, 1980, advised the Board that it did not oppose an own motion order reopening this claim for right hip revision suggested by Dr.Weinman and for which claimant was hospitalized on April 30, 1980.

The Board, after considering all the evidence in this case, finds that it is sufficient at this time to warrant a reopening of claimant's claim under its own motion jurisdiction. Therefore, the Board orders this claim be reopened, effective April 30, 1980, the date claimant was hospitalized in preparation for his right hip revision until closed pursuant to the provisions of ORS 656. 278.

IT IS SO ORDERED.

WCB CASE NO. 77-7780 May 30, 1980

BEULAH HAMLIN, CLAIMANT
William A. Barton, Claimant's Atty.
Roger Warren, Employer's Atty.
Order On Remand

On September 10, 1979, the Board entered its Order on Review in this case which reversed the Referee's order, which had granted claimant 50% permanent partial disability. The Board found that claimant's condition was only temporarily exacerbated by the industrial exposure and that claimant did not suffer any permanent partial disability. The Board's order was appealed to the Court of Appeals.

The Court of Appeals, in an opinion dated March 31, 1980, reversed the Board's order and remanded this case to the Board with instruction to reinstate the Referee's order.

Therefore, the Board, in compliance with the judgment and mandate dated May 9, 1980, reverses its Order on Review dated September 10, 1979, and reinstates the Referee's order dated December 27, 1978, which granted claimant compensation equal to 160 degrees for 50% unscheduled disability and granted claimant's attorney 25% of the additional award as and for a reasonable attorney fee to a maximum of $2,000.00.

IT IS SO ORDERED.

CLAIM NO. C 27334 May 30, 1980

DENNIS W. PADGETT, CLAIMANT
Thomas J. Flaherty, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On October 21, 1970, claimant sustained a compensable injury to his low back. Claimant's claim was closed and his aggravation rights have expired.

On May 16, 1980, the State Accident Insurance Fund (Fund) advised the Board it had authorized claimant to attend the Northwest Pain Center. The Fund indicated it would not oppose an Own Motion Order allowing time loss while claimant was enrolled at the Northwest Pain Center.

Therefore, the Board after reviewing this matter, would order this claim reopened under its own motion jurisdiction effective the date claimant enters treatment in the Northwest Pain Center program until closed pursuant to the provision of ORS 656.278.

IT IS SO ORDERED.

CLAIM NO. DC 438423 May 30, 1980

JAMES R. SAMPSON, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On March 3, 1980, claimant requested the Board reopen his claim under its own motion jurisdiction. On November 20, 1972, claimant injured his left knee. The claim had been initially closed by Determination Order, dated January 29, 1975, which awarded claimant a period of temporary total disability compensation and compensation equal to 67.5 degrees for 45% loss of his left leg. The claim subsequently was reopened and closed by a Determination Order, dated August 28, 1978, which awarded claimant additional temporary total disability compensation and additional compensation equal to 10% loss of his left leg. Claimant's aggravation rights have expired.

On February 11, 1980, Dr. Harry Groth reported claimant was having difficulty with his left knee. Claimant complained of increasing pain with walking. Dr. Groth diagnosed inflammatory changes of the left knee adjacent to the patellar tendon and medial joint line. On February 12, 1980, Dr. Groth wrote to the State Accident Insurance Fund (Fund) requesting this claim be reopened because claimant was having progressing problems with his knee. Dr. Groth, in April 1980, reported that claimant was having increasing difficulty with the left knee. Claimant complained of pain at night and pain along the medial femoral condyle, pain along the medial patellar tendon. Dr. Groth felt that claimant's condition had worsened since February 1980. He felt that claimant had a general deterioration of the knee.

On May 1, 1980, the Board requested the Fund advise of its position in respect to claimant's request for own motion reopening of his claim. The Fund, on May 5, 1980, advised the Board it opposed an Own Motion Order for reopening his claim for time loss, as it did not appear to be currently verified by the treating physician. It indicated that it would continue to pay medical bills in this claim. Attached to the Fund's letter was a report, dated March 18, 1980, from Dr. Groth. Dr. Groth basically repeated his prior reports concerning claimant's condition.

In September 1979, Dr. Groth had reported that claimant had continuing knee pain and felt that claimant's current problems were a direct result of his original injury. He felt that the two related and that claimant's fall had resulted in claimant having delayed arthritic changes of the knee.

The Board, after throughly reviewing evidence in this claim finds it sufficient to reopen the claim at this time. Dr. Groth reports that claimant's condition is progressive and due to his original injury in that claimant has had delayed arthritic changes. Therefore, the Board finds this claim should be reopened the date of this order for payment of compensation and other benefits, less time worked, until closed pursuant to provisions of ORS 656.278.

IT IS SO ORDERED.

WCB CASE NO. 79-1741 May 30, 1980

RICHARD L. WINE, CLAIMANT
Jerry Gastineau, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order Denying Motion

On April 18, 1980, the Board entered its Order on Review in the above entitled matter. On May 27, 1980, the Board received a request for reconsideration from the claimant, by and through his attorney. The Board finds that claimant's appeal rights had expired before he mailed his request and the Board no longer has jurisdiction over the case. Claimant's request for reconsideration should be denied.

IT IS SO ORDERED.

CLAIM NO. C 414621 May 30, 1980

DARRYL S. ZUCKER, CLAIMANT
Richard Kropp, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On December 24, 1972, claimant sustained compensable injury to his left shoulder. This claim was initially closed by a Determination Order, dated August 21, 1974, which granted claimant temporary total disability compensation. Subsequently the claim was reopened and closed by a Second Determination Order, dated September 20, 1979, which awarded claimant additional temporary total disability compensation and compensation equal to 128 degrees for 40% unscheduled disability resulting from his left shoulder injury. Claimant's aggravation rights have expired.

Dr. Monte Ellison reported on December 5, 1979, he drained an abscess which had formed on the interior aspect of the left shoulder. After the surgery claimant was treated conservatively, however, on February 15, 1978, Dr. Ellison performed additional surgery. This surgery consisted of exploration arthrotomy of the joint of the left shoulder with debridement of scar and old suture material, "anterior reconstruction and advancement in the manner of Putti-Putti, utilizing the subscapularis muscle" and transfer of the coracoid process to the anterior surface of the humerus. Dr. Ellison related the need for this treatment to claimant's original shoulder injury.

On may 9, 1980, the State Accident Insurance Fund advised the Board it would not oppose an Own Motion reopening this claim for the recent surgery.

The Board, after reviewing the evidence in this case, finds it sufficient to warrant a reopening of claimant's claim at this time. Therefore, the Board orders the claim reopened, effective February 15, 1980, the date claimant was hospitalized for the surgery performed by Dr. Ellison, until the claim is closed pursuant to provisions of ORS 656.278.

Claimant's attorney is entitled to a reasonable attorney fee a sum equal to 25% of the increased temporary total disability compensation which claimant may receive as a result of this order, not to exceed $750.

IT IS SO ORDERED.

WCB CASE NO. 78-3124 June 4, 1980

WILLARD BABB, CLAIMANT
Olson, Hittle, Gardner & Evans,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

The State Accident Insurance Fund (Fund) seeks review by the Board of the Referee's order which found all of claimant's alleged conditions to be compensable and remanded the claim to it for acceptance and granted claimant an award of permanent total disability effective November 15, 1977.

FACTS

Claimant, 45 years of age, owned and operated his own surveying business and on January 4, 1977 was on the pea line and was crossing a log and the bark slipped off causing him to fall into the brush. His eye began to water and the back of his left leg bothered him. This accident occurred near the end of the work day so claimant went home and complained to his wife.

The next morning, January 5, claimant got up and went off to work and didn't feel well so he turned the car around and returned home. His jaw began to hurt and so did his right arm. He was restless and he couldn't sit still. He called Dr. Sproed's office and his wife drove him to the appointment, however, before arriving claimant became unconscious and when he arrived at the doctor's office he had no blood pressure or pulse. Claimant was quickly driven to the hospital, one-and-a-half blocks away and was resuscitated.

The medical question which is to be decided is did claimant's fall cause an embolism to develop in his leg which in turn traveled to the right side of his heart causing cardiac arrest and lodging in the lung or did claimant have a myocardial infarction leading to cardiac arrest and subsequently developed a pulmonary embolism.

The second medical question is did claimant also suffer from his industrial injury a scarred cornea leading to visual loss; ulnar nerve entrapment; development of diabetes and psychological personality changes.

At the first session of the hearing, Dr. Johnson, an ophthalmologist, testified that he examined claimant on August 31, 1978 and by that time the eye condition had healed. He opined that the injury to the eye was not related to the industrial injury because the hospital reports did not specify any complaints of pain. He stated a scarred or scratched cornea was extremely painful.

Dr. Griswold, a cardiologist, testified that he examined claimant on August 23, 1978 and reviewed all of the medical reports of record. His opinion was that claimant had a myocardial infarction about one hour prior to the hospital admission which led to cardiac arrest. He based his opinion on the EKG's and serum enzyme studies. Dr. Griswold felt there was absolutely no relationship between the myocardial infarction and the industrial injury occurring the day before. Further, he felt there was no pulmonary embolism, but if claimant did have one it did not develop until 12 days after the myocardial infarction based upon the hospital records.

Claimant's wife testified that claimant complained of leg pain and the eye was bloodshot and looked very irritated. She indicated that the leg was red and slightly swollen.

At this point in the first session of hearing the State Accident Insurance Fund denied the eye and heart conditions which had already been accepted and for which a Determination Order had already granted 40° for 40% loss of vision of the right eye and 144° for 45% unscheduled disability for the heart injury. This hearing came about because claimant appealed the Determination with a cross-appeal for a hearing by the Fund.

At the second session of hearing there was a change of counsel for both sides. Claimant testified that since January 1979 he had been hospitalized twice for chest pain.

Dr. Sproed, a family practitioner, and the doctor who revived claimant, testified claimant had no prior problems. Dr. Sproed testified that claimant was discharged from the hospital on January 28, 1977 with a diagnosis of pulmonary embolism and cardiac arrest. The cause of the cardiac arrest, in his opinion, was that claimant suffered an injury which thrombosed his left leg and the next day caused an embolism which caused the cardiac arrest. The doctor felt claimant did have a minor myocardial infarction secondary to the cardiac arrest. The doctor went on to say that claimant also had right hand and arm numbness, swelling of the left leg, personality change, all from the cardiac arrest, as claimant's heart had stopped for three to seven minutes. The doctor also felt the diabetes could be from tremendous physical and psychological stress. The doctor found a blood clot from the fall started the whole thing. Dr. Sproed testified the enzyme levels were not helpful as they also rise with resuscitation.

Dr. Grossman, a diagnostician and internist, testified he did not examine the claimant, but he read the medical reports in evidence. He felt all factors indicated that either Dr. Sproed and Dr. Griswold's diagnoses could be correct. He personally felt, however, that probably a pulmonary embolism together with pre-existing coronary artery disease triggered off some insufficiency causing a myocardial infarction. Dr. Grossman also felt that diabetes could be caused by an inadequate blood supply affecting the pancreas. In his opinion claimant was not capable of gainful employment. Dr. Grossman summarized his testimony saying that it was most logical to assume the sequence of events started with the embolism. The doctor admitted it was unusual for a bump on the leg to initially have a diagnosis of cardiac problems with a subsequent diagnosis of pulmonary embolism.

Dr. Vervloet, a cardiopulmonary specialist, testified he only read the medical reports. He felt it was hard to state which came first and whether only one of the conditions did occur. In his opinion, the pulmonary condition came first. Claimant's myocardial infarction was only a partial one. The question, he felt, really was did claimant have an embolism earlier or did the "cutdown" on the left leg at the hospital cause the embolism. His final opinion was the odds of a "cutdown" being the cause were unlikely unless claimant had deep vein thrombosis. He felt the clinical evidence supported a pulmonary embolism.

Dr. Griswold testified at the second session of the hearing that claimant's physical reactions on January 5, 1977 of restlessness, pain in the jaw, into the right arm, were consistent with a myocardial infarction and not a pulmonary embolism. He felt there was no medical proof of any possibility of a embolism until January 17 or 19, 1977.

The hospital admittance report indicates that claimant had complaints of chest pain prior to this hospital admission. The diagnosis on January 5, 1977 was myocardial infarction with cardiac arrest, ventricular fibrillation, and old seizure disorder. On January 8, 1977, a "cutdown" was performed and claimant developed a staph infection. The nurse's note dated January 18, 1977 indicated pneumonia was suspected. On August 22, 1977, Dr. Sproed released claimant to restricted work with no climbing or heavy lifting.

On September 12, 1977, Dr. Carey, an internist, examined claimant and felt that it was amazing that claimant had survived. Claimant's pulmonary functions were 70% and quite good. He felt claimant was disabled from heavy work. On November 15, 1977, Dr. Carey found claimant medically stationary with severe fatigue and shortness of breath on exertion. The doctor felt claimant was permanently and totally disabled from regular occupation.

Claimant has an eighth grade education with past work experience in grocery store work, cold storage plant, and construction work for the Bureau of Public Roads. He owned and operated a trailer park and restaurant. He had managed a motel and worked as a plumber and carpenter. Claimant testified that since January 4, 1977 he has made no attempt to go to work. He stated he suffers from right hand numbness and his hand shakes and is affected by cold weather. His worst problem, he testified is breaking out in cold sweats with dizziness.

The Referee found this case complex and difficult and that it was a close question on the issue of compensability of the heart condition but concluded the weight of the evidence favors compensability. As to the eye condition, he found that claimant had proven compensability.

The Referee further found that the aggregate medical evidence does not establish that the arm condition, diabetes, and personality changes were caused by non-job-related events and, indeed, claimant had none of these problems prior to the injury and, therefore, felt that the total evidence supports the conclusion that the conditions were related. He remanded the claim to the Fund for acceptance of all conditions and granted claimant an award of permanent total disability effective November 15, 1977.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, reverses the Referee's order in its entirety. The evidence indicates claimant's leg injury on January 4, 1977 was very minor. Dr. Johnson testified he opined claimant's eye condition was not related to the industrial injury because the hospital reports did not specify any complaints of pain. He stated a scarred or scratched cornea would have been very painful. Dr. Grossman felt the fall could have caused claimant's eye problem. Based on the evidence, the Board finds Dr. Johnson more persuasive and does not find claimant's eye condition is related to the injury.

The Board finds there was no evidence of medical causation for claimant's alleged conditions of right ulnar problems or psychological condition.

Further, the Board does not find claimant's myocardial infarction was related to his bump on the leg. Dr. Griswold testified claimant had a myocardial infarction on January 5, 1977 rather than a pulmonary embolus and that claimant's work and his fall did not contribute to it. Dr. Sproed felt the leg injury caused a thrombosis which resulted in a pulmonary embolism and subsequent cardiac arrest. Dr. Griswold felt this was a "pure-simple hypothesis". The Board finds Dr. Griswold more persuasive than the other doctors. Dr. Griswold did not feel claimant's diabetes was related to the bump on the leg, but felt it could have occurred because of hypoxia. Likewise, based on the evidence and the Board's finding that the myocardial infarction is not compensable, the Board does not find that the subsequent diabetes condition is related to the industrial injury. Therefore, the Board reverses the Referee's order in its entirety.

ORDER

The Referee's order, dated October 1, 1979, is reversed in its entirety.

The State Accident Insurance Fund's denials are reinstated and affirmed.

WCB CASE NO. 78-8467 June 4, 1980

KAREN BINDER, CLAIMANT
Bischoff, Murray & Strooband,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Claimant seeks Board review of that portion of the Referee's order which affirmed the State Accident Insurance Fund's (Fund) denial of her claim for a tarsal tunnel syndrome.

FACTS

Claimant, a 33-year-old conservation aide with the Oregon State Board of Forestry at its D.L. Phipps Forest Nursery, alleges that her work caused her to develop a right leg condition. She filed a claim on December 12, 1977.

Dr. R. W. McLean first diagnosed claimant's injury as synovitis of the right achilles tendon sheath and attachment related to a strain. Claimant received conservative treatment.

In February 1978, Dr. Stanley Donahoo reported claimant complained of chronic low back pain and right hip pain. He felt claimant had L4-L5 disc disease.

The Fund, on February 21, 1978, denied this claim. It concluded that claimant's right leg condition was caused by a pre-existing condition and was not caused or materially aggravated by her job activities.

Dr. McLean, in March 1978, reported at work claimant had to use her legs in an awkward position and subsequently developed inflammation of the achilles tendon. He stated the "mechanisms of synovitis is excessive strain on given tendon . . .". It was felt this inflammation would have subsided with cessation of unusual stress. Dr. McLean did not relate her March 1978 symptoms to the December 1977 problems.

In April 1978, Dr. Jim Norris-Pearce, a neurologist, reported claimant said she had lifted a pallet in December 1977 and felt she "pulled something in her legs". He felt claimant had a lumbosacral strain.

Claimant also was treated by Dr. Anthony Roberts, D.C. He diagnosed chronic lumbosacral strain with attendant radicular irritation and associated chronic cervical sprain. Dr. Roberts felt claimant's work aggravated her back problem. He indicated heavy lifting or prolonged standing and sitting are contraindicated. Dr. Roberts felt claimant would have some permanent disability and would be precluded from heavy lifting (over 25 pounds), prolonged periods of stooping, twisting or bending. He felt continuous heavy labor or bending would worsen claimant's condition.

The Orthopaedic Consultants, in June 1978, reported claimant complained of low back pain, right thigh pain, neck pain, and pain across her right shoulder and into her right hand. They diagnosed resolved right achilles tendinitis, chronic lumbosacral strain syndrome by history, bursitis of the right hip resolved and unrelated to her injury, functional overlay, and a convulsive disorder unrelated to her injury. It was their opinion claimant's right achilles tendinitis was related to claimant's work and was resolved without any permanent partial disability. They did not find the neck, shoulder, arm, back, or other symptoms relating to her low back and right hip related to her industrial injury. Dr. Donahoo concurred with this report.

In August 1978, Dr. Donahoo reported claimant's functional complaints overshadowed his examination. Claimant was adamant that she could not return to work in the nursery.

A stipulation reopened this claim as of September 6, 1978 for the right achilles tendon sheath and attachment. The stipulation provided the Fund accept the right achilles condition. A Determination Order, dated October 19, 1978, awarded claimant temporary total disability compensation.

In March 1979, Dr. Paul Jones diagnosed right tarsal tunnel syndrome, right-sided hypesthesia not borne out in his examination and grand mal epilepsy under treatment.

The Fund, in April 1979, advised claimant it had not accepted responsibility for claimant's bursitis of the right hip, convulsive disorder, low back problem or tarsal tunnel syndrome.

In June 1979, Dr. Jones reported the tarsal tunnel syndrome was often caused by trauma. He noted delayed "post-traumatic effects can result from tendon injury which causes a tenosynovitis". He felt the injury to the right heel and ankle described by claimant might be responsibility for a delayed tarsal tunnel syndrome.

Also, in June 1979, Dr. Stanley Filarski opined claimant's tarsal tunnel syndrome was related to her industrial injury.

In their depositions Drs. Jones & Filarski affirmed their opinions that claimant's tarsal tunnel syndrome was related to her industrial injury.

The Referee found claimant had failed to prove by the preponderance of the evidence that her tarsal tunnel syndrome was compensable. Therefore, the Referee affirmed the Fund's denial. Further, the Referee found claimant was not entitled to additional temporary total disability compensation or permanent partial disability.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, modifies the Referee's order. Claimant appealed that portion of the Referee's order which affirmed the Fund's denial of her tarsal tunnel syndrome. The Board finds the weight of the medical evidence establishes this condition is related to her industrial injury and is compensable. Drs. Jones and Filarski both opined claimant's tarsal tunnel syndrome was related to her industrial injury. Therefore, the Board reverses that portion of the Referee's order appealed and remands claimant's claim for the right tarsal tunnel syndrome to the Fund for acceptance and payment of compensation as of the date claimant is hospitalized for surgery until closed pursuant to ORS 656.268.

ORDER

The Referee's order, dated December 11, 1979, is modified.

That portion of the Referee's order which approved the State Accident Insurance Fund's denial of claimant's right tarsal tunnel syndrome is reversed. Claimant's claim for that condition is remanded to the Fund for acceptance and payment of compensation effective the date claimant is hospitalized for surgery until closed pursuant to ORS 656.268.

The remainder of the Referee's order is affirmed.

WCB CASE NO. 79-6874 June 4, 1980

BETTY LOUISE CAMPBELL, CLAIMANT
Welch, Bruun & Green, Claimant's Attys.
Schwabe, Williamson, Wyatt, Moore & Roberts, Employer's Attys.
Order on Reconsideration

Claimant requested reconsideration of the May 20, 1980 Board's Order on Review in this case. Claimant contends she is entitled to temporary total disability compensation from April 24, 1979 to September 10, 1979.

The evidence in this case indicates that on April 18, 1979 Dr. Harder released claimant for limited duty with no heavy lifting or heavy use of her left arm.

Claimant testified she returned to work but her shoulder was so painful she only worked a total of eleven hours and quit working on April 20, 1979. However, the employer's personnel representative testified claimant returned to work with her arm in a sling and her job was modified. She was instructed to sort onion rings with her right hand and to do no lifting. This modified work was within claimant's physical capabilities as outlined by Dr. Harder.

Claimant then sought treatment from Dr. Peterson in Seattle who found her disabled. The carrier then, on August 13, 1979, had claimant examined by Dr. Rosenbaum who found her condition medically stationary with mild impairment.

On August 14, 1979, Dr. Peterson indicted he did not want claimant in any form of employment from April 24, 1979 to an undetermined future date.

The Board conclusion that claimant was not entitled to further temporary total disability until her hospitalization on September 10, 1979 was based on the medical opinions of two Oregon doctors. Dr. Harder, on April 18, 1979, released claimant for "limited duty" work. "Limited duty" work was available to her and she was physically capable of performing it. Dr. Rosenbaum's findings in August 1979 support a conclusion that claimant's condition had not worsened, in fact, he found her medically stationary with mild impairment.

The Board further felt that Dr. Peterson offered no curative treatment and it was not until claimant was examined and came under the care of Dr. Smith that a curative approach was taken.

The Board amends its Order on Review, dated May 20, 1980, as follows: on page one, first paragraph, line three, the date "April 24, 1978" is changed to "April 24, 1979" and on that same page, second paragraph, line two, the date "March 26, 1976" is changed to "March 26, 1979". The Board, after reconsidering its Order on Review as amended, finds its decision is correct and would affirm the Order on Review as amended.

IT IS SO ORDERED.

WCB CASE NO. 79-5997 June 4, 1980

CLARENCE W. EVANS, CLAIMANT
Maurice V. Engelgau, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

The State Accident Insurance Fund (Fund) seeks Board review of the Referee's order which granted claimant an award of compensation equal to 48° for 15% unscheduled disability for his low back injury, making a total award in this case of compensation equal to 80° for 25% unscheduled disability for claimant's back injury. The Fund contends this award is not supported by the evidence.

FACTS

The Board adopts the facts as recited in the Referee's order, a copy of which is attached to this order.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, reverses the Referee's award of compensation in this case. The evidence indicates that claimant now has limitations that he should not engage in work which requires lifting over 50 pounds, excessive bending, stooping, lifting, twisting, or other such movements. These work restrictions have resulted in a loss of wage earning capacity due to this injury. However, since his injury, claimant has been retrained and is qualified in refrigeration repair work and was offered employment in this field, however, elected to work as a freight truck driver. Claimant did not attempt to return to work in the mill. Claimant testified that he worked as a freight truck driver

until the middle of October 1979 and missed no time from work because of back pain. He was laid off because of a slump in the freight business. Claimant was able to load and unload freight. This evidence does not support the award of compensation granted by the Referee. The Board finds that the Determination Order correctly compensated claimant for the loss of wage earning capacity he has sustained as a result of this injury. Therefore, the Board would reverse the Referee's award of additional compensation in this case, restore the Determination Order and affirm it.

ORDER

The Referee's order, dated December 17, 1979, is reversed in its entirety.

The Determination Order, dated June 20, 1979, is restored and affirmed.

This is an appeal from a determination order of June 20, 1979 which awarded the claimant temporary disability from February 13, 1978 through November 21, 1978 and from January 29, 1979 through June 22, 1979 and 10% unscheduled low back permanent partial disability (Ex. 21). The hearing was held in Gold Beach, Oregon on December 5, 1979 before Kirk A. Mulder, Referee and was closed that day. Claimant was present and represented by his attorney, Maurice V. Engelgau. The defendant was represented by Paul L. Roess.

The issues include further medical care and temporary disability, or in the alternative, extent of permanent disability.

The claimant suffered a compensable lumbar strain on or about February 9, 1978 when he slipped and fell (Exs. 1 through 3).

Claimant was treated by E.G. Samuel, D.C., N.D., and referred to Thomas C. Bolton, M.D., orthopedist who advised on April 18, 1978 that claimant's low back discomfort had not responded to two months of rest and outpatient treatment (Ex. 4).

Claimant was hospitalized but continued to have a backache (Ex. 8).

Claimant was referred to James E. Dunn, II, M.D., neurological surgeon, who advised on July 7, 1978 that claimant should lose weight and that claimant should do work not involving lifting over 50 pounds, or excessive bending, stooping, lifting, twisting, etc. (Ex. 11).

In his closing report of April 28, 1979, Dr.

Samuel indicated that the prognosis was unchanged, that claimant has permanent impairment and requires more treatment (Ex. 20).

On October 23, 1979, which was after the determination order in question, Dr. Samuel advised that claimant had an exacerbation dating to September 28, 1979 and that claimant now had symptoms extending down to the foot and ankle. The doctor suggested that the claim be reopened (Ex. 22).

At the hearing, claimant complained of constant belt-level pain, which worsens with bending, lifting or sitting. He has trouble sleeping. He takes no medication.

Claimant worked part time since June 1979. He was a freight truck driver. He missed some work because of his back. He was laid off for reasons unrelated to his injury. He had finished refrigeration school in Portland before then. He had been unable, to the time of the hearing, to obtain work in that field.

Claimant testified that he would have kept the freight job if he had not been laid off.

I conclude that claimant has failed to prove entitlement to re-opening of his claim for "active" treatment and temporary disability. But for being laid off, claimant probably would still be working. Claimant is entitled to necessary medical care under ORS 656.245.

At the time of the hearing, claimant was 37 years old.

I conclude that claimant has suffered a permanent loss of wage earning capacity beyond 10%.

ORDER:

It is hereby ordered that defendant pay to:

(1) Claimant additional compensation equal to 48° (15%) unscheduled low back disability for a total award of 80° (25%).

(2) Claimant's attorney, 25% of, and from, the increase in compensation, as a reasonable attorney fee, not to exceed $2,000.

CLIFFORD C. GILINSKY, CLAIMANT
Velure, Heysell & Pocock, Claimant's Attys.
Thomas J. Mortland, Employer's Atty.
Request for Review by Employer

The employer-carrier seeks Board review of the Referee's order which granted claimant an award of compensation equal to 320° for 100% unscheduled disability. The employer-carrier contends this award is excessive.

FACTS

Claimant, a 27-year-old "jacker" with Cascade Wood Products, on November 2, 1976, injured his head and neck when, while picking up wood chunks, he straightened up and struck the back of his head on a metal support. This injury was diagnosed as a cervical strain. Claimant had a pre-existing cervical compression fracture at C4. An EEG test was normal.

In January 1977, Dr. John Melson reported that claimant continued to complain of a dull aching sensation in his head. This pain was increased by all neck and arm movements. Dr. Melson diagnosed an old cervical compression fracture, with anterior osteophytosis and bridging at C3-4 and cervical cephalgia from this fracture, complicated by chronic anxiety--tension state. He hospitalized claimant for a trial period of traction.

While claimant was hospitalized in April 1977, he underwent a discogram and a block of the greater occipital neurovascular bundle which did not relieve his pain. Dr. Melson opined that claimant had chronic tension headaches, superimposed on cervical arthritis. Because of continuing complaints of pain, claimant underwent a myelogram and an analgesic discograph. The myelogram revealed a defect at the C5-6 level.

In July 1977, Dr. Melson reported that claimant continued to complain of severe headaches and ringing in the left ear. He opined that claimant's condition was stationary and recommended that the claim be closed. However, Dr. Melson later referred claimant to Dr. Kevin Sullivan, a neurologist.

In September 1977, Dr. Sullivan reported that he felt claimant's symptoms were related to chronic muscle contraction and tenderness in the neck and across the shoulders which resulted in headaches. His diagnosis was chronic muscle contraction headaches.

This claim was first closed by a Determination Order, dated October 27, 1977 which awarded claimant temporary total disability compensation.

Dr. Sullivan, in November 1977, reported that he had begun claimant on a physical therapy program and weight reduction. He indicated that claimant, at that time, had a moderately severe disability because of his continuing pain. He reported that claimant was unable to engage in any activities that involved the use of the arm without greatly worsening his complaints of pain. Dr. Sullivan diagnosed chronic cervical strain with resultant headaches and neck pain, exacerbated by activity involving use of the arms. On December 12, 1977, Dr. Sullivan reported that he had last treated claimant on November 4, 1977 and felt that claimant's condition was stationary since he had not responded to any medication or therapy. He recommended claimant enter a vocational rehabilitation program.

Dr. Melson, on January 11, 1978, reported that it was his opinion that claimant's condition was neurologically stationary and that if claimant's headaches were still persisting at such a level that he was unable to work, psychiatric intervention should be obtained.

In February 1978, Dr. Frederick Fried, a psychiatrist, reported claimant had had difficulty while in the service where he experienced considerable stress resulting in a psychological decompression with stammering, attacks of anxiety and crying which led to his hospitalization and discharge. In 1975 claimant had also been divorced and his wife obtained custody of their child. Dr. Fried reported that apparently this separation was quite traumatic for claimant and that he still had strong unresolved feelings which placed him in considerable conflict in regards to his personal life. Claimant told Dr. Fried that he felt his accident prevented him from returning to work and he stated that he was unable to work to support his family and that he was having difficulty accommodating himself to the change in his lifestyle and admitted to feeling depersonalization and anxiety. Dr. Fried opined that claimant's pre-morbid personality coupled with his industrial injury contributed to his current state and emotional turmoil. Dr. Fried felt that claimant's condition was not psychiatrically stable and that the combination of previous organic damage and concurrent emotional stress decreased claimant's ability to function adequately. He felt that claimant should receive a three-month trial period of psychotherapy and anti-depressant medication and biofeedback. Dr. Fried felt claimant's psychological profile was suggestive of a psychoneurotic conversion reaction with depression.

The employer-carrier denied any relationship between claimant's injury and his psychological condition. A hearing was held in January 1978 and a Referee found that claimant's psychiatric condition was related to his industrial injury and remanded the claim to the employer-carrier for acceptance and payment of compensation. At that hearing, claimant complained of continuous headaches which varied in intensity and that he was unable to perform any physical activity because of his headaches and increased pain brought on by any movement.

On November 15, 1978, Dr. Fried opined that claimant's condition was medically stationary at that time, but that he needed continuing palliative medical care. Claimant's response to treatment was excellent.

A Second Determination Order, dated Decmeber 28, 1978, awarded claimant additional temporary total disability compensation.

On March 19, 1979, Dr. Fried reported claimant was virtually pain-free and his attitude was excellent. He released claimant for work.

Dr. Melson, in late March 1979, reported that claimant complained of some residual neck soreness, but his headaches were virtually non-existent. He found that claimant had a full range of neck motion without any complaints of pain. Claimant told the doctor he was concerned about heavy lifting so Dr. Melson placed a 100-pound lifting restriction on him.

In March 1978, claimant had been found not to be a vocationally handicapped worker, however, in November 1978, he was referred for employment re-entry assistance and referred to Comprehensive Rehabilitation Services. Claimant advised his counselor that he had a high school education and had attended approximately four quarters of additional schooling. He indicated he left school because of family difficulties and financial problems. Claimant had worked as a lumberjack with this employer as well as a lot person and parts runner and performed various occupations in the logging industry as well as attempting security work, working in a roller rink, fiberglass molding company, and a department store. Many job contacts were made with many employers in claimant's geographical area, however, no employment was obtained. The counselor reported that the majority of this activity was during a slow time of the year when the economy in the area was depressed. The counselor reported that claimant was motivated to work and had a strong work ethic and continued on his own to seek employment and to work with the counselor. By March 1979, the counselor reported that claimant continued to be well motivated to return to work, however, was somewhat depressed over his lack of success in obtaining employment. Claimant indicated that Dr. Fried had

advised him to seek some type of work which would be less stressful for him than the millwork which he had been doing previously. The counselor indicated claimant had been seeking jobs in the area of light delivery, school custodian, inventory clerk, and a shipping and receiving clerk. Claimant applied for a number of jobs and indicated that he was able to perform the jobs he applied for. Claimant stated he could return to work if he found a job which did not involve substantial stress. The case coordinator for Comprehensive Rehabilitation Services, in February 1979, reported that claimant was an excellent candidate for job placement service since he was highly motivated and appeared to have very few physical limitations. On March 12, 1979, the case manager reported that claimant received a determination of no disability and in view of that finding, claimant was ineligible for vocational rehabilitation services and they were going to terminate their services to him.

On April 13, 1979, a vocational coordinator with the Field Services Division advised claimant that their file on him had been closed, effective December 28, 1978, because he had not been granted any unscheduled disability award.

At the hearing, claimant testified that he had had a series of difficulties in his lifetime. He indicated he was discharged from the service because of an emotional inability to cope with military life. He had left a business college because of emotional stress caused by a broken engagement. He had left a job in a department store because of personal conflict with his boss and emotional upset. He indicated he left the job with the fiberglass molding company because his work overwhelmed him. He indicated that confrontation type situations caused the headaches to occur. He was depressed since he had been unable to find a job, but indicated he no longer took any anti-depressant medication.

The Referee did not find that claimant was permanently and totally disabled. However, the Referee, based on all the evidence, found that claimant was entitled to an award of compensation equal to 100% of the maximum allowable for unscheduled permanent partial disability, based on a permanent loss of wage earning capacity and granted claimant an award for this amount.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, modifies the Referee's order. The Board does not find that the preponderance of the evidence indicates that because of this industrial injury claimant is unable to work. The psychological medical evidence indicates that claimant is now virtually pain-free and his attitude is excellent. Dr. Fried indicates he does need continuing supportive group and individual counseling which can be provided under ORS 656.245. Dr. Melson concurred

with claimant's concern about heavy lifting and placed a limitation on claimant that he engage in no lifting over 100 pounds. Claimant testified that he felt he could return to regular employment if he could find a job which did not involve substantial stress. He testified that all the jobs he has applied for he feels he is quite capable of doing. The other evidence indicates that claimant is now 27 years old, has a high school education with additional training in business courses. He has worked in a number of occupations ranging from heavy manual labor such as logging and millwork to jobs such as a security guard and watchman, clerk and retail sales clerk. Since the injury, claimant testified that he has worked approximately two weeks caring for a 92-year-old man, but indicated that he had to quit this job

because of the stress involved which he felt aggravated his mental condition. Claimant testified at the hearing that he had chronic neck pain, periodic depression and chronic headaches when faced with stressful or confrontation situations. The Board based on all this evidence, finds that the award granted by the Referee is excessive. Based on this same evidence, the Board finds that claimant is entitled to an award of compensation equal to 48° for 15% unscheduled disability for claimant's head and neck injury and psychiatric condition.

ORDER

The Referee's order, dated June 28, 1979, is modified.

That portion of the Referee's order which granted claimant an award equal to 320° for 100% unscheduled disability is reversed. Claimant is hereby granted an award of compensation equal to 48° for 15% unscheduled disability for his head and neck injury and his psychiatric condition. This award is in lieu of all previous awards of unscheduled disability for these conditions. The remainder of the Referee's order is affirmed.

WCB CASE NO. 79-6865 June 4, 1980

THOMAS L. HAYDEN, CLAIMANT
Pozzi, Wilson, Atchison, Kahn
& O'Leary, Claimant's Attys.
Schwabe, Williamson, Wyatt, Moore
& Roberts, Employer's Attys.
Request for Review by Claimant

Claimant and the employer seek Board review of the Referee's order which affirmed the employer's denial, dated August 2, 1979, to the extent that it was not responsible for claimant's time loss and medical expenses related to the re-injury of his left knee on July 23, 1979, but found that it was responsible for time loss and medical care related to the June 12, 1979 injury to claimant's left knee and remanded the claim to it for further processing and awarded claimant's attorney a fee of $700. Claimant contends the carrier is responsible for the July 23, 1979 re-injury of his left knee. The employer-carrier contends that it correctly suspended temporary total disability payments, that claimant's injury of July 23, 1979 is not compensable, and that the Referee erred in awarding time loss benefits subsequent to July 23, 1979 and erred in awarding claimant's attorney the fee he did.

FACTS

Claimant, a 28-year-old production worker with Freightliner Inc., sustained an injury to his left knee on June 12, 1979 when he slipped on a pallet, fell and struck his left knee on a cement floor. This injury was diagnosed as a traumatic effusion of the left knee. Dr. Donald Tilson treated claimant by placing the knee in a cast. Dr. Tilson diagnosed a left knee contusion and sprain.

On July 3, 1979, Dr. Tilson reported that claimant injured his knee when he was 15 years old and had surgery on it. That condition had been diagnosed as a probable chondromalacia of the patella and femoral condyle. Claimant had been advised to stay away from strenuous work. Claimant advised Dr. Tilson that he had returned to strenuous activity including three years of military service, including parachuting. Dr. Tilson felt that claimant would be unable to perform heavy work for the next six weeks. He felt that claimant had a pre-existing arthritic condition which had been aggravated by his employment. Dr. Tilson concluded that by virtue of the traumatic effusion of his left knee claimant had been unable to work at any but sedentary work since June 12, 1979 and was not likely to be able to do anything but sedentary work for the next four to six weeks. On July 20, 1979, Dr. Tilson clarified his restrictions on

claimant's work and indicated he felt claimant should not walk or stand for more than 15 minutes at a time without rest, should do no repetitive squatting, kneeling or stooping, and should not lift or carry objects weighing more than 20 pounds.

Claimant was again treated on July 23, 1979 when he alleges that while going to a bus stop his knee gave out and he fell. He indicated that while standing at the bus stop he was fixing his knee brace and the left knee gave way and he started getting pain and was unable to walk. The hospital admission notes indicated that claimant drove himself to the hospital. The diagnosis of this injury was a sprain of the left knee.

On August 2, 1979, the employer denied any further responsibility for any continuing need for medical treatment and any time away from work as a result of the industrial injury of June 12, 1979.

Dr. Howard Mintz, on October 2, 1979, opined that claimant's left knee problem was a direct result of the industrial injury of June 12, 1979. Dr. Mintz had first treated claimant on July 24 for pain and swelling of the left knee. He diagnosed this condition as contusion of the left knee and felt claimant's condition was not medically stationary and could not determine if claimant would be released for regular work. Claimant had given Dr. Mintz a history of injuring the same knee in 1968 in a gym accident at school. Claimant also indicated to Dr. Mintz that he had injured his knee while at work on June 12, 1979.

At the hearing, claimant indicated that he was unable to drive his car after the June 12, 1979 injury to his left leg. He indicated that his employer had offered him sedentary work and he was on his way to work on July 23, 1979 when his knee gave way. The employer had agreed to pay claimant's bus fare to and from work, since claimant said he was unable to drive his car to and from work because of the knee injury.

In mid-July claimant was seen sitting in the driver's seat of an automobile in front of his employer's premises. On July 25 and July 29, 1979 claimant was observed by an investigator for the employer wearing a cast and limping when he walked with the use of a crutch. He was later observed walking without the crutch and driving a red automobile with a red top. Claimant denied driving his vehicle at any time after his original injury.

The Referee found that he was unable to determine how claimant injured his knee on July 23, 1979, if he, in fact, did. The Referee found that claimant had failed to prove that his re-injury, if such it was, resulted as alleged or from some superceding accident for which the employer would not be responsible. The Referee found the employer's termination of time loss was justified at least for the period of time that claimant was unable to work because of the alleged re-injury. The Referee found that claimant was not a credible witness. However, he found the employer denied responsibility for any continuing need for medical treatment. The Referee concluded that the employer-carrier, since claimant's condition was not stationary, was responsible for continuing medical care and treatment and time loss that resulted from the June 12, 1979 left knee injury.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, modifies the Referee's order. The Board concurs with the Referee's findings that claimant has failed to prove by a preponderance of the evidence that the July 23, 1979 incident was, in fact, a consequential re-injury of the original injury and therefore compensably related to the June 12, 1979 injury. Therefore, the Board would affirm that portion of the Referee's order.

The Board finds that the employer correctly terminated temporary total disability compensation as of July 23, 1979 when claimant sustained a second and intervening injury to his left knee. This event relieved this employer from continuing responsibility for payment of temporary total disability compensation and for medical treatment related to the July 23, 1979 incident. Claimant was returning to a modified job at the same pay for this employer on that date. Therefore, he would not be entitled to any additional temporary total disability compensation for the June 12, 1979 injury. Claimant is entitled to continuing medical care and treatment as provided under ORS 656.245 for the June 12, 1979 injury. Therefore, to that extent it would reverse the employer's denial. Based on the above findings, the Board concludes that the attorney fee granted by the Referee is excessive and, therefore, reduces that fee from the sum of $700 to the sum of $200 for the claimant's prevailing on obtaining additional medical care and treatment under ORS 656.245.

The Board strongly favors that employer-carriers should specify the grounds for their denying a claim. It is very helpful to all the parties if an explanation of the grounds of the denial are given so the issues in controversy are clear.

ORDER

The Referee's order, dated December 13, 1979, is modified.

Those portions of the Referee's order which reversed the employer's denial to the extent that it was held responsible for time loss and medical care related to the industrial injury of June 12, 1979 and remanded the claim to the employer for further processing and granted claimant's attorney a fee of $700 is reversed.

It is hereby ordered that claimant is entitled to continuing medical care and treatment for his June 12, 1979 left knee injury pursuant to ORS 656.245. To that extent, the employer's denial is reversed.

Claimant's attorney is granted a fee equal to the sum of $200 for prevailing in overcoming a portion of the employer's denial.

WCB CASE NO. 79-5003 June 4, 1980
WCB CASE NO. 79-979

RONALD L. IRELAND, CLAIMANT
Blair & MacDonald, Claimant's Attys.
Velure, Heysell & Pocock, Employer's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant
Cross-request by SWF Plywood

The claimant and Southwest Forest Plywood (SWF) seek Board review of the Referee's order which: (1) referred the claim back to SWF for acceptance of the claim and payment of Dr. Cook's medical bills and additional treatment that claimant may require as a result of this occupational disease; (2) affirmed the denial by the State Accident Insurance Fund (Fund), Case No. 79-5003; (3) found claimant was not entitled to any additional temporary disability; (4) ordered the Fund to pay attorney's fees of $300, ordered SWF to pay attorney's fees of $500 for their late denials of claimant's claims.

Claimant contends that the Referee failed to award temporary total disability or, in the alternative, temporary partial disability, and he failed to award penalties and attorney's fees for unreasonable resistance and delay against each carrier.

The SWF contends that the Referee erred in referring the claim back to the carrier as compensable and the responsibility of SWF.

FACTS

Claimant, 25 years old, was employed with SWF for approximately two years as a plywood grader. After about six months on the job, claimant's hands started going numb. Dr. Ellison reported on May 18, 1978 that claimant's symptoms and work history was consistent with nerve entrapment at the wrist. Dr. Ellison recommended that claimant give up that occupation and seek sedentary type employment or an operation might be advisable. Claimant quit SWF in April 1978 because of the 80-mile roundtrip commuting and went to work with Northern Santiam Plywood (Santiam) doing the same job with a slight difference in volume of lumber during a shift. Claimant's claim was accepted by the previous employer (SWF) but they closed the claim based on a letter from Dr. Ellison, dated September 5, 1978, that stated claimant's symptoms have returned to a pre-injury level.

Dr. Ellison referred claimant to Dr. Throop for electrical studies which were reported as normal. Claimant filed his 801 with SWF in August, based on Dr. Ellison's medical evaluations, after he terminated with them. SWF accepted the claim and paid the medical bills. Dr. Ellison continued to treat claimant while he worked at Santiam until his wrist got so bad he terminated his employment in August 1978. Claimant took a vacation and then took employment with a bank in Portland.

Claimant went to Dr. Cook in Portland and was advised that exploratory surgery of the carpal tunnel might be necessary to obtain relief. SWF declined to pay Dr. Cook's bills because it contended claimant's condition was stationary and any new flare-ups were the responsibility of his new employer. The medical bills from Dr. Cook were sent to SWF and they issued a denial letter, dated February 15, 1979, refusing any further responsibility. Claimant's attorney wrote a letter on March 20, 1979 to Santiam (insured by the Fund) requesting payment. The Fund issued a denial letter, dated June 5, 1979.

Claimant testified he continued to have the same problems in his wrist at Santiam as he did at SWF. He could not say that it got progressively worse. Claimant stated he got tired of putting up with the continuous pain and took Dr. Ellison's advice, thus terminating this employment and went to work for the bank.

The Referee found that under the last injurious exposure rule the second exposure seemed to have been purely a temporary aggravation of the original condition which had been caused by the first employment and accepted as compensable by the first employer.

Claimant raised the question of additional temporary partial disability. The Referee determined that claimant terminated his employment voluntarily. Even though the work was too difficult for him and aggravating his condition, the only alternative was an operation, therefore, the claimant was medically stationary for all practical purposes and the fact that claimant took a lower paying job did not entitle him to temporary partial disability.

The Referee found that SWF should have continued paying for the medical treatment and care including the medical bills from Dr. Cook and to pay temporary total disability and additional medical bills if an operation becomes necessary. However, because only the payment of medical bills was refused and there was no showing of hardship suffered by the claimant, no penalties would be awarded for unreasonable delay.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, affirms the Referee's order. The preponderance of the evidence in this case supports the Referee's conclusion. Claimant's condition continued to be non-disabling from his employment with SWF entitling him to continuing medical care and treatment under ORS 656.245. The Board finds the Referee correctly decided all the issues before him.

ORDER

The Referee's order, dated November 27, 1979, is affirmed.

WCB CASE NO. 79-1293 June 4, 1980

LOIS Y. JONES, CLAIMANT
Malagon & Yates, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

The State Accident Insurance Fund (Fund) seeks Board review of the Referee's order which ordered it to pay claimant's permanent partial disability compensation award, made pursuant to the January 19, 1979 Opinion and Order, without any deduction for temporary total disability compensation paid from December 1, 1977 through May 12, 1978. Further, the Referee ordered it to pay an additional sum equal to 25% of the compensation due claimant as a penalty and awarded claimant's attorney a fee of $750.

FACTS

Claimant, a 55-year-old employee of Agripac, allegedly injured her left leg on August 28, 1976 because of the standing required on her job. The claim was first denied and after a hearing ordered accepted.

On December 1, 1977, Dr. John Porter indicated claimant should not return to her previous line of work or work requiring her to stand on her feet for eight hours at a stretch.

The claim was initially closed by a Determination Order, dated May 16, 1978, which granted temporary total disability compensation from August 28, 1976 through November 30, 1977. This Determination Order was appealed and after a hearing claimant was granted an award of compensation equal to 50% loss of the left leg by an Opinion and Order, dated January 19, 1979.

On February 6, 1979, the Fund advised claimant it was offsetting temporary total disability compensation paid after November 30, 1977 and up to May 12, 1978 in the amount of $2,816.72. Claimant received her first payment of the permanent partial disability compensation award on the February 6, 1979 date.

The Referee found the Fund was not entitled to take the offset and that claimant was entitled to receive her award without deduction. Further, the Referee found the Fund's conduct in this case amounted to an unreasonable refusal to pay compensation and awarded a penalty and attorney fee. The Referee found the Fund had timely made the first installment payment of permanent partial disability award and did not award any penalties or attorney's fees on that issue.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, modifies the Referee's order. The Horne and Taylor cases are distinguishable from this case. In both of those cases the claims had been closed and aggravation claims were found to be compensable. In both cases the Fund attempted to take a set-off for installments on an award for permanent partial disability which it had previously paid during the period of time for which temporary total disability compensation payments were ordered. The Court of Appeals noted the differences between permanent partial disability and temporary total disability and the purposes they serve. The Court went on to say because of these differences there was nothing inequitable in requiring a carrier to make both types of payments concurrently. In this case, temporary total disability compensation was paid pending the original closure of this claim. There had been no award of permanent partial disability made. The Fund

initially requested a determination be made in this case on January 19, 1978, but it was not until May 12, 1978 that a Determination Order was issued. Claimant was paid temporary total disability compensation from August 28, 1976 through May 12, 1978. The Workers' Compensation Department, in Bulletin #9, specifically requires carriers to continue to pay benefits until the claim is "terminated under ORS 656.268". Further, it stated: "Over-payments created through the lapse of time necessary to refer a claim for determination will normally be credited against a future award of permanent disability". Claimant's condition was found on November 30, 1977 to be medically stationary.

The Fund contends it is entitled to "off-set" this "over-payment" of temporary total disability compensation against the permanent partial disability compensation.

The Board finds that the Fund is entitled to offset the temporary total disability compensation it paid to claimant from November 30, 1977 to May 12, 1978 and would reverse the Referee's order requiring the Fund to pay temporary total disability compensation from December 1, 1977 through May 12, 1978, assessing a penalty equal to 25% of the temporary total disability compensation due claimant and awarding claimant's attorney a $750 fee. The Board finds it would be inequitable not to grant the Fund the right to this off-set. Claimant was paid temporary total disability compensation she was not entitled to receive. To allow her to retain this money would result in unjust enrichment.

The Board agrees with the Referee's finding that there was no basis to assess a penalty and attorney fee for the payment of the first installment of compensation made by the Fund on February 6, 1979.

ORDER

The Referee's order, dated January 3, 1980, is modified.

That portion of the Referee's order that ordered the State Accident Insurance Fund to pay claimant's permanent partial disability award, made pursuant to the January 19, 1979 Opinion and Order, without any deduction for temporary total disability compensation paid from December 1, 1977 through May 12, 1978 and awarded a sum equal to 25% of this as a penalty and granted claimant's attorney a fee of $750 is reversed.

The State Accident Insurance Fund is hereby authorized to deduct the temporary total disability compensation it paid to claimant from December 1, 1977 through May 12, 1978 from the permanent partial disability compensation awarded claimant by the January 19, 1979 Opinion and Order.

The remainder of the Referee's order is affirmed.

MARGARET L. MARLOW, CLAIMANT
Coons & Anderson, Claimant's Attys.
Velure, Heysell & Pocock, Employer's Attys.
Request for Review by Employer

The employer seeks Board review of that portion of the Referee's order which granted claimant compensation equal to 128° for 40% unscheduled disability for her upper back, neck and shoulder injury. The employer contends this award is excessive.

FACTS

Claimant, a 38-year-old skoog operator for Roseburg Lumber, on September 6, 1977, injured her left knee, neck and back when she slipped on some grease and fell to the floor. Dr. W. L. Streitz diagnosed claimant's injuries as "1. Left bicipital tendinitis, 2. Cervical strain syndrome, 3. Left trapezius and rhomboid strain syndrome. Probably secondary to number one, 4. Lumbosacral strain verses [sic] discogenic low back pain without neuropathy." He noted that claimant did not seem overly motivated to return to work; on the other hand she had continued to work despite her complaints of neck pain, back pain, and headaches, as well as left shoulder pain and difficulty with her left hand. Claimant was released for regular work on December 18, 1977. Claimant returned to work on December 8, 1977, however, returned to Dr. Streitz complaining of hurting her neck on December 12 while loading the machine. Claimant returned to work again on December 21, 1977, however, was off work as of December 28, 1977. Claimant reported that she was unable to keep up with her work.

In May 1978, the Orthopaedic Consultants reported claimant complained of a dull, throbbing ache in her neck, accompanied by an achiness in the left scapula, and headaches. She reported that any type of activity, use of the arms, or any kind of lifting, would increase the pain and cause the pain to extend upward into the head, causing headaches. Claimant also complained of intermittent numbness along the left upper arm, forearm and hand, ending up in the index and middle fingers of the left hand. This was in addition to continuing pain in the back. The Orthopaedic Consultants diagnosed cervical strain syndrome, lumbosacral strain syndrome, history of a contusion injury of the left knee which had been treated in the past with a partial patellectomy, a minor rotator cuff tendinitis of the left shoulder and functional overlay. They opined that claimant's condition was stationary and her claim could be closed. It was their opinion because of claimant's continuing symptoms it would

be advisable for her to avoid jobs which involved heavy lifting on a repeated basis. However, they did feel that claimant would be able to return to the same type of occupation with some limitation. They found no loss of function in the low back and rated the total loss of function in the neck due to this injury as mild. They did not find any evidence of loss of function of the left knee or of the left shoulder. Dr. Streitz concurred with this report and felt that she could return to work as of July 3, 1978 provided she did not engage in any lifting greater than 20 pounds or repetitive bending.

The claim was initially closed by a Determination Order, dated August 23, 1978, which awarded claimant temporary total disability compensation and compensation equal to 15% unscheduled disability for her back injury. On September 5, 1978, claimant returned to work for this employer performing the same job she had at the time of the injury. In early October 1978, claimant reported she was unable to perform this job because of continuing difficulty with her right and left shoulder and neck. Dr. Streitz did not feel that claimant would be able to return to mill work.

In December 1978, Dr. Streitz reported that claimant continued to have pain in the neck to the shoulder and occasionally the hand. He felt that claimant needed to return to a form of work which was within her capabilities. In January 1979, Dr. Streitz reported that he continued to feel that claimant was medically stationary but that she was not vocationally stationary. Further, he felt that she was not psychologically stationary. He indicated he did not argue with the award of unscheduled disability made in this case and did not find any physical factors that indicated this rating was inadequate. Dr. Streitz felt that although claimant's physical symptoms came and went, they were more psychosomatic than truly physical.

A Second Determination Order, dated March 2, 1979, awarded claimant additional temporary total disability compensation.

Claimant was referred, in April 1979, to a private rehabilitation service. She advised the counselor that she had obtained an eighth grade education and did not have a GED. Claimant had previously worked as a housekeeper, operated a saw, worked on the sorting belt, sorted and stacked lumber and worked in a trailer factory and eventually obtained a job with this employer working in a variety of jobs including a dryer feeder, pulling off the core belts, pulling off the dry belts, edge-glue machine operator, salvage saw operator, offbearer and skoog operator. The

counselor spoke with the supervisor of this employer and he indicated that the lightest job they had available was that of skoog operator. The counselor concluded that claimant had no marketable transferable skills.

On May 17, 1979, Dr. Streitz reported that he would place a lifting limitation on claimant of 25 to 30 pounds or less, suggested she avoid repetitive lifting, limit repetitive bending, twisting and if required to stand be allowed occasional movements and limit her standing to approximately three to four hours. He did not feel that claimant had any limit on kneeling or squatting provided that it was not continuous or "prolonged position".

Claimant left Oregon on about May 25, 1979 to take care of her ill mother in Arkansas. Claimant stated that she also felt she would be able to find work in Arkansas, if she were able to conceal her on-the-job injury and its affects. At the time of the hearing, claimant was living in Arkansas with her husband and mother. Claimant testified that she has been unable to do her previous mill jobs which involve, repetitive lifting. She felt she might be able to do light clean-up work, time card handling, light inspection and even possibly an operator job on the edge-gluer. She said she obtained a job in a chicken processing plant in Arkansas for a short period of time.

The Referee, after reviewing all the evidence in this case, based upon the limitations stated by Dr. Streitz found claimant was entitled to compensation equal to 128° for 40% unscheduled disability for her injuries representing her loss of future wage earning capacity. The Referee felt that claimant could only do a very few light jobs and was unable to do heavy repetitive work which she had been able to do prior to her injury.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, modifies the Referee's order. Claimant is now 41 years old and has an eighth grade education. Her prior work experience has been mainly in manual labor type of occupations. Dr. Streitz feels that claimant would not be able to return to her job in the mill as a skoog operator and felt that she should limit her lifting to 25 to 30 pounds or less, avoid repetitive lifting, limit her standing to three to four hours duration and limit her repetitive bending and twisting. He did not find any limitation on claimant's kneeling or squatting providing this was not continuous or prolonged in any one position. Claimant testified that she feels she could perform a number of occupations including light clean-up work, time card handling, light inspection and possibly the offbearer job and edge-gluer. The Board, after reviewing all the evidence in this case and considering all the relevant factors as

well, concludes that claimant has established she has lost some wage earning capacity related to this injury. The Board does not find that the loss of wage earning capacity is as great as that granted by the Referee. The Board finds that claimant is entitled to an award of compensation equal to 80° for 25% unscheduled disability for her injuries as a result of the September 6, 1977 incident. This award would be in lieu of all previous awards of compensation.

ORDER

The order of the Referee, dated November 7, 1979, is modified.

Claimant is hereby granted an award of compensation equal to 80° for 25% unscheduled disability for her upper back, neck and shoulder injury. This award is in lieu of any previous awards of unscheduled disability made in this case. The remainder of the Referee's order is affirmed.

WCB CASE NO. 78-8260 June 4, 1980

RICHARD McCARTNEY, CLAIMANT
Jules Drabkin, Claimant's Atty.
Acker, Underwood, Beers, Smith & Warren, Employer's Attys.
Request for Review by Employer

The employer seeks Board review of that portion of the Referee's order which granted claimant an award of compensation equal to 80° for 25% unscheduled disability for his low back injury in lieu of the award of compensation equal to 16° for 5% unscheduled disability granted by the October 13, 1978 Determination Order. The employer contends this award is excessive.

FACTS

Claimant, a 25-year-old cabinet builder with Nomad Travel Trailer, on October 5, 1977, injured his back while lifting a cabinet. Claimant had previously had a mild back strain, but recovered. Dr. Lawrence Cohen diagnosed the October 1977 injury as strained left dorsolumbar muscles. By January 1978, Dr. Cohen indicated claimant continued to complain of right upper lumbar muscle pain mostly on the left side. He felt claimant could return to work if he avoided heavy lifting and expressed some concern over claimant's continuing to work as a cabinet maker because of the lifting, bending, and twisting required.

Dr. Don Poulson, in March 1978, reported claimant had a 12th grade education and had done all types of building. He felt claimant had a chronic lumbar strain.

In April 1978, the Orthopaedic Consultants reported claimant's condition was stationary as related to his industrial injury, however, he continued to need care for an ulcerative colitis. They felt claimant could return to the same occupation and rated claimant's loss of function of the back related to his October 1977 injury as minimal.

This claim was initially closed by a Determination Order, dated June 7, 1978, which awarded claimant temporary total disability compensation.

On June 16, 1978, Dr. Rex Howard, D.C., reported claimant continued to have a great deal of pain at times. He felt claimant should be referred to the "Disability Prevention or Rehabilition [sic]".

An Order on Reconsideration, dated October 13, 1978, modified the first Determination Order and granted claimant compensation equal to 16° for 5% unscheduled disability for his low back injury.

Dr. Poulson, in March 1979, reported claimant continued to have periods of severe pain, which were increased by riding in a car, twisting, or "lifting something just wrong". He felt claimant had a degenerated disc and needed further diagnostic testing. Dr. Poulson felt claimant would benefit from getting out of heavy construction work.

The Orthopaedic Consultants, in May 1979, reported claimant should seek another occupation and that the total loss of function of his back related to the October 1977 injury was mild. They did not feel the Determination Order award was adequate. Dr. Poulson, however, felt the award was adequate.

In June 1979, claimant began a two-year pre-nursing program at a community college. However, this was not an authorized vocational rehabilitation program because claimant was found not to be a vocational handicapped worker.

Claimant testified he is a high school graduate and had worked building transformers, trailers, and had done electrical wiring. He complained of constant pain in his back which varied in intensity and is relieved by lying down. Claimant said he attempted to return to cabinet making, but could not do the work because of back pain. He now limits his social and home activities because of back pain. At the time of the hearing he was in a pre-nursing course. He felt he could not return to the hard physical labor types of employment he previously had done.

The Referee, after reviewing all the evidence, concluded claimant had lost 25% of his future wage earning capacity and granted him an award of compensation equal to that.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, modifies the Referee's order. Based on all the evidence, the Board, in comparing the facts in this case with other similar cases, finds the Referee's award is excessive. Based on this same evidence, the Board finds claimant has lost 15% of his wage earning capacity and grants claimant an award of compensation equal to 48° for 15% unscheduled disability.

ORDER

The Referee's order, dated November 1, 1979, is modified.

That portion of the Referee's order which granted claimant an additional 20% or 64° permanent partial disability, unscheduled, for his low back injury, in lieu of that granted by the October 13, 1978 Determination Order is reversed.

Claimant is hereby granted compensation equal to 48° for 15% unscheduled disability for his low back injury. This award is in lieu of all previous awards of unscheduled disability.

The remainder of the Referee's order is affirmed.

WCB CASE NO. 79-1224 June 4, 1980

ROBERT E. NICHOLS, CLAIMANT
Frank Susak, Claimant's Atty.
David Horne, Employer's Atty.
Request for Review by Employer

The employer seeks Board review of the Referee's order which granted claimant an award of compensation equal to 112° for 35% unscheduled disability for his low back injury in lieu of all prior awards granted before. The employer contends this award is excessive.

FACTS

Claimant, a 21-year-old machine operator with Barker Manufacturing Company, on February 1, 1974, injured his low back while attempting to lift a loaded hand truck. The injury was originally diagnosed as a low back strain. X-rays revealed claimant had spondylolisthesis and spondylolysis. Claimant came under the care and treatment of Dr. Raymond Case who, in May 1974, reported claimant would be unable to return to an occupation at that time which required repetitive heavy lifting. He suggested that claimant be considered for retraining in an occupation which did not require heavy lifting. He felt that claimant had a first degree spondylolisthesis which had been aggravated by this injury. After a period of conservative treatment proved to be unsuccessful, Dr. Case, on October 16, 1975, performed a spinal fusion at the L5-S1 level. His diagnosis was spondylolisthesis first degree, with bilateral spondylosis. He released claimant for modified work as of July 1, 1976 and felt that claimant should return in six weeks for a further examination.

The claim had been initially closed by a Determination Order, dated April 1, 1975, which awarded claimant temporary total disability compensation and compensation equal to 16° for 5% unscheduled disability for his low back injury. Claimant appealed this order and was granted an additional award of compensation equal to 32° for 10% unscheduled disability (making a total award of compensation equal to 48° for 15% unscheduled disability) for his back injury.

This claim was reopened and claimant underwent a spinal fusion.

On July 21, 1976, Dr. Case reported that claimant had been released to return to light work on June 20, 1976 in order to expedite his return to a training program for optical technology. He thought that claimant had achieved an excellent result from the spinal fusion and that further medical treatment was not indicated. He recommended claim closure and felt that claimant was able to undertake a training program as an optical technician. He indicated that claimant did have some permanent disability as a result of the industrial injury.

A Determination Order, dated September 17, 1976, awarded claimant additional temporary total disability and temporary partial disability compensation and additional compensation equal to 16° for 5% unscheduled disability for his low back injury. This award gave claimant a total award of compensation equal to 64° for 20% unscheduled disability for this injury.

The Orthopaedic Consultants, in December 1976, reported that claimant's condition was stationary and he would not be able to return to the same occupation with or without limitations, but could be involved in another occupation. They rated the total loss of function of the back as it existed at that time in the range of mildly moderate, but due to this injury as only mild. They based this opinion on a finding that claimant's spondylolisthesis probably pre-existed the injury, although it had been aggravated by the injury.

Also, in December 1976, Dr. Case opined that considering claimant's age the possibility of late development of disc degeneration that an award of permanent partial disability should be approximately 25%.

In May 1977, Dr. Case reported that claimant had began a course in drafting instead of optical technology. Claimant indicated that he was required to sit in a "drafting chair" for four-hour periods. Claimant indicated that when sitting in the drafting chair he used a soft cushion as a back support and if he didn't he would experience some back problems. Dr. Case felt these continuing symptoms were due to myofacial strain. Dr. Case felt that claimant would benefit from physical therapy and instituted a physcial therapy program. By July 1977, Dr. Case reported that claimant was back on a physical training program and was not having any difficulty. However, in December 1977, Dr. Case reported that claimant continued to complain of low back pain which was aggravated by the prolonged sitting which claimant was doing in his drafting courses.

In July 1978, Dr. Case reported that the claimant indicated he could do only about 2/3 of what he could do prior to his surgery. He continued to complain of periodic aching at the lumbosacral level associated at times with numbness in the bottom of his left foot. Claimant indicated these symptoms do clear and at times he felt fairly good. Dr. Case indicated that claimant should resume wearing a brace and continue to do his exercises.

Claimant began a vocational rehabilitation program on December 1, 1976 with a vocational goal of becoming an industrial draftsman. This program was terminated on September 15, 1978. This program was interupted for a short period of time in August 1978 because of claimant's continuing complaints of back pain. Claimant did complete this program on September 14, 1978 and in October 1978 began an on-the-job training program with a civil engineering corporation. This on-the-job training program terminated in December 1978; claimant was employed by Pacific Engineering in January 1979 as a draftsman.

Dr. Case, in December 1978, indicated that claimant needed to continue with his exercise program and also should monitor his weight.

A Determination Order, dated January 29, 1979, awarded claimant additional temporary total disability compensation and found that his disability was the same as that rated by a Determination Order, dated April 1, 1975, and an Opinion and Order, dated July 30, 1975, and a Determination Order, dated September 17, 1976.

In May 1979, Dr. Case reported he had last examined claimant in March 1979 and could not demonstrate that claimant's condition was actually worse than it was prior to his spinal fusion operation. He noted that claimant had not reached the level of physical conditioning which one required for optimum results following spinal fusion surgery. He indicated claimant did have some residual increase in the lumbar lordotic curve associated with his slight hip flexion contractures and that it was his opinion this was the primary reason for claimant's present back symptoms. Dr. Case felt that since claimant had had the spinal fusion he had no more than a minimal permanent disability and estimated claimant's permanent disability was approximately 25% loss of function of the spine. He indicated that claimant was doing some physical exercising, but it was not sufficient in that claimant had increased his weight. Dr. Case felt claimant should lose weight.

Claimant testified at the time of the hearing he had been working approximately a year as a draftsman. He indicated that prolonged sitting at work caused muscle cramps and that he experienced a slight pain or twinge from time to time during the day. He said walking three or four blocks causes a sharp pain, a pinching in his back, and leg numbness. He stated that he also feels light numbness of the top of the leg after he has been sitting for more than 10 minutes. He indicated that he had used medication for the swelling, but discontinued pain medication because of the side affects. At that time, claimant felt he was unable to do anything physical such as bending, lifting more than 50 pounds without exacerbating his pain. He said he could not sweep, vacuum, hunt or fish.

The Referee, after reviewing all the evidence including claimant's physical impairment, age, education and training, work experience and adaptability to non-physical labor and intellectual ability, found that claimant was entitled to an award of compensation equal to 112° for 35% unscheduled disability for his low back injury in lieu of all previous awards granted for permanent disability. The Referee further granted claimant's attorney a fee out of this increased compensation.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, reverses the Referee's order. Claimant, prior to the last Determination Order, dated January 29, 1979, has been granted awards of compensation equalling 64° for 20% unscheduled disability for his low back injury. Since his original injury, claimant has been retrained for a non-physical form of employment, which he is able to perform without difficulty. Claimant is in his late 20's and has a high school education in addition to further training. He has experience as a machine operator and is able to perform as a draftsman; claimant is able to adapt to non-physical work. Claimant's physical impairment is rated as minimal. Based on these factors, the Board finds that the award granted by the Referee is excessive. The Board concluded that claimant is entitled to compensation equal to 64° for 20% unscheduled disability for his low back injury. Claimant had been granted awards of compensation equal to this amount before the last Determination Order. Therefore, the Board would reverse the Referee's award of 15% additional unscheduled disability and restore the Determination Order, dated January 29, 1979, which found claimant's disability was the same as rated by a Determination Order, dated April 1, 1975, an Opinion and Order, dated July 30, 1975, and a Determination Order, dated September 17, 1976.

ORDER

The Referee's order, dated October 10, 1979, is reversed in its entirety.

The Determination Order, dated January 29, 1979, is ordered restored and affirmed.

WCB CASE NO. 78-6348 . June 16, 1980

DICK BABCOCK, CLAIMANT
Steven C. Yates, Claimant's Atty.
Brian L. Pocock, Employer's Atty.
Stipulation

COME NOW the claimant, by and through his attorney, and the insurer, by its authorized representative, and move the Board for an Order based upon the following stipulations of the parties.

1. The Unided Pacific Reliance Insurance Company appealed an Opinion and Order of a Referee remanding Claimant's claim to them for payment.

2. The Workers' Compensation Board affirmed but failed to award an attorney fee.

3. Claimant's attorney, Steven C. Yates, shall be pain an attorney fee of $250 on the appeal herein.

IT IS SO STIPULATED:

IT IS SO ORDERED.

WCB CASE NO. 78-6397 June 6, 1980

CHARLES D. BAUDER, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Attys.
Foss, Whitty & Roess, Employer's Attys.
Request for Review by Claimant
Cross-appeal by Employer

Claimant and the employer both seek Board review of the Referee's order which granted claimant an award of compensation equal to 320° for 100% unscheduled disability for his back injury. Claimant contends he is permanently and totally disabled. The employer contends the award granted by the Referee was excessive.

FACTS

Claimant, a 54-year-old pipefitter with Weyerhaeuser Company, on September 18, 1974, injured his back while using a bar to push a pipe through a culvert. This injury was originally diagnosed as an acute lumbosacral back strain with left sciatica and possibly a developing herniated disc syndrome. Claimant was released for work by Dr. Peterson on October 1, 1974.

In January 1975, Dr. J. A. Holbert reported that on January 18, 1975, claimant had been carrying some heavy pipe and hurt his back. Dr. Holbert reported that besides injuring his back in September 1974, claimant also had injured his back in 1964. Claimant had undergone a medial meniscectomy of the left knee in January 1970 and fractured his arm in 1929. Dr. Holbert took claimant off work. On February 4, 1975, Dr. Holbert released claimant for light work. Claimant reported that he was able to do light work, but was required by his employer to go up and down ladders. Claimant indicated he had continuing back pain as well as pain and difficulty with his left knee.

injury. Claimant also injured his right shoulder and elbow and this condition was likewise denied on June 10, 1977 by the employer as not being related to his injury of September 18, 1974.

In September 1975, Dr. Holbert reported that claimant had been working since February 1975. Claimant reported after working four to six hours as a millwright, lifting, climbing, and getting under things, his low back and his left leg would bother him. X-rays revealed calcification in the abdominal aorta and thinning of the disc spaces in the lumbar spine. Dr. Holbert reported that claimant had arthritic changes in his lumbar spine commensurate with his age. He felt that claimant did a lot of heavy work and was having symptoms related to the osteoarthritic changes and that the traumatic aggravation tended to be an ongoing thing in a millwright's job. Dr. Holbert felt that claimant's condition was stationary as related to his September 18, 1974 injury.

The claim was initially closed by a Determination Order, dated September 26, 1975, which granted claimant temporary total disability compensation and compensation equal to 32° for 10% unscheduled disability for his low back injury.

In July 1976, Dr. Holbert reported claimant continued to complain of low back and pain in both legs. Dr. Holbert felt that based on the calcification of the abdominal aorta that there was some possibility of relative oxygen lack in the muscles of the calf.

Dr. J. K. Bert, an associate of Dr. Holbert, reported in August 1976 that claimant had been working in a basket underneath a dock and the tide hit the bottom of the basket he was in while he was attempting to drill a hole. It was reported that this caused a twisting injury to claimant's back and that he had experienced a great deal of pain and not worked since this incident. Dr. Bert diagnosed an aggravation of the previously described degenerative arthritis of the lumbar spine.

Dr. Holbert, in November 1976, reported that claimant continued to have a great deal of difficulty with the low back and had shortness of breath trying to move. He reported that claimant was wearing a lumbosacral support and using a transcutaneous nerve stimulator.

On December 12, 1976, claimant was admitted to the hospital for conditions diagnosed by Dr. David Oelke as an acute inferior myocardial infarction. This condition was denied on January 14, 1977 by the employer as being related to his work or as being part of the September 18, 1974

Dr. Holbert, in June 1978, reported claimant continued to complain of back pain. Claimant reported the pain in his back extended to both hips and that any activity aggravated his problem. He stated that if he walks more than a block-and-a-half, his left leg got numb and there was cramping in the calf. He stated that he was also out of breath after walking a block-and-a-half. He indicated that he noticed his problem worst in the left leg but that it was at that time bothering also his right leg. Dr. Holbert diagnosed calcification of the abdominal aorta, traumatic aggravation of the osteoarthritic changes in his spine, significant weight control problem, significant heart problems, and a suspicion that claimant had an oxygen insufficiency in his lower extremities in response to ambulation. He felt that as far as claimant's back condition was concerned, it was medically stationary.

A Second Determination Order, dated August 3, 1978, awarded claimant additional temporary total disability compensation and additional compensation equal to 64° for 20% unscheduled disability for his low back injury.

The vocational rehabilitation counselor reported on October 31, 1978 claimant was not accepted by them because of his multiple disabilities involving his back, left knee, and heart problem. Claimant had indicated to the counselor that he was limited as to prolonged sitting and walking beyond two blocks. The counselor felt that in view of these problems claimant was unemployable at that time.

Dr. Holbert, in November 1978, reported that he considered claimant's injury in August 1976 as one in a continuing ongoing series of work-related stresses. He noted that after this incident in August 1976 claimant did not return to work but also noted that claimant suffered a major heart attack in December 1976 and would not be returning to work as a result of that problem.

On April 19, 1979, Dr. Oelke reported that claimant's myocardial infarction was basically uncomplicated. He reported that since his original myocardial infarction, claimant's heart status had remained very stable. Dr. Oelke found it difficult to evaluate in terms of exercise tolerance claimant's condition because he complained he could not perform the treadmill test because of back discomfort. Claimant also stated that it was difficult for him to lie down. Dr. Oelke reported that in 1977 claimant had undergone a treadmill test which had not revealed any abnormalities. He reported claimant's performance was less than ideal and that claimant did not really have an adequate test to fully access his exercise tolerance because the treadmill was stopped mainly because of claimant's fatigue. Dr. Oelke

reported that claimant, at the time the test was stopped, did have abnormalities which were consistent with a decreased blood flow to the heart muscle and narrowing of the arteries of the heart which claimant had because he had suffered a myocardial infarction. It was Dr. Oelke's opinion that based on these changes and the increase in heart rate that claimant was definitely going to be limited in his ability to do certain types of work, such as lifting or strenuous physical activity, even if he were able to and assuming he had no back discomfort.

Claimant has a service-connected loss of hearing problem in addition to his other problems. Claimant stated he has worked as a teacher of industrial arts, a laborer in a door manufacturering plant, a sheet metal fitter, a deep sea diver while in the service, a vehicle inspector, a law enforcement officer, an auto body mechanic and a pipe fitter--millwright. He stated that he has a high school education and had attended a teacher's college for approximately one-and-a-half years. Claimant stated that he experiences constant low back pain and has pain in both of his buttocks, the left side being worse than the right, and has pain clear down his calf and into his foot. He stated he is unable to do any bending, twisting or lifting. He says that he can walk only a block and a half, cannot sit for longer than 15 minutes or stand for longer than 30 minutes at a time. According to claimant, a transcutaneous nerve stimulator does provide some relief. He stated that he now uses a cane to move around because of the numbness in his foot and calf. The pain he experiences in the low back according to claimant makes it difficult for him to sleep has caused him to limit his activities. He indicated he does not feel he can be active on an eight-hour basis as far as his back was concerned. At the time of the hearing, claimant indicated he was taking medication for his heart condition, but was not taking any pain medication for his back. He stated that he had not looked for any work of any type for the last two years.

The Referee found that claimant was severely crippled and that there was no way he could do any work. The Referee felt that claimant's pain prohibited any retraining or working. The Referee felt that that heart attack which occurred on December 12, 1976 clouded the assessment of disability and the determination of responsibility therefor. The Referee found that based on Dr. Holbert's November 13, 1978 report that the major heart attack in December 1976 was keeping claimant from returning to work. The Referee noted that claimant had not been retrained and had not looked for work. He concluded that claimant was permanently and totally disabled upon the occurrence of the heart attack. He did not find this condition was the responsibility of this employer. However, the Referee concluded that just prior to

the heart attack claimant's disability due to the back problem was nearly total. Therefore, the Referee granted claimant an award of compensation equal to 320° for 100% unscheduled disability for his low back injury.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, modifies the Referee's order. In this case, claimant's heart attack occurred after his industrial injury. The Board would concur with the Referee that this condition was not related to his employment and not related to the injury for which this claim was filed. Likewise, the Board would concur with the Referee that this heart attack and resulting heart condition does render the claimant permanently and totally disabled. However, the Board cannot consider the subsequent event in determining claimant's loss of wage earning capacity as related to his compensable injury.

Claimant has a high school education plus one-and-a-half years of college work and has worked in a variety of occupations, some being heavy manual labor jobs and others not being heavy manual labor jobs. Claimant has not sought any work of any type for over two years. Dr. Oelke places certain limitations on claimant because of his heart condition, such as no lifting or strenuous physical activity, even if he were able to and assuming he had no back discomfort. Dr. Holbert reported claimant probably would not return to work because of his heart attack. In June 1978, Dr. Holbert found that claimant's back condition was medically stationary.

The Board, after reviewing and considering all the evidence in this case, finds that the award of compensation granted by the Referee is excessive. The Board does not find, as the Referee did, that just prior to his heart attack the claimant suffered a total loss of wage earning capacity. Based on all the evidence in this case, the Board finds that claimant has lost approximately one-half his wage earning capacity and grants claimant an award of compensation equal to 160° for 50% unscheduled disability for his back injury.

ORDER

The order of the Referee, dated July 30, 1979, is modified.

That portion of the Referee's order which granted claimant compensation equal to 320° of the maximum allowable by law for unscheduled (back) permanent partial disability on account of the two [sic] back injuries of September 18, 1974, as magnified and worsened by the last incident of August 13, 1976, in lieu of the two previous awards, is

reversed. Claimant is hereby granted an award of compensation equal to 160° for 50% unscheduled disability for his back injuries. This award is in lieu of any previous awards of unscheduled disability granted for these injuries.

The remainder of the Referee's order is affirmed.

CLAIM NO. C 460553 June 6, 1980

MILTON BOWKER, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On May 23, 1973, claimant indicated that he had bilateral inguinal hernias. These were surgically repaired. His claim was closed and aggravation rights have expired.

In June 1974, claimant experienced a mass in his right groin area. This was treated conservatively for a number of months. In January 1977, Dr. Warrington reported that claimant appeared to be having a reaction to his suture. Later, claimant reported a thickening over the pubic symphysis area. Dr. Warrington felt this probably represented an inflammatory reaction to sutures as a consequence of his surgery. Dr. Warrington, in February 1978, reported that the situation did not require surgery, however, if it flared up again, he felt that exploration and removal of the suture was indicated. Dr. Warrington, in early February 1980, reported that the mass in the right groin area continued to bother claimant at times and swelled up and then would disappear. He recommended this foreign body be excised.

On February 19, 1980, Dr. Thomas Lindell performed an exploration of the inguinal region with evacuation of clots and ligation of a bleeder. Dr. Warrington felt this was a continuation of claimant's original injury and treatment therefor.

On May 27, 1980, the State Accident Insurance Fund advised the Board of the above information and indicated it would not oppose an Own Motion Order reopening this claim for surgery which was done on February 20, 1980.

The Board, after reviewing the evidence in this case, finds that the claim should be reopened as of February 19, 1980, the date claimant underwent additional surgery. Therefore, the Board remands this claim to the State Accident Insurance Fund for acceptance and payment of compensation as

provided by law, commencing on February 19, 1980, the date claimant underwent the additional surgery, and until the claim is closed pursuant to ORS 656.278, less any time worked.

IT IS SO ORDERED.

WCB CASE NO. 79-3080 June 6, 1980

AGNES J. BRECH, CLAIMANT
Pozzi, Wilson, Atchison, Kahn
& O'Leary, Claimant's Attys.
Schwabe, Williamson, Wyatt, Moore
& Roberts, Employer's Attys.
Request for Review by Claimant

Claimant seeks Board review of the Referee's order which affirmed a Determination Order, dated March 16, 1978, except that part that dealt with the commencement of temporary total disability compensation. The Referee ordered temporary total disability compensation from the date of reopening by the insurer or June 6, 1978 whichever was earlier. Claimant contends she is entitled to an award of compensation equal to 100% unscheduled disability for her left hip, leg and right knee injury and temporary total disability compensation from July 20, 1977 through March 1, 1978 and from November 10, 1976 through December 22, 1976.

FACTS

Claimant, a 63-year-old motel maid employed by River Shore Motel, on November 10, 1976, tripped and fell while walking on "blacktop". Claimant was hospitalized in early January 1977 by Dr. Samuel Gill. Dr. Gill diagnosed degenerative arthritis of the left hip, patellofemoral arthritis of the right knee, old chronic sacral strain, all aggravated by claimant's fall.

In May 1977, Dr. Arthur Hauge reported claimant had a history of difficulty with her left knee, but had been able to work. He advised claimant not to go back to work requiring her to be on her feet or "being up and down". It was his opinion claimant could not return to her previous job in her present condition. Dr. Hauge felt claimant needed a total hip replacement and then she might be able to get back to work, depending on her hip and knee pain. He indicated claimant limped and used a cane.

In June 1977, Dr. Theodore Pasquesi reported claimant had a back injury in 1973 which he had felt resulted in 16% impairment of the whole man. Further, claimant had undergone surgery on her left foot and in 1970 had fractured her left ankle. At the time she was examined by Dr. Pasquesi, claimant was complaining of left hip pain and right knee pain. Dr. Pasquesi felt claimant's condition warranted a replacement of the left hip. He felt claimant's fall was only in a small way responsible for claimant's current hip problem. It was his opinion 90% of claimant's hip impairment pre-existed this industrial injury and 10% was due to "aggravation". He rated the total impairment of the left lower extremity at 36% and of the right knee at 10%.

The claim initially was closed by a Determination Order, dated November 9, 1977, which granted claimant temporary total disability from Decmeber 22, 1976 through July 19, 1977 and compensation equal to 30° for 20% loss of her left leg and compensation equal to 7.5° for 5% loss of her right leg.

In March 1978, Dr. Pasquesi opined claimant could do sedentary work.

On June 6, 1978, claimant was hospitalized and on June 7, 1978, Dr. Hauge performed a total left hip replacement. By November 1978, Dr. Hauge indicated claimant was having trouble with muscle cramp in her foot and calf. He noted claimant continued to limp as she did prior to her surgery and was still using a cane.

Dr. Hauge, on February 7, 1979, reported claimant's condition was stationary. Claimant complained of hip pain after walking a block, standing on her feet, lifting anything, twisting, or bending. She said sitting caused stiffness in her left hip and right knee. Dr. Hauge did not feel claimant could return to a job which required claimant to be on her feet, do "any lifting, bending, or twisting etc." He felt claimant, if she returned to work, would have to perform very sedentary work.

A Second Determination Order, dated March 16, 1979, awarded claimant additional temporary total disability compensation and compensation equal to 112° for 35% unscheduled disability for her left hip injury.

At the hearing, claimant testified she has a high school education and has worked as a janitor, laborer in a cannery, and as a motel maid. Since her injury, she has worked on a limited basis for this employer watching the

desk, taking calls and renting motel rooms. Part of the reason for her limited work is that she receives social security and does not want her earnings from work to affect it. She said she is not permanently and totally disabled, but feels she is entitled to compensation equal to 100% unscheduled disability since she can only work one day per week. From July 1977 until March 1978 claimant said she did not seek any treatment from any doctors. At the hearing, she testified she could only walk 1-1/2 blocks and could not squat. She said her left thigh was sore and her right knee was painful, but she does not use any pain medication and uses a cane occasionally.

The claim was voluntarily reopened on March 1, 1978 by the carrier.

The Referee found claimant had failed to prove her entitlement to temporary total disability compensation from July 19, 1977 until her claim was reopened by the carrier. Therefore, the Referee affirmed the Determination Order and allowed temporary total disability compensation from the date of reopening or June 6, 1978, whichever was earlier.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, affirms the Referee's order. The preponderance of the evidence indicates claimant's award of permanent partial disability compensation for her hip and knee are correct. She returned to the same employer and was given a sedentary job at which she limits her work so as not to affect her social security benefits. The Board finds that after reviewing all of the evidence in this case, the awards granted by the Determination Order are correct.

Regarding claimant's contention she is entitled to additional temporary total disability compensation, the Board finds claimant has failed to establish her entitlement to it. There is no proof claimant is entitled to temporary total disability after July 19, 1977 and before the claim was reopened by the insurer. Therefore, the Board affirms the Referee's order.

ORDER

The Referee's order, dated September 18, 1979, is affirmed.

WILMA CHARLES, CLAIMANT
Ringo, Walton & Eves, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

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 96° for 30% unscheduled disability for her back injury. The Fund contends that no award for unscheduled disability should have been made.

FACTS

Claimant, a 43-year-old poultry processing plant employee, alleged that her work on the processing line on August 30, 1976 caused her to develop pain in both hands, both arms and her back. Dr. Thomas Martens diagnosed right carpal tunnel syndrome and recurrent lumbosacral spine strain. An EMG test by Dr. Throop was interpreted as being mildly abnormal and indicative of a mild carpal tunnel syndrome bilaterally. After conservative treatment, claimant underwent a carpal tunnel decompression of the left on January 18, 1977 which was performed by Dr. Martens.

Claimant had a prior injury in 1971 when she fell and broke her tailbone and was off work six weeks. In 1974 she suffered tendinitis of the left arm and was off work six weeks. Seh received no permanent partial disability award from either injury.

In August 1977, Dr. Martens reported that claimant continued to complain of minimal strength in her left grip. She also indicated she had minimal discomfort in her right hand and some discomfort between her shoulder blades and in her neck. Dr. Martens felt that claimant's condition was medically stationary and that she required no further treatment other than grip strengthening exercises. He felt she was unable to return to her previous employment because of the strenuous use of the upper extremities that was required. Dr. Martens could not explain the marked weakness in her grip strength in her left wrist.

Dr. Victoria Azavedo, of the Disability Prevention Center, in November 1977, reported that claimant complained of pain in both hands with more severe pain in the left than the right, problems dropping things, pain in the upper and lower back and the fact that both of her arms "go to sleep". Dr. Susan Means, a psychologist at the Disability Prevention Center, reported that claimant had a very indifferent-passive attitude and did not appear to want to get involved

in anything which may increase her physical functioning. Dr. Azavedo opined that claimant had a slight to moderate physical impairment and that psychological factors also contributed to claimant's vocational impairment. Claimant's IQ was average. Based on the vocational team's evaluation of claimant, they did not make any recommendation due to lack of claimant's motivation to work. Dr. Means felt that claimant was limited to light to medium work with no repetitive bending, lifting, or twisting. Dr. Means opined that claimant had not gained anything from her attendance at the Disability Prevention Center.

In January 1978, Dr. Martens again reported claimant's condition was medically stationary and she could engage in any occupation that did not require strenuous and repetitive use of her upper extremities or repetitive bending, lifting, twisting and prolonged standing or walking. He urged claimant to contact a vocational rehabilitation officer for job placement.

The claim was initially closed by a Determination Order, dated February 8, 1978, which awarded claimant temporary total disability compensation and compensation equal to 7.5° for 5% loss of her left hand (forearm). The Field Services Division service coordinator, in February 1978, closed claimant's file. It was reported by the service coordinator that claimant did not want their services. In March 1978, claimant was advised of a non-referral of vocational assistance. This is based on a Field Services Division evaluation that claimant had minimal disability which would not prevent her from returning to work. Further, the records indicated claimant had previous work experience in a variety of jobs.

Dr. Richard LaFrance, in April 1978, reported claimant complained of difficulty with her left arm and hand and low back pain. Dr. LaFrance thought that claimant's history seemed most consistent with bilateral thoracic outlet and possibly bilateral carpal tunnel syndromes. He felt there was also some possibility of a C5-6 radiculopathy on the left. Further, he felt claimant had chronic low back pain, possibly secondary to the scoliosis condition and depression. EMG testing on May 5, 1978 revealed a mild degree of slowing across the left carpal tunnel. Other portions of the study were normal.

In May 1978, a counselor with Vocational Planning Consultants reported claimant had attended a workshop and indicated she had no successful work experiences, no skills and nowhere to go as far as a job was concerned. He reported that claimant was looking for jobs driving such as taxiing people around who had disabilities, being a utility meter reader, working for a bus service, or being a parts runner.

Mr. Don Williams, a counselor with the Corvallis Rehabilitation office, on June 1, 1978, reported he felt claimant's disability may be considerably more than minimal and he had been unable to identify any marketable skills. He felt, in view of claimant's physical limitations, lack of education, lack of high aptitudes, lack of transferable work experience and current motivation, he would request reconsideration of a referral for vocational rehabilitation for claimant. This was done and on July 19, 1978 claimant was advised that she was again not referred for vocational assistance because their file indicated that with claimant's prior work exerience she should be able to re-enter the labor market at a modified job.

The Orthopaedic Consultants, in February 1979, reported that claimant had many complaints of pain. She indicated she had numbness, pain and weakness in her arms, pain in the neck, radiating into the cervical and dorsal spine and chronic back pain and diffuse arthralgias in her hands, elbows and knees. Their diagnosis was a chronic cervical, dorsal and lumbar strain from claimant's history, severe functional overlay, and status post-operative carpal tunnel repair. It was their opinion that claimant's condition was stationary and no further treatment was recommended. It was their opinion that claimant did not appear to be interested in working. They found no medical reasonable relationship between her job in the poultry processing plant and her neck and back complaints. They did feel that her carpal tunnel syndrome was related to her work.

At the hearing, claimant testified she has weakness and numbness in her legs, numbness in her arms, wrists and hands. She complained of pain in her upper and lower back, a tendency to drop things, and difficulty with her elbows and knee joints. Claimant stated that her problems were bad for several days before she finally terminated her job and they did not resolve after she went home. She indicated she had sought work with various employers but had been unsuccessful obtaining a job. Claimant stated she can drive only a little while without developing pain in her arms and hands. According to claimant, this pain causes her difficulty in sleeping. She said her job with this employer was "gutting" chickens that came by hanging upside down. She indicated she was doing approximately 58 chickens a minute. She said she was, at the time of the hearing, seeing no doctor for treatment for her various complaints and was taking no pain medication.

Claimant has an eighth grade education with past working experience in farming, delivering laundry, working in a machine shop, electronics assembly work and in the chicken plant.

The Referee, after reviewing all the evidence, found that claimant was entitled to an award of compensation equal to 96° for 30% unscheduled disability to her back, 15° for 10% loss of use of the left hand and 15° for 10% loss of use of the right hand; these awards are to be in lieu of the previous awards. The Referee also granted claimant attorney a fee not to exceed 25% of the increased compensation.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, reverses the Referee's award of unscheduled disability in this case. The Board finds no medical evidence in this case which connects claimant's present back pain to any industrial injury exposure in 1976.

Dr. LaFrance opined that claimant's scoliosis is, in fact, the cause of her back pain. The Orthopaedic Consultants do not find that claimant's back or neck pain is related to her work. Further, the Board finds that there is no proof of any loss of wage earning capacity as a result of claimant's back pain. Therefore, the Board would reverse the Referee's award of compensation equal to 96° for 30% unscheduled disability to claimant's back.

ORDER

The Referee's order, dated October 3, 1979, is modified.

That portion of the Referee's order which granted claimant compensation equal to 96° for 30% unscheduled disability is reversed.

The remainder of the Referee's order is affirmed.

WCB CASE NO. 78-4009 June 6, 1980

KENNETH CLINKENBEARD, CLAIMANT
Cramer & Pinkerton, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Order On Remand

On July 31, 1979, the Board entered its Order on Review which affirmed and adopted the Referee's order which affirmed the State Accident Insurance Fund's denial of claimant's claim for systemic lupus erythematosus and atrial melitis and affirmed the Determination Order for claimant's accepted pneumonia condition. This Board's order was appealed to the Court of Appeals.

The Court of Appeals, in an opinion filed February 19, 1980, held that a stipulation entered into by the parties resolved any questions of compensability. The Court reversed the Board's order and remanded this claim to it to determine the extent of claimant's disability. On March 31, 1980, the Judgment and Mandate in this case was issued.

The Board, after reviewing this case in light of the Court of Appeals decision, finds claimant is permanently and totally disabled. The totality of the medical evidence establishes this as claimant's disability. In September 1978, Dr. Morrison reported claimant was unable to perform any useful work and had no respiratory reserve. Claimant complained of joint pain, chest pain and shortness of breath on exertion of the most "trivial type". Claimant is now in his early 50's and has worked as a logger. Claimant testified he tried to return to work in the woods, but could not because of his breathing difficulty. Claimant indicated he continued to have difficulty breathing and had difficulty doing much of anything because of it. This award is effective May 28, 1978, the last date for which temporary total diability compensation was paid. Claimant's attorney is entitled to a fee for prevailing in overcoming the denial and a fee out of the increased compensation.

ORDER

Claimant is hereby granted an award of compensation for permanent total disability effective May 28, 1978.

Claimant's attorney is granted as a reasonable attorney's fee a sum equal to $1,250 for prevailing on overcoming the denial and a fee equal to 25% of the increased compensation granted by this order not to exceed $3,000.

CLAIM NO. C 121906 June 6, 1980

LOUIS CROSS, CLAIMANT
Galton, Popick & Scott, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On April 16, 1968, claimant sustained a compensable injury to his neck. The claim was initially closed by a Determination Order, dated January 19, 1970, and claimant's aggravation rights have expired.

On March 21, 1980, Dr. William Smith reported that in his opinion claimant's neck condition had worsened since the surgery in early 1970. He felt that claimant's current problems were related to his industrial injury. He indicated that he had again operated on claimant on January 31, 1980. He felt that claimant would be off work until he showed enough improvement and less pain. He recommended that time loss begin sometime in December 1979 when claimant had noted the onset of his recent symptoms.

Claimant, by and through his attorney, on April 16, 1980, requested the Board to reopen his claim under its own motion jurisdiction. On April 22, 1980, the Board requested the State Accident Insurance Fund (Fund) to advise it of its position with respect to claimant's request. On April 28, 1980, the Fund reported that it did not have enough evidence to make a determination in this case and indicated it would need additional information before it could advise the Board of its position. An independent examination was scheduled for March 21, 1980. The Fund, as of the date of this order; has not yet responded to claimant's request.

The Board, after reviewing the reports submitted to it in this case, finds that the evidence is sufficient to warrant a reopening of this claim under its own motion jurisdiction at this time. Therefore, the Board orders that this claim be remanded to the State Accident Insurance Fund for acceptance and payment of compensation and other benefits provided by law, effective January 30, 1980, and until closed pursuant to ORS 656.278. It is further ordered that claimant's attorney be granted as and for a reasonable attorney's fee in this case a sum equal to 25% of the increased temporary total disability compensation not to exceed $750.

IT IS SO ORDERED.

WCB CASE NO. 79-1812 June 6, 1980

A.J. HUGHES, CLAIMANT
A. Thomas Cavanaugh, Claimant's Atty.
Schwabe, Williamson, Wyatt, Moore & Roberts, Employer's Attys.
Request for Review by Claimant
Cross-appeal by the SAIF

Claimant and the State Accident Insurance Fund (Fund) seeks Board review of the Referee's order which affirmed the Fund's denial of claimant's right ankle injury, granted claimant an award of additional compensation equal to 32° for 10% unscheduled disability for his back injury and denied claimant any additional temporary total disability compensation. Claimant contends he proved his right ankle injury was compensable, that he is entitled to an additional award of permanent partial disability and was entitled to penalties and attorney's fees. The Fund contends the award of permanent partial disability granted by the Determination Order was correct and the increase granted by the Referee was not supported by the evidence.

FACTS

Claimant, a 52-year-old backhoe operator with Hoffman Construction Company, on December 5, 1977, injured his back when while climbing off of a backhoe he slipped and injured his back. Claimant could not work the next day. Dr. Anton Eilers diagnosed a low back sprain. X-rays revealed "quite a bit of degenerative arthritis".

Dr. John Nelson performed an EMG test in January 1978 and reported no positive findings.

In March 1978, Dr. Eilers indicated claimant had operated a backhoe for 15 years. He felt if claimant continued to have back pain he would be unable to return to that occupation. He found only tight muscles in claimant's back.

Dr. William Parsons, in July 1978, reported claimant continued to complain of low back pain. Claimant denied any previous back injuries or pain. The diagnosis was chronic lumbar strain. Dr. Parsons found no evidence of lumbar nerve root compression.

In August 1978, Dr. Theodore Pasquesi reported claimant's condition was not stationary. He indicated he was concerned about claimant's intake of Darvon and felt claimant should be referred to the Northwest Pain Center. Dr. Parsons concurred.

Dr. Eilers, in September 1978, reported claimant had a considerable amount of restriction of his low back motion related to pain, but he found no reflex and motor power changes. He recommended continued active exercise. Dr. Eilers felt claimant would not be able to return to heavy equipment operator and should consider vocational rehabilitation. He opined claimant had "mostly degenerative arthritis that is giving him his discomfort . . . ".

Dr. Edward Colbach, a psychiatrist, also in September 1978, reported claimant had an 8th grade education and had performed physical work. He felt claimant was "slowing down", but could not admit it. Dr. Colbach stated claimant presented the typical problem of the aging physical laborer who had few employment options because of his educational level. He felt claimant should be returned to work as soon as possible.

In December 1978, the Orthopaedic Consultants diagnosed chronic lumbar sprain superimposed upon pre-existing degenerative arthritis, functional overlay with conversion features and by history chronic alcoholism. They felt claimant's condition was stationary, however, found it difficult to assess claimant's physical impairment because of the psychologic disturbance. No objective evidence of a serious injury was found. They felt a job change was needed and that claimant could perform light to medium work. They rated claimant's low back impairment as a result of this injury as mild and suggested vocational rehabilitation. On January 7, 1979, Dr. Eilers concurred.

A Determination Order, dated January 29, 1979, awarded claimant temporary total disability compensation from December 6, 1977 through January 12, 1979 less time worked and compensation equal to 48° for 15% unscheduled disability for his back injury.

In April 1979, Dr. Eilers stated he felt claimant had mechanical low back pain. He felt claimant could not return to heavy equipment work, but did not find claimant was disabled from gainful employment.

On May 3, 1979, claimant injured his right ankle. Claimant said that he awoke at 3 a.m. to go to the bathroom, got down the hallway and his back gave way causing him to fall and sprain his right ankle. Dr. Eilers diagnosed a severe sprain of the medial and lateral ligaments of the right ankle and related this injury to claimant's back injury.

The Orthopaedic Consultants, in July 1979, did not feel the right ankle injury was the result of or related to claimant's industrial injury of December 5, 1977.

Also, in July 1979, Dr. Eilers indicated claimant was disabled from returning to work as a backhoe operator, or an occupation requiring stooping, bending, twisting, or lifting of more than 10-15 pounds. Claimant's condition was unchanged with low back pain and no objective findings other than some restriction of motion.

On August 3, 1979, the Fund denied responsibility for the right ankle injury.

Claimant had been referred for job search assistance. The job developer reported in October 1979 that claimant had returned to a light-duty backhoe operation job. Claimant had attended the Williams School for a short period of time. He was found to be unmotivated.

Claimant testified that in October 1979 he went to work for his brother operating a small backhoe for $12.00 an hour. He indicated his back had given out on several occasions after his initial injury. He does not feel he could do heavy construction work because the "pounding' he would receive on a large piece of equipment.

The Referee found claimant and his witness were not credible. The Referee felt claimant had a problem with his alcohol consumption and was not motivated to return to work. The Referee concluded: (1) claimant's loss of wage earning capacity due to this injury was 25% and granted claimant an award of compensation equal to that amount; (2) claimant was not entitled to additional temporary total disability; and (3) the Fund's denial of the right ankle injury was correct and approved it.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, affirms the Referee's order. Claimant is 52 years old and has an eighth grade education. Claimant has worked mainly in physically demanding types of employment. The Orthopaedic Consultants feel claimant could perform light to medium work and could not return to his previous job. Claimant is able to operate small equipment but feels he could not operate heavier larger equipment. Based on the limitations imposed on claimant after this injury and considering all the other relevant factors in this case, the Board concurs with the Referee's award of permanent partial disability.

The Board finds the evidence does not establish claimant is entitled to any additional temporary total disability compensation. Claimant's condition was found to be stationary in September 1978 by Dr. Colbach and on December 1, 1978 by the Orthopaedic Consultants, with whom Dr. Eilers agreed. There is no evidence claimant's condition worsened or became not stationary after the Determination Order.

Claimant has failed to prove his right ankle injury is compensable. The Referee found claimant and his witness were not credible. The Orthopaedic Consultants did not find the right ankle injury to be related to the December 1977 accepted back injury. The Board cannot conclude claimant has proven by the preponderance of the evidence his right ankle injury is related to the December 5, 1977 back injury.

ORDER

The Referee's order, dated December 13, 1979, is affirmed.

WCB CASE NO. 79-3094 June 6, 1980

HERBERT A. JACKSON, CLAIMANT
Galton, Popick & Scott, Claimant's Attys.
MacDonald, McCallister, Snow
& Anderson, Employer's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Claimant seeks Board review of the Referee's order which approved the State Accident Insurance Fund's (Fund) denial of this claim and did not award claimant any penalties or attorney's fees for the late denial of his claim and the late payment of compensation.

FACTS

Dr. Robert Kaye first saw claimant on December 13, 1978 and reported claimant had bent over in a barn and went to get up and felt pain in his right hip. Claimant said he had injured his right hip on December 11, 1978 shoveling rock, dirt, and sand on the job. The diagnosis was a muscle spasm of the gluteal muscle.

On December 19, 1978, Dr. Samuel Scheinberg reported claimant had experienced pain in his right hip and low back about two-and-a-half weeks previously. Claimant stated he had been working for a home builder shoveling dirt, sand and rocks. Claimant said he worked a week following the shoveling activity and until he was pouring a barn floor, bent over, and could not straighten up. Claimant reported he had a constant pain, increased by twisting, prolonged sitting or with lying on the right side. Dr. Scheinberg diagnosed a probable musculoligamentous strain and possible early herniated disc.

On January 23, 1978, claimant filed a claim for his alleged right hip injury. On the form 801 the employer stated claimant had left work two hours early to bury a dead cow on the farm he lives on. The employer indicated claimant did not complain of any difficulty that day, but called in sick the next day. The date of injury was listed as December 11, 1977. Claimant last worked on December 12, 1978.

Dr. William Smith, in February 1979, reported claimant indicated he had injured his low back on about December 2, 1978 shoveling sand. He indicated he worked until December 12, 1978. Claimant was hospitalized with the admitting diagnosis "Blood pain [illegible] 12-12-78 [illegible]." A myelogram was normal.

The Fund first paid claimant temporary total disability compensation on February 14, 1979 and continued to pay it to every two weeks. It denied claimant's claim on April 4, 1979 because it could not substantiate any injury-producing incident and the evidence it had indicated a non-industrial and a pre-existing problem.

Claimant testified he hurt his back the first week in December 1978, but did not mention it to anyone. He said he was performing heavy manual labor and first noticed leg and back pain while digging in rocky clay soil. He said he finished the day and continued to work with his wife's rubbing his low back, right leg and right hip with liniment each night. On December 12, 1978, claimant said he worked six hours and left early to bury a dead cow, but could not [illegible] of back and leg pain. His wife testified [illegible] this for claimant. On December 13, 1978, claimant stated he was putting down a plank floor in his barn when he felt a sharp pain in his back and could not straighten up.

The employer and two of claimant's co-workers testified claimant did not mention any work injury. Claimant did not appear to be in any pain when they observed him. One co-worker stated claimant told him he hurt himself burying the dead cow. Another co-worker testified claimant said he hurt himself putting in the floor in the barn. Claimant did not tell his employer on December 15, 1978 he hurt himself and would not be at work. Claimant filed an off-the-job injury claim with another insurance company.

Claimant testified he waited to file a claim for an off-the-job injury because he did not like "hasseling with insurance companies". Also, he felt his condition would improve.

Claimant's wife stated claimant had back symptoms prior to the cow burying incident.

The Referee found claimant had not been disabled because of his back until after the barn incident. Further, the Referee found no evidence claimant experienced any hardship because of the late denial and late first payment of compensation to warrant imposing penalties. Therefore, the Referee affirmed the Fund's denial.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, modifies the Referee's order. The Board finds as the Referee did that claimant failed to prove by the preponderance of the evidence he suffered a compensable injury as he alleges. The Board affirms the Fund's denial of claimant's claim.

The Board does not find the late denial of this claim was unreasonable. The Fund's acts in this case were correct. The claimant was paid temporary total disability compensation up to the date of the denial, which was based on the Fund's investigation of the claim. Its actions were reasonable and claimant was not prejudiced by them. Therefore, the Board does not find claimant is entitled to penalties and attorney fees on the late denial.

The first payment of interim compensation was a few days late. Oregon law requires interim compensation to be paid within 14 days of the employer having notice or knowledge of the claim. The claim was filed on January 23, 1978 and on February 14, 1978, the first payment of temporary total disability compensation was made. The Board finds this late payment entitles claimant to a penalty equal to 25% of the temporary total disability compensation due from January 23, 1978 to February 14, 1978 and an attorney fee of $50.

The first ten exhibits were received by the Referee over the objection of claimant's attorney and made part of the record. The Referee indicated he would "accord them the probative value" he believed they deserved. The Board does not find anything incorrect in the Referee accepting these exhibits.

ORDER

The Referee's order, dated September 14, 1979, is modified.

That portion of the Referee's order which denied claimant's request for penalties and attorney's fees for the late payment of the first installment of compensation is reversed.

Claimant is hereby granted a sum equal to 25% of the temporary total disability compensation due from January 23, 1978 to February 14, 1978 and an attorney fee of $50 for the late payment of the first payment of temporary total disability compensation.

The remainder of the Referee's order is affirmed.

WCB CASE NO. 78-3189 June 6, 1980

EDDIE LEAVELL, CLAIMANT
Kenneth W. Shaw, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order Of Dismissal

On April 1, 1980, the Presiding Referee entered his order dismissing claimant's case.

On May 12, 1980, the Board received a letter from claimant which was construed to be a request for review of the Presiding Referee's order. The letter was originally sent to the State Accident Insurance Fund which they apparently received on May 6.

More than 30 days have passed from the date of the issuance of the Presiding Referee's order, therefore, the order is final by operation of law and claimant's request for review must be dismissed. ORS 656.289(3).

IT IS SO ORDERED.

WCB CASE NO. 78-7367 June 6, 1980

KENNETH M. RUMSEY, CLAIMANT
Pozzi. Wilson, Atchison, Kahn
& O'Leary, Claimant's Attys.
Roger R. Warren, Employer's Atty.
Order On Remand

On October 19, 1979, the Board issued an Order on Review which modified the Referee's order. That portion of the Referee's order which granted claimant's attorney a $600 fee was reversed. Claimant's attorney was granted a fee equal to 25% of the additional compensation granted by the Referee's order, payable out of the increased compensation as paid, not to exceed $3,000. The Board's order was appealed to the Court of Appeals.

In an opinion filed on March 31, 1980, the Court of Appeals reversed and remanded this case for reconsideration in light of Morgan v. Stimson Lumber Company, 288 Or 595, _____ P2d _____ (1980). The judgment and mandate in this case was entered on May 14, 1980.

The Board, after reconsidering this case, in light of the case cited by the Court of Appeals, modifies its Order on Review. The carrier in this case withheld various medical reports from claimant's attorney after they had been requested. This act was unreasonable resistance and entitled claimant to an award of penalties and attorney fees. However, there is no compensation due on which to assess a penalty. However, the Board finds the carrier's acts do justify awarding claimant's attorney a fee equal to $200 in addition to the attorney fee granted out of the increased compensation.

ORDER

The Board's Order on Review, dated October 19, 1979, is amended. The following is added to that order:

Claimant's attorney is hereby granted an attorney fee equal to $200 for the carrier's failure to provide the requested reports. This is in addition to the attorney fee granted out of the increased compensation. The remainder of the Board's Order on Review of October 19, 1979 is affirmed.

WCB CASE NO. 79-7593 June 6, 1980

ANTHONY J. LUJAN, CLAIMANT
Douglas L. Minson, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

The State Accident Insurance Fund (Fund) seeks Board review of the Referee's order which found: (1) claimant's claim was not barred because of late filing because the Fund did show it was prejudiced by the late filing; (2) claimant's injury of April 20, 1979 was compensable and awarded claimant's attorney a fee of $800; and (3) ordered the payment of a penalty equal to 25% of the compensation paid claimant from May 17 through June 11,1979 and awarded claimant's attorney a $75 fee.

FACTS

The Board adopts the Referee's finding of facts as set forth in the Opinion and Order, a copy of which is attached to this order.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, modifies the Referee's order. The Board affirms those portions of the Referee's order which found claimant's late filing of his claim did not bar it since the Fund failed to show it was prejudiced by the late filing and awarded claimant additional compensation equal to 25% of the compensation paid between May 17 and June 11, 1979 and awarded claimant's attorney a fee of $75.

The Board, however, does not find the preponderance of the evidence establishes that claimant's claim is compensable. Claimant has given various explanations of how he injured his back. He stated that on April 20, 1979 his rib cage was bumped by a pipe, he was struck in the leg by an asphalt plug, and it was reported he experienced a sharp pain in his back while picking up a 100-pound asphalt plug, which he later denied. Claimant's wife stated he said on April 20, 1979 he was struck in the legs by a keg of asphalt and twisted his back. Claimant told a co-worker on April 20, 1979 he hurt his back "tearing down a pipe" or lifting asphalt.

After the alleged injury, claimant applied for a job with Buckaroo Thermoseal and denied any previous injuries or health problems. Claimant did not seek medical treatment until after he went to work with Buckaroo Thermoseal. On May 16, 1979, after being employed by Buckaroo Thermoseal, claimant went to the emergency room at at Woodland Park Hospital. He indicated he had bumped his rib cage three weeks previously and had experienced increasing pain with lifting the past few days. Claimant felt he had a kidney stone problem similar to the one he had previously. However, Dr. Donald Young re-

ported claimant had no history of trauma, injury, or falling which claimant was aware of. The Board finds the preponderance of the evidence does not support a finding of compensability. Therefore, the Board approves the denial of the Fund.

ORDER

The Referee's order, dated November 28, 1978, is modified.

That portion of the Referee's order which reversed the State Accident Insurance Fund's denial of August 30, 1979 and remanded claimant's claim to it for acceptance and payment of benefits according to law and awarded claimant's attorney a fee of $800 is reversed. The State Accident Insurance Fund's denial is affirmed.

The remainder of the Referee's order is affirmed.

CLAIM NO. 200-156-2005 June 6, 1980

LYLE SEEHAWER, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant requested this claim be reopened under the Board's own motion jurisdiction for additional temporary total disability compensation. On March 13, 1972, claimant sustained a compensable injury to his low back. After a myelogram and laminectomy, this claim was initially closed by a Determination Order, dated October 3, 1972, which granted claimant temporary total disability compensation and compensation equal to 48° for 15% unscheduled disability for his back injury. Claimant's aggravation rights have expired.

Claimant continued to have back pain and the claim was subsequently reopened for additional treatment and closed by a Second Determination Order, dated March 16, 1976, which granted additional temporary total disability compensation.

In February 1980, Dr. James Degge reported claimant complained of aching pain in his low back and right hip which radiated down the right leg. Conservative treatment, including physical therapy, was begun. On March 5, 1980, a myelogram was performed and interpreted as negative. Claimant was hospitalized from March 3 to March 7, 1980.

In May 1980, Dr. Degge reported claimant's symptoms were related to his original injury. He felt claimant put up with the periodic back symptoms while he worked, but

since he had been laid off in January 1980 he sought medical treatment for them. Dr. Degge opined claimant's condition was stationary and did not appear to have an increase over the previous 15% award.

The employer, on May 27, 1980, advised the Board claimant had been asked to return to work on March 10, 1980, but indicated based on medical reasons he couldn't. Claimant had indicated he would verify this. The employer had not received such verification and asked that claimant's request for own motion relief be denied.

The Board, after reviewing the information supplied to it by the employer, does not find it is sufficient to justify the reopening of this claim under its own motion jurisdiction at this time. Therefore, claimant's request to have this claim reopened under the Board's own motion jurisdiction is denied.

IT IS SO ORDERED.

WCB CASE NO. 78-6493 June 6, 1980

THOMAS W. SPRINGGAY, CLAIMANT
A.C. Roll, Claimant's Atty.
Schwabe, Williamson, Wyatt, Moore & Roberts, Employer's Attys.
Order

On May 28, 1980, the Board received a notice of appeal and petition for review to the Court of Appeals and second request for reconsideration in that order. The Board no longer has jurisdiction based on the appeal notice and denies claimant's second request for reconsideration. The Board will process this case and forward the necessary documents to the Court of Appeals.

ORDER

Claimant's second request for reconsideration in this case is denied.

WCB CASE NO. 78-7870 June 6, 1980

WALTER J. STUGELMEYER, CLAIMANT
Malagon & Yates, Claimant's Attys.
Velure, Heysell & Pocock, Employer's Attys.
Request for Review by Employer

The employer seeks Board review of the Referee's order which set aside its denial of claimant's aggravation claim and remanded that claim to it for payment of benefits due him and awarded claimant's attorney a fee of $800. The employer contends this denial of claimant's aggravation claim was correct.

FACTS

Claimant, a 55-year-old clean-up man with SWF Plywood Company, on September 7, 1976, sustained an injury to his low back and legs when, while standing between two decks, he was struck and knocked into a roller. Dr. Anne Jensen diagnosed this injury as a contusion to the mid-back area. He did not feel that claimant would experience any permanent impairment as a result of this injury. Claimant received further treatment from Drs. Warren Glaede and Douglas Lundsgaard. He was originally released for work as of October 13, 1976, and returned to work on October 18, 1976, but was unable to do the heavy work assigned to him. Claimant was released for light work on October 18, 1976.

On November 16, 1976, Dr. Lundsgaard reported that claimant continued to have pain in his back and occasionally radiation into the left leg. He felt claimant had a chronic strain of the lumbar back area and prescribed a lumbosacral corset as well as medication. Dr. Lundsgaard felt that claimant must limit his lifting to 20 pounds without working at any occupation which required prolonged standing or bending for more than four hours a day.

Dr. Glaede felt claimant could work but should not bend, stoop, or squat more than four hours per day. Claimant tried to work, but said he was too sore after two days of trial work.

Dr. Glaede, in February 1977, reported he did not feel claimant was in need of any additional treatment except pain medication and that claimant's condition may possibly resolve itself in time. Claimant had had a fractured 11th rib which healed with no disability. Claimant's pain, the doctor felt, was from contused left sacroiliac. He felt the claim could be closed.

A Determination Order, dated March 3, 1977, awarded claimant temporary total disability compensation and compensation equal to 48° for 15% unscheduled disability for his back injury.

In late March 1977, Dr. Glaede reported that claimant had a recurrence of back pain in early March 1977, but had been released on March 11, 1977 for light work.

A Second Determination Order, dated April 1, 1977, affirmed the original Determination Order after considering additional evidence.

Dr. Donald Stainsby, in an undated report, reported that claimant had early Dupytren's contractures of both hands. He reported that claimant also complained of back pain and left leg pain. Dr. Stainsby felt that claimant had evidence of conversion reaction. He did not feel that claimant had any evidence of a protruded lumbar intervertebral disc and did not feel that any additional diagnostic procedures were needed. Further, he felt there was no need for any specific medical or surgical treatment for claimant's back and left leg pain. Dr. Stainsby opined that claimant had a permanent partial disability resulting from his back injury which was in the "lower range of mild at about 20%". His diagnosis of claimant's condition was a lumbar sprain and conversion reaction.

In September 1977, Dr. Richard Rosenbaum reported that Dr. Edward Rosenbaum had examined claimant because of continuing complaints of back pain which radiated down the left leg. An EMG test of the left leg was mildly abnormal. Dr. Richard Rosenbaum felt claimant's symptoms were suggestive of an injury of the nerve root at the left fifth lumbar or first sacral level and related this to his industrial injury in September 1976. He felt that claimant needed additional treatment in the form of prolonged bedrest, traction, or back surgery and might need a myelogram in the future.

On April 26, 1978, the Orthopaedic Consultants reported they felt claimant's condition was stationary and claim closure was "definitely indicated". They felt that claimant would be unable to return to his former occupation, but if properly motivated, could perform some other occupation. It was their opinion that job placement assistance should be given to claimant and that he should have a psychological examination. Part of their diagnosis, in addition to a contusion of claimant's back and a chronic sprain of the lumbar spine with radicular symptoms, was a conversion reaction. They rated the loss of function related to this back injury in September 1976 as being in the upper limits of mild. The Orthopaedic Consultants felt that claimant was psychologically a cripple, with functional disturbance severe.

Dr. Hugh Gardner, a psychiatrist, in August 1978, reported that claimant has a fifth grade education and had worked basically in farming until he moved to Oregon where he had worked for this employer. Dr. Gardner reviewed certain surveillance films and concluded that based on these films and his observation of claimant in his office and his review of his psychiatric evaluation, that it was his opinion that claimant consciously "clings to and intensifies the symptoms when its in his interest, however, there is an element of conversion reaction". The observation films showed claimant getting in and out of a car, grocery shopping, leaving a restaurant and picking out a watermelon in the market and revealed that he had a slight limp on the left side. Dr. Gardner questioned claimant about some of the activities observed in the film. Claimant told him that he was unable to do them. It was his opinion that the condition was stable, and that treatment from a psychiatric sense would be to no avail. He rated claimant's disability in the mild range and felt that no further treatment was indicated. Dr. Gardner felt claimant's injury supplied "a conscious-saving relief from his compulsive orientation".

A Third Determination Order, dated September 14, 1978, awarded claimant additional temporary total disability compensation and compensation equal to 5% unscheduled disability for his back injury and 5% loss of his left leg.

In January 1979, Dr. David Ott, D.C., reported that claimant's condition was not medically stable and recommended a further course of conservative treatment. Dr. Ott opined that claimant was not capable of gainful employment in the line of work he had previously performed and was not able at that time to pursue any type of work activity.

Dr. H. R. Henderson, a psychiatrist, in April 1979, reported that he diagnosed chronic strain of the lumbar spine with radicular symptoms, psychophysiological disorder of the musculoskeletal system with features of conversion reaction, chronic pain syndrome, depressive neurosis which was mild in nature and secondary to the chronic pain syndrome and a sleep disturbance secondary to the depressive neurosis. It was Dr. Henderson's opinion that claimant had sustained some psychiatric impairment as a result of his industrial injury and its sequelae. He felt that claimant should be treated with anti-depressant medication or a transcutaneous stimulator to assist him in sleeping. Dr. Henderson opined that claimant's psychiatric impairments at that time were moderately severe in degree.

Claimant testified at the hearing that he has not yet returned to work. He said he continues to see Dr. Henderson about once every other week. Initially, he testified he was seeing Dr. Henderson about every four days.

The Referee found the medical evidence in the record did not establish a worsening of claimant's back condition. However, the Referee found the medical evidence did establish a worsening of claimant's psychiatric condition since the claim was last closed. The Referee recited that an issue of compensability of claimant's aggravation claim had been raised in March 1979 in claimant's request for hearing. It was noted that that request referred to a denial of the employer, dated March 1, 1979. This denial was not placed in the record. The Referee concluded, based on all the evidence, that claimant established a worsening of his psychiatric condition since the issuance of the last Determination Order and, therefore, set aside the employer's denial and remanded the claim to it for reopening as of the date claimant first began treatment with Dr. Henderson and awarded claimant's attorney an $800 fee.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, modifies the Referee's order. The medical evidence in this case indicates that claimant's psychiatric condition is related to his back injury. However, this evidence does not indicate that claimant is disabled or has any residuals because of his psychiatric problems. As such, claimant is entitled to continuing treatment under ORS 656.245 for his psychiatric problems and the Board would so order.

The Board finds that the preponderance of the evidence does not establish that claimant's back or psychiatric condition has worsened since the last award or arrangement of compensation in this case. Therefore, the Board approves the employer's denial of claimant's aggravation claim.

Based on this finding, the Board finds the claimant's condition is stationary and that the extent of disability should be rated. The evidence indicates claimant is poorly motivated to return to any work. Dr. Gardner notes this injury is used by claimant as a conscious relief from his compulsive orientation. Based on claimant's back injury plus other relevant facts, such as claimant's age, education, prior work experience and motivation, the Board finds that claimant is entitled to an award of compensation equal to 160° for 50% unscheduled disability for his back condition.

ORDER

The Referee's order, dated December 20, 1979, is modified.

That portion of the Referee's order which ordered the employer to accept claimant's aggravation claim and remanded it to the employer and granted claimant's attorney a fee is reversed.

The employer's denial of claimant's aggravation claim is affirmed.

The employer's denial of responsibility for claimant's psychiatric condition is reversed and the Board finds the psychiatric condition is causally related to claimant's back injury. Claimant is entitled to continuing treatment for this condition under ORS 656.245.

Claimant's attorney is granted a fee of $250 for overcoming this denial.

Claimant is hereby granted an award of compensation equal to 160° for 50% unscheduled disability for his back injury. This award is in lieu of all previous awards of unscheduled disability for these conditions.

Claimant's attorney is granted an attorney fee equal to 25% of the increased compensation not to exceed $3,000.

WCB CASE NO. 78-2247 June 10, 1980

WILLIAM T. BROWN, CLAIMANT
Donald O. Tarlow, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Claimant seeks Board review of the Referee's order which granted him an additional award of compensation equal to 48° for 15% unscheduled disability for his low back injury. A Determination Order, dated November 16, 1977, had granted claimant compensation equal to 48° for 15% unscheduled disability for his low back injury. Claimant contends he is permanently and totally disabled.

FACTS

The Board finds the facts recited in the Referee's Opinion and Order are correct and adopts them. A copy of the Referee's Opinion and Order is attached to this order.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, modifies the Referee's order. Claimant is now 52 years old and has a third grade eudcation, but is functionally illiterate. Claimant's previous work experience has been in heavy manual labor. Because of a combination of low back pain and a thyroid condition, claimant was found by a Vocational Rehabilitation counselor to be unemployable. Claimant feels he could perform light work if it were available. Since his injury, claimant has returned to work for this employer, but could not perform the work he was given. He also has looked for other work and attempted to build furniture.

The Board, based on all the evidence, does not find claimant has proven he is permanently and totally disabled. The medical evidence alone does not establish that claimant is permanently and totally disabled. Dr. Struckman, in September 1979, rated claimant's "disability" as mildly moderate to moderate. He felt claimant was "over-reacting" and was capable of performing any occupations which did not require prolonged lifting, bending or squatting. In cases where the medical evidence alone does not establish permanent total disability, other relevant factors, as delineated in the Wilson v. Weyerhaeuser case, must be considered. Claimant told a vocational counselor he felt there wasn't any job he could perform and didn't need rehabilitation services. Claimant's condition related to his compensable injury is not so severe that he is not required to reduce his disability or to reduce the affects of it. Claimant has not shown a reasonable effort to return to gainful employment. Further, Dr. Hummel indicated claimant had had good relief of his radicular pain after a laminectomy. He noted claimant had mild chronic low back pain and was capable of gainful employment.

Based on all the evidence in this case, however, the Board finds claimant has lost more of his wage earning capacity than that which he has been previously compensated for. The Board finds claimant is entitled to an award of compensation equal to 192° for 60% unscheduled disability for his low back injury. This is in lieu of all previous awards of unscheduled disability for this injury.

ORDER

The Referee's order, dated December 14, 1979, is modified.

Claimant is hereby awarded 192° for 60% unscheduled disability for his low back injury. This is in lieu of all previous awards of unscheduled disability granted for this injury.

Claimant's attorney is granted as a reasonable attorney's fee a sum equal to 25% of the increased compensation, payable out of said compensation as paid, not to exceed $3,000.

JOHN DILWORTH, CLAIMANT
Clayton Hess, Employer's Atty.
Order Approving Disputed Claim Settlement

WHEREAS, State Accident Insurance Fund has appealed the order of Referee Pferdner dated October 11, 1979 contending inter alia that his order insofar as it orders State Accident Insurance Fund to submit the above-numbered claim to Closing & Evaluation for determination of the permanent disability, if any, resulting from an ordered accepted myocardial infarction was void in the face of the Board's previous ruling that Closing & Evaluation was without jurisdiction to make such a determination State Accident Insurance Fund having therefore formally denied permanent impairment of function and/or disability resulted from that which it was forced to accept.

WHEREAS, State Accident Insurance Fund notwithstanding its contention that the Referee's order aforesaid was void did in fact submit the claim to C&E and C&E did on January 17, 1980 make an award of temporary total disability March 8, 1976 through August 3, 1978 together with 112 degrees for 35% unscheduled disability which State Accident Insurance Fund contends was not justified either factually on the basis of the record or legally in the face of the Board's previous order concerning jurisdiction.

WHEREAS, State Accident Insurance Fund further contended on its appeal that the Pferdner order awarding claimant's counsel an additional fee was both void and unjustified as an order duplicating fees for the same denial which had theretofore been awarded by an original Gemmell order of February 4, 1977;

WHEREAS, Claimant cross-appealed the Pferdenr order and thereby kept viable all issues theretofore or hereafter possible to be raised in this litigation including the possibility of an appeal from the Determination Order of January 17, 1980 if the Board were not to again find it void in the face of State Accident Insurance Fund's denial, and

WHEREAS, both claimant and State Accidnet Insurance Fund are desirous of putting an end to otherwise endless litigation, now therefore IT IS AGREED as follows:

(1) State Accident Insurance Fund will pay to claimant's counsel the sum of $900.00 as attorneys' fees in full and final and complete discharge of its attorney fee obligations not before this time previously paid.

(2) State Accident Insurance Fund will further pay to claimant the balance of the temporary total disability

awarded by C&E together with the unpaid balance of the 112 degrees permanent partial disability awarded by C&E but such payment to be made and/or continued as if by way of disputed claim settlement.

(3) In consideration of the foregoing payments being made claimant agrees:

(a) That State Accident Insurance Fund's de facto denial of responsibility for claimant's atherosclerotic heart disease and/or any disability attendant upon or resulting therefrom which pre-existed March 25, 1976 or which followed July 18, 1976 may be affirmed.

(b) That no right of appeal from the determination order exists.

It appearing to the Board from its de novo review of the record that the foregoing stipulation and agreement is a reasonable method of disposing of doubtful and disputed claims, the agreement of the parties is hereby approved, and this litigation concerning injury or occupational disease having its inception in March of 1976 is ended without right of appeal.

WCB CASE NO. 78-250 June 10, 1980
WCB CASE NO. 78-3947

BRUCE A. HELFING, CLAIMANT
Welch, Bruun & Green, Claimant's Attys.
Schwabe, Williamson, Wyatt, Moore & Roberts, Employer's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Claimant seeks Board review of the Referee's order that affirmed the denials issued by Asplundh Tree Expert Company and Stevens Tree Surgery through their respective Workers' Compensation insurance carriers. Claimant contends he established a compensable occupational disease.

FACTS

Claimant was employed on and off by the two employers, Asplundh Tree Expert Company and Stevens Tree Surgery, over a number of years. The record indicates that claimant worked from October 1975 through April 1976 for Stevens Tree Surgery (Stevens). The record also indicates that he was unemployed from April 1976 to September 1976, performing only light maintenance work as a apartment manager. Claimant worked for Asplundh Tree Expert Company (Asplundh) from September 1976 through April 1977. He worked for Stevens one week in May 1977 and for Asplundh for approximately a month in December 1977 and January 1978.

In March 1976, Dr. Keith H. Griffin reported that claimant had a situation develop where he experienced pain and lost his self-control. Claimant stated that while working as a tree trimmer for PGE he became very frustrated, lost control, screamed at the top of his voice, threw his hard-hat down on the ground and then sat down and cried. Dr. Griffin diagnosed claimant's condition as reactive depression with chronic tension state.

Claimant testified that in late April 1976 he began to experience pain and muscle spasms in his back which caused him to be even more short tempered than he normally was. He stated that he was employed by Stevens at that time as a groundsman.

Dr. P. Unger, on May 4, 1976, reported that claimant complained of being nervous, shaking and having a violent temper for the past 5-6 years. He felt that claimant had an extreme amount of agitated depression with the main component being agitation and depression. Dr. Unger also reported claimant complained of back pain and muscle spasms. He diagnosed a muscle spasm in the back with evidence of scoliosis "probably from shortening of the left leg".

In June 1976, Dr. John Thompson reported that he felt claimant's marked length leg discrepancy was a contributing factor to his ongoing lumbar spine pain. He did not find any evidence of nerve root compression or spondylosis or spondylolisthesis. It was noted that thoracic spine films revealed evidence of old Scheurmann's disease, but Dr. Thompson did not feel this was actively involved at that time. In early November 1976, Dr. Thompson reported that claimant had been working approximately five weeks and about three weeks previously began to have pain in his chest, intrascapular area, shoulder, his neck and also began having headaches. Dr. Thompsom felt it appeared that claimant may have a rheumatoid spondylitis.

In late November 1976, claimant was hospitalized because of fairly severe abdominal pain associated with nausea and vomiting which had started in his back and came around anteriorly radiating into both groin areas. He reported that coughing and sneezing made this pain worse. Dr. Unger reported that claimant had a complex pain syndrome and requested that Dr. Lawrence Zivin, a neurologist, examine claimant and determine if he had any cord lesion and disc lesion in the thoracic or low lumbar area. Dr. Zivin felt that claimant had diffuse thoracolumbar back pain without evidence of spinal cord or neuropathic involvment. He noted that claimant had a possible peptic ulcer disease and questionable renal lithiasis, and hernia, and also suffered from chronic anxiety and depression. Dr. Zivin noted that it had been raised that claimant possibly might have an ankylosing spondylitis and felt that if claimant did have this condition he would be well advised to reduce the stress and strains on his back in obtaining more sedentary, less stressful type of employment. Dr. Unger reported that claimant was quite reluctant to change his job at that time because of financial reasons.

In November and December 1976, Dr. Unger reported that claimant continued to have epigastric pain and back pain. Dr. Unger felt claimant would definitely need to change his vocation. He suggested that claimant place a heel plate in his left foot for working hours. On February 28, 1978, Dr. Unger reported claimant had a recurrence of his back pain. Conservative treatment was prescribed. Tests ruled out ankylosing spondylitis and the diagnosis was Scheurmann's disease.

Claimant stated that Dr. Unger said he should change jobs and get into something lighter because the work he was doing was causing a strain on his back and muscles. Claimant stated that from May 1977, when he was laid off by Stevens, up until December 1977, he performed various odd jobs such as painting, yard work, auto repair work, and managing an apartment complex. He stated that his back hurt continually during this time.

In October 1977, claimant was examined by Dr. Ronald Fraback, a rheumatologist. Dr. Fraback diagnosed chronic back pain, which he felt was most likely due to abnormal mechanical stress resulting from Scheurmann's disease. He felt that a fused right sacroiliac joint may also be contributing to claimant's back discomfort. Dr. Fraback felt that although Scheurmann's disease was most often an incidental x-ray finding which did not cause symptoms, he did not find anything else to account for claimant's complaints and his objective physical findings. He felt it was quite conceivable that this pre-existing condition was worsened by claimant's employment as a tree trimmer. He expected with conservative care that claimant's symptoms would abate but that he may

never be completely free of back pain. He felt this condition should be classified as an occupational disease and recommended that claimant have vocational retraining to enter an occupation which did not stress his back or require heavy lifting.

Claimant stated that Dr. Fraback was the first doctor who informed him he had an occupational disease. On December 13, 1977 he filed a claim for an occupational disease which occurred while working at Asplundh.

On December 14, 1978, claimant again went to work for Asplundh and worked there until mid-January 1978 when he was terminated. On February 9, 1978, Asplundh's Workers' Compensation insurance carrier denied claimant's claim. Claimant, on March 23, 1978, filed a claim for an occupational disease incurred while employed at Stevens. Stevens' Workers' Compensation insurance carrier denied this claim on June 7, 1978.

In March 1978, in response to a letter from claimant's attorney, Dr. Unger stated that he did not tell claimant specifically that he had the type of disease or injury that would be a compensable disease or injury under the Workers' Compensation law. He indicated he did not tell claimant that he had a type of disease which would allow him to file a claim against his employer for workers' compensation benefits. Dr. Unger denied that he told claimant that his condition arose out of the course and scope of his employment and was causally related to his employment in the sense of being an occupational disease. Later, in March 1978, Dr. Unger indicated that sometime in the fall of 1976 he suggested that claimant's continued employment as a tree trimmer would aggravate his condition. Dr. Unger felt that his employment aggravated the condition of his back and felt, however, that this condition was most likely there before he started his employment.

At the hearing, claimant testified the first time he ever experienced back symptoms was in April 1976 while employed by Stevens as a groundsman. He related that he had no specific injury, but had just had a gradual development of back pain. He stated he never left any employment because of back problems. In between jobs, he reported he was essentially unemployed although he managed apartments and performed various odd jobs. He stated that during these times he continued to experience back pain with little or no change in his back condition. He stated he last worked as a tree trimmer in January 1978 but was terminated from that job because the crew was laid off and not because of back problems.

The Referee stated that claimant must prove that his condition originally caused a material worsening of his condition. The Referee found that claimant had failed to meet his burden of proof in this case. Under all the facts and circumstances of this case and considering the opinions

of Dr. Fraback and Dr. Unger, the Referee found that it would be mere speculation to determine that claimant's work activities accelerated the natural progression of his pre-existing condition (Scheurmann's disease), permanently increased his symptomatology or led to disability. Therefore, the Referee affirmed the denials issued on behalf of the two employers by their respective Workers' Compensation insurance carriers.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, affirms the Referee's order. The Board notes that the Weller v. Union Carbide case and the Stupfel v. Edward Hines Lumber Company case cited by the Referee were the Court of Appeals cases. Both of these cases were appealed to the Supreme Court. The Supreme Court, in Weller v. Union Carbide, 288 Or 27, ____ P2d ____ (1979), stated "In light . . . of ORS 656.802(1)(a) and Beaudry v. Winchester Plywood, we believe that in order to prevail claimant would have to prove by a preponderance of the evidence that (1) his work activity and conditions (2) caused a worsening of his underlying disease (3) resulting in an increase of his pain (4) to the extent that it produces disability or requires medical services." In Stupfel v. Edward Hines Lumber Co., 288 Or 39, ____ P2d ____ (1979), the Supreme Court stated that if an increase in symptomatology requires medical services or results in disability, either temporary or permanent, the claim for such services or disability is compensable if the restrictions of Weller are all satisfied. The Court stated that a permanent increase is not a pre-requisite to compensability. The Board, after reviewing all the evidence in this case, concurs with the Referee's finding that claimant's work activities did not accelerate the natural progression of his pre-existing condition, increase his symptomatology or lead to disability, either temporarily or permanently. Therefore, the Board would affirm the Referee's order.

ORDER

The Referee's order, dated October 13, 1978, is affirmed.

WCB CASE NO. 78-2884 June 10, 1980
WCB CASE NO. 78-4942

MARION H. KIZAR, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Amended Order On Review

On June 3, 1980, claimant, by and through his attorney, requested the Board amend its May 23, 1980 Order on Review which failed to award an attorney fee at the Hearings level. The Referee, in his Opinion and Order, granted claimant's attorney a fee equal to $1,550 payable by the State Accident Insurance Fund. When the Board reversed the Referee's order in its entirety, that fee was deleted. The Board, therefore, amends the "Order" portion of its May 23, 1980 Order on Review as follows:

"Claimant's attorney is granted as a reasonable attorney's fee for his services at the Hearings level a sum equal to $1,550, payable by Universal Underwriters Insurance Company for reversal of its denial."

The remainder of the Board's order is affirmed.

IT IS SO ORDERED.

WCB CASE NO. 79-6714 June 10, 1980

JOHN D. O'NEIL, CLAIMANT
David Vandenberg, Claimant's Atty.
SAIF, Legal Service, Defense Atty.
Request for Review by the SAIF

The State Accident Insurance Fund (Fund) seeks Board review of the Referee's order which found the suspension order issued by the Workers' Compensation Department's Compliance Division on July 31, 1979 suspending claimant's temporary total disability compensation from July 23, 1979 to August 10, 1979 is invalid and a nullity and ordered the Fund to pay claimant temporary total disability compensation for that period. Further, the Referee awarded a penalty of 25% of the compensation due to claimant and granted an attorney fee of $750.

BOARD ON DE NOVO REVIEW

The Board approves of and adopts the Referee's statement of the issues and the findings and opinion of the Referee, except that portion relating to the constitutionality of ORS 656.325. A copy of the Referee's Opinion and Order is attached hereto and made a part hereof. The constitutional question must be resolved by the Judicial system and for the purposes of an administrative agency such as the Workers' Compensation Board, it is to be presumed that statutes and administrative rules, when regularly adopted, are constitutional. The Board, therefore, does not approve and adopt that portion of the Referee's Opinion and Order.

The Board affirms and adopts the Order portion of the Referee's Opinion and Order.

ORDER

The Referee's order, dated December 11, 1979, is affirmed.

WCB CASE NO. 79-1463 June 10, 1980

MAXINE D. SAMS, CLAIMANT
Charles Robinowitz, Claimant's Atty.
Lang, Klein, Wolf, Smith, Griffith & Hallmark, Employer's Attys.
Request for Review by Claimant

Claimant seeks Board review of the Referee's order which approved the employer-carrier's denial of his aggravation claim. Claimant requests the Board reverse the Referee's order, remand the claim to the Referee and order a closing evaluation by the Workers' Compensation Board in accordance with ORS 656.268.

FACTS

Claimant, a 47-year-old welder and metal grinder with Pierce-Pacific Manufacturing, Inc., on February 3, 1975, injured his back when his foot slipped off a crane carrier and he landed on his tailbone and small of his back. This injury was diagnosed as an acute lumbosacral strain. Claimant's complaints of low back pain continued into 1977. Claimant continued working and saw no doctors until April 1977.

In September 1977, Dr. Robert Lorey, D.O., who had been treating claimant since 1975, diagnosed claimant's condition as a lumbosacral strain. He began treating claimant with heat and osteopathic manipulation.

Dr. G. D. Parrott, D.C., in April 1978, reported claimant continued to complain of low back pain and pain in the left leg.

In November 1978, Dr. Lorey indicated claimant continued to complain of back pain. Claimant indicated he did heavy lifting which increased his back pain. Dr. Lorey stated that on October 23, 1978 claimant's back was worse with aggravation at the left sacroiliac area and radiation into his left hip and thigh. Following treatment claimant's back was worse and Dr. Corey indicated that since October 24, 1978, claimant had been unable to work. He referred claimant to Dr. Richard Borman, an osteopathic-orthopedic surgeon.

Dr. Borman indicated that x-rays did not reveal any defects. He diagnosed mild residuals of a lumobsacral strain. Dr. Borman felt claimant should continue to participate in active exercises to maintain flexibility and increase the strength of his back. He found claimant did not appear to have any significant residuals from his 1975 injury and felt claimant's condition was "fixed".

On December 12, 1978, Dr. William Duff diagnosed chronic lumbosacral strain. He felt claimant's condition was stationary. He rated claimant's disability as mild and felt claimant would be impaired from performing heavy lifting and bending. Dr. Duff felt claimant's current problems were not related to the original injury, but more likely due to the continued stress and strain on the low back related to claimant's work and non-work activities. He opined that there was no doubt that claimant was symptomatically worse with heavy work, but could not "pinpoint" any work induced cause to the present problem. Dr. Borman concurred with this report.

The carrier, on January 18, 1979, advised claimant that the medical information it had received indicated his back condition which he had been experiencing did not relate to his February 3, 1975 injury. Therefore, it denied his claim for benefits as a result of his back condition as it could not be attributed to the February 3, 1975 injury.

Claimant submitted a list of unpaid medical bills from Dr. Lorey and Parrott and from Eastmoreland Hospital and Eastmoreland Radiology for $218. Also, he claimed $32.50 for transportation costs to various doctors for treatment and evaluation.

Claimant testified he did miss some time from work due to his back injury, but never reported it to his employer as being related to his injury. The carrier classified the injury as non-disabling. Claimant said he continues to perform his regular job which requires lifting of 50-60 pounds, sliding up to 200 pounds on a table, a lot of walking, bending, stooping, climbing and crawling. He feels his back pain has progressively worsened over the years and has pain into the right leg.

The Referee affirmed the employer-carrier's denial.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, modifies the Referee's order. The Board concurs with the Referee's findings and conclusion that claimant failed to prove an aggravation claim. Further, it does not find this case was improperly, incompletely or otherwise insufficiently developed or heard by the Referee so as to require it to be remanded to the Referee.

The Board does find the various treatment claimant has received from Drs. Lorey and Parrott and the medical bills from Eastmoreland Radiology and Eastmoreland Hospital are related to his February 3, 1975 injury and claimant is entitled under ORS 656.245 to continuing medical treatment for conditions relatd to his original injury. Therefore, the Board orders the employer-carrier to pay these costs and the transportation costs. Based on the unreasonable denial of the payment of these bills by the carrier, the Board finds a penalty is due equal to 25% of the unpaid medical bills of record at the time of its denial and grants claimant's attorney a $100 fee for overcoming the carrier's denial of this treatment.

ORDER

The Referee' order, dated November 26, 1979, is modified.

That portion of the Referee's order which affirmed that portion of the denial of claimant's aggravation claim is affirmed. That portion of the Referee's order which affirmed the denial of continuing treatment of claimant's condition is reversed.

The employer-carrier is ordered to pay for continuing medical care and treatment under ORS 656.245 including the bills for treatment from Drs. Lorey and Parrott and the bills from Eastmoreland Radiology and Eastmoreland Hospital. It is ordered to pay as a penalty an amount equal to 25% of the unpaid medical bills of record at the date of its denial and awards claimant's attorney a fee of $100 for overcoming the employer-carrier's denial.

CLAIM NO. GC 449993 June 12, 1980

DELBERT D. GRAY, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

On July 5, 1973, claimant sustained compensable injuries to his low back and right shoulder. This claim was initially closed by a Determination Order, dated July 25, 1974, which granted claimant an award of temporary total disability compensation and compensation equal to 5% unscheduled disability for his low back and right shoulder injuries. The claim was subsequently reopened and after a laminectomy was performed closed by a Determination Order, dated May 26, 1976, which granted claimant additional temporary total disability compensation and additional compensation equal to 96° for 30% unscheduled disability for his low back injury. Claimant's aggravation rights have expired.

Claimant continued to have difficulty with his back and on October 16, 1976 the claim was reopened by the carrier. On December 1, 1976, the area of the previous laminectomy was re-explored and a right facetectomy was performed. This claim was again closed by a Determination Order, dated May 9, 1978, which granted claimant additional temporary total disability compensation.

On January 1, 1980, claimant was hospitalized by Dr. H. Burke for severe back pain. Claimant was hospitalized for approximately seven days because of this condition. The final diagnosis by Dr. Burke was an acute lumbomyositis, osteoarthritis of the lumbar spine, post-fusion changes and joint dysfunction of the sacroiliac and cervical areas. Dr. Burke noted claimant was advised to seek medical help elsewhere because he proved to be too much of a challenge for Dr. Burke.

In February 1980, Dr. Ray Grewe reported that claimant complained of back pain. Claimant indicated he had fallen during the holiday season because his left leg had given way. Dr. Grewe felt the main problem in this case was attaching some type of disability settlement one way or another. Claimant was given prescriptions for certain medications to assist in his sleep and in his pain reduction.

In early February 1980, the Orthopaedic Consultants reported that they had examined claimant in late January 1980 and his claim of low back and left pain and intermittent numbness of the left lower extremity. They diagnosed in addition to the chronic lumbar sprain and post-laminectomy and facetectomy procedures, functional overlay and emotional disturbance and drug dependency. They felt that this claim should be reopened for further evaluation and treatment.

They felt based on claimant's psychological condition he was a poor candidate for additional surgery consisting of a lumbar spine fusion. They recommended that claimant be enrolled in the Pain Clinic for evaluation and treatment of his drug dependency. They concurred with Dr. Borman's proposal for a trial period of immobilization in a flexion plastic body jacket. The Orthopaedic Consultants felt that following a discharge from the Pain Clinic, claimant would require vocational assistance to return to light work. They noted that claimant had sales training and experience.

By an Own Motion Order, dated February 15, 1980, the Board ordered this claim reopened as of May 22, 1979, the date that Dr. Grewe had reported that claimant was unable to work because of his back pain and until closed pursuant to ORS 656.278.

On March 11, 1980, Dr. Grewe reported he concurred with Dr. Borman's and the Orthopaedic Consultants' reports. He felt that claimant would resist any effort to be sent to the Pain Clinic because claimant felt that his pain justifies his need for medication and that being cut off from pain management by this method would threaten his ability to function. Dr. Grewe noted that in the past claimant also felt that he could determine his own vocational activities and felt confident about his resorcefulness in terms of possible gainful employment. Dr. Grewe felt that settling the financial aspects of this claim might have considerable bearing on claimant's future activities.

On May 14, 1980, a Determination Order was issued inadvertently by the Evaluation Division. This order has subsequently been set aside in its entirety.

On March 19, 1980, the State Accident Insurance Fund requested a determination of claimant's disability. The Evaluation Division of the Workers' Compensation Department, on May 21, 1980, recommended that this claim be closed with additional temporary total disability compensation from May 22, 1979 through March 11, 1980. They recommended no additional permanent partial disability be granted.

The Board does not concur with this recommendation of temporary total disability compensation. The Board finds that claimant's temporary total disability compensation should be terminated the date of this order. Claimant has continuing difficulty with overuse of pain medication and should be referred to the Pain Clinic for treatment and reduction of his use of medication. Claimant has failed to enter this program. The Board would reconsider reopening this claim if and when claimant enters the Pain Clinic for treatment. The Board does not find claimant is entitled to any additional permanent partial disability.

ORDER

Claimant is hereby granted an award of additional temporary total disability compensation from May 22, 1979 through the date of this order.

WCB CASE NO. 77-2741 June 12, 1980

THOMAS D. ORMAN, CLAIMANT
James D. Vick, Claimant's Atty.
Schwabe, Williamson, Wyatt, Moore & Roberts, Employer's Attys.
Order

On April 15, 1980, the employer requested the Board dismiss claimant's request for review on the grounds it had been untimely filed.

Claimant's attorney provided an affidavit of service indicating his request for Board review had been personally served on October 19, 1979 on an employee of the Board. The Referee's Opinion and Order was dated September 20, 1979.

The Board, based on this affidavit, finds claimant's request for Board review was timely filed. Therefore, the employer's motion is denied.

IT IS SO ORDERED.

WCB CASE NO. 78-9826 June 13, 1980

IRENE V. PENIFOLD, CLAIMANT
Malagon & Yates, Claimant's Attys.
SAIF, Legal Services, Defense Atty,
Order On Reconsideration

On May 22, 1980, claimant, by and through her attorney, requested that the Board reconsider its Order on Review, dated May 16, 1980, whereby the State Accident Insurance Fund's denial of her aggravation claim was affirmed. Claimant requests that the Board admit a report from Dr. Storrs, dated May 9, 1980, into the record or, in the alternative, that the case be referred back to the Referee for further consideration.

The Board, after thoroughly reconsidering this case, concludes that its Order on Review should remain unchanged. The Board found that the responsibility of the Fund for claimant's dermatitis condition ended when claimant left her employment in November 1978. Therefore, there is no reason to consider Dr. Storrs report and the Board concludes its Order on Review should be affirmed.

ORDER

The Board's Order on Review, dated May 16, 1980, is hereby affirmed in its entirety.

CLAIM NO. AC 313874 June 17, 1980

JALENE C. FAW, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury on May 8, 1971 to her low back. This claim was initially closed by a Determination Order, dated July 28, 1971, which granted claimant an award of temporary total disability compensation and no permanent partial disability. The claim was subsequently reopened and closed in September 1971 and in November 1974. Claimant was not awarded any permanent partial disability compensation. Claimant's aggravation rights have expired.

In October 1979, claimant began having increasing symptoms. She sought the treatment of a chiropractor. On October 24, 1979, Dr. F. Harold Nickila, M.S., D.C., requested this claim be reopened. In December 1979, claimant forwarded to the State Accident Insurance Fund (Fund) copies of various time records so that her claim could be reopened for time loss.

On March 20, 1980, Dr. Herbert Spady reported that he had last treated claimant in 1974. He stated that claimant had had periodic troubles with her back and had continued to use a back brace and traction at home. Claimant stated she had experienced a worsening of her condition in 1976 and began chiropractic treatment. She advised Dr. Spady that in October 1979, due to increased activity, she experienced a marked increase in pain symptoms and required more intensive chiropractic treatments at that time. She told Dr. Spady that at that time her symptoms had recovered pretty much to the point they were prior to her experiencing increased symptoms in October 1979. Dr. Spady felt that claimant had had a continuum of symptoms since he had last seen her in

1974 without any history of any injury to her back. He felt that the chiropractic treatments claimant was currently receiving were not curative, but rather supportive or palliative. He recommended that her claim be closed with an appropriate disability award commensurate with the existing impairment of function.

The Fund, on April 11, 1980, advised the Board it did not oppose an Own Motion Order allowing the time loss which claimant was claiming. The Evaluation Division of the Workers' Compensation Department, on May 23, 1980, recommended this claim be closed with an additional award of temporary total disability compensation from October 15, 1979 through March 20, 1980, less time worked, and an award of 10% unscheduled disability for her low back injury.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted temporary total disability compensation from October 15, 1979 through March 20, 1980, less time worked, and compensation for 10% unscheduled disability for her low back injury resulting from the May 8, 1971 industrial injury. These awards are in addition to any previous awards claimant has been granted for this injury.

WCB CASE NO. 79-3044 June 17, 1980

DAN A. HALTER, CLAIMANT
January Roeschlaub, Claimant's Atty.
Schwabe, Williamson, Wyatt, Moore & Roberts, Employer's Attys.
Request for Review by Claimant

Claimant seeks review by the Board of the order of the Referee which affirmed the employer's denial of claimant's claim for compensability.

FACTS

Claimant was employed on a construction crew as a carpenter's helper and alleges that on January 16, 1979 he awoke and didn't feel well. He tried to call his supervisor, but couldn't reach him so he went back to bed. Claimant awoke and felt fine and went to the worksite arriving around noon. He ate his lunch and then talked to the supervisor, Mr. Summers, about missing work that morning.

Claimant alleges that Mr. Summers and Mr. Sauvain, another carpenter's helper, and claimant were standing around before 12:30 discussing new cars versus old cars. Mr. Summers walked over to Mr. Sauvain's new Ford Fiesta and picked up the rear end commenting that he bet no one could do that with his pickup. Then Mr. Sauvain picked it up and then the claimant. Claimant felt a sharp pain in his mid back and grabbed his back. Claimant testified it finally resolved and they all went to work.

Claimant alleges around 2:00 to 2:30 in the afternoon he lifted a pipe weighing 90 to 100 pounds incorrectly and had low back pain. He continued working and the pain progressively worsened. Claimant didn't make it to work the next day.

On January 17, claimant saw Dr. Miller who diagnosed lumbosacral strain. Claimant gave a history of picking up a pole. Dr. Miller released claimant for regular work on February 16, 1979.

On March 16, 1979, Dr. Paluska examined claimant and reported that he had lifted a pillar at work which he thought weighed 30 pounds and which, unfortunately, weighed 90 pounds.

On March 28, 1979, the employer issued its denial.

Claimant testified at the hearing at length to other competitive bouts at work, a foot race and a rock throwing contest. Claimant was finally fired for unexcused absences. Claimant felt that competing in these competitive events raised his prestige in the eyes of his foreman and maybe would give him better opportunities at work.

The Referee found that claimant told no one of an on-the-job injury of lifting any pipe and that the car lifting incident was not on the job and was a personal mission and, therefore, he affirmed the denial.

BOARD ON DE NOVO REVIEW

The Board finds that this case is similar to the case of Olsen v. SAIF, 29 Or App 235, 562 P2d 1234 (1977). In that case, the claimant was injured when, during the regular lunch break, he was thrown from a co-worker's bicycle. Claimant was injured on the employer's premises. The activity was observed by and acquiesced in by the claimant's supervisor. The employees often used bicycles to go to and from work. The Court held the claimant's injury, in that case, arose out of and in the course of his employment. The Court held claimant was not on a personal mission.

The evidence in this case indicates: (1) the injury occurred in a place usually used by the employees to park their vehicles, (2) the activity was condoned and participated in by claimant's supervisor, (3) claimant was not on a personal mission, and (4) this activity was part of claimant's regular work, i.e., there were other competitive contests of strength engaged in by the employees. The Board finds that the rationale in the Olsen case is determinative in this case. Therefore, under the rationale of that case, the Board would reverse the Referee's order and reverse the employer's denial of this claim.

ORDER

The Referee's order, dated September 24, 1979, is reversed.

The employer's denial, dated March 28, 1979, is reversed and this claim is remanded to it for acceptance and payment of compensation and other benefits provided for by law 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.

WCB CASE NO. 79-2411 June 17, 1980

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

The State Accident Insurance Fund seeks review by the Board of the Referee's order which remanded claimant's claim to it for acceptance and the payment of all benefits as provided by law.

FACTS

In early 1978 claimant was employed for Coos County as administrator of youth programs. On November 1, 1978 she commenced employment as a deputy sheriff with the County Sheriff's office in the jail section. Claimant worked in a 10' x 10' room with no windows or ventilation and only a fan. Claimant worked the 4 p.m. to midnight shift and during the day 6 to 10 officers worked in that room and were mostly smokers.

Claimant worked this shift with a partner who smoked two packs a night. Claimant herself had been a casual cigarette smoker for 25 years, but quit in June 1978.

Claimant testified the first week on the job her eyes began to burn, her hearing went down, she had difficulty breathing and had headaches. Claimant's symptoms persisted and on November 30, 1978 she quit this job and hasn't been employed since.

Claimant had pre-existing conditions which were described by Dr. Lindsay as borderline to mild adult onset diabetes, chronic cervical instability syndrome, transient situational disturbances, low back problems and mild sinusitis.

Prior to this alleged exposure, claimant had seen Dr. Echevarria in July 1978 for nasal drainage and decreased hearing acuity. Claimant's nasal problem came on with eating of "hot" foods. Claimant also had voice loss and fatiquability. The diagnosis at that time was allergic upper airway diesease and minimal high frequency sensory neural hearing loss.

On November 30, 1978, claimant filed her occupational disease claim. On December 1, she saw Dr. Bradley, her family physician, who is an internist, as she had gummy eyes and shortness of breath.

On February 6, 1979, Dr. Morgan reported that he examined claimant on December 27. He reported claimant's high degree of exposure to tobacco smoke at the Sheriff's office precipitated an acute allergic state.

Claimant was examined by Dr. Minor, a Board certified allergist. He reported on February 14, 1979, that his diagnosis was allergic rhinitis. He felt she was not allergic to cigareette smoke which is an irritant and can bother people with sensitive nasal mucosa. Claimant's symptoms were highly unusual for alleric or even a reaction due to irritation. Dr. Minor did not believe exposure to cigarette smoke at work caused her symptoms. It may have created the burning sensation in her eyes, but it sounded like she had conjunctivitis that might have responded to antibacterial eye drops. On February 16, 1979, Dr. Arthur Steele, an ophthalmologist, examined claimant. She complained of eye irritation due to smoke allergy. He found her examination was compatible with a mild allergic conjunctivitis. He prescribed eye drops and a complete re-examination in one month.

On February 28, 1979, the Fund issued its denial.

On June 13, 1979, Dr. Morgan reported that he was putting claimant through desensitization, and he felt claimant would probably keep her sensitivity for may years. On April 10, 1979, Dr. Morgan reported he gave claimant a skin test for allergy to tobacco, tobacco smoke and tobacco mix and only the latter was positive.

On April 24, 1979, Dr. Hunt, upon referral by Dr. Morgan, examined claimant and reported that she had allergic rhinitis and conjunctivitis for many years duration. Her symptoms were aggravated by smoke, fumes, inhalant allergens and nervous tension. In recent years her illness had become more severe and aggravated by smoke to the degree that she was unable to perform her work satisfactorily.

Dr. Morgan testified at the hearing that he was not an allergist, and his specialty was pediatrics, but he dealt primarily with allergies. He testified that the only objective signs he noticed about claimant physically were that her eyelids were swollen and the whites of the eyes were red. He indicated he based his whole opinion almost exclusively on the history claimant related to him.

The Referee found claimant was a credible witness in all respects. He found that even if claimant was deemed not to have sustained a "new" sensitivity as the defendant had suggested, she most certainly had suffered a work-produced body reaction requiring medical treatment and producing disability.

The Referee concluded that the claim was compensable and remanded it to the Fund for acceptance and payment of benefits as required by law.

BOARD ON DE NOVO REVIEW

Based on the facts of this case, the Board reverses the Referee's order. This case requires evaluation by an expert in the field of allergy. Dr. Morgan, felt claimant's high degree of exposure to tobacco smoke at the sheriff's office precipitated an acute allergic state and permanently sensitized claimant. Dr. Morgan's specialty is pediatrics, but he testified he deals primarily with allergies.

Dr. Minor, a Board certified allergist, diagnosed allergic rhinitis. He did not feel claimant was allergic to cigarette smoke. Dr. Minor believed claimant's exposure at work did not cause her symptoms. He felt the smoke at claimant's work place may have created the burning sensation she had in her eyes, but he felt claimant had conjunctivitis. This condition he felt might have responded to antibacterial eye drops. Skin tests performed by Dr. Minor were negative with respect to cigarette tobacco, but positive for grass, grass seed, several weeds and several trees.

Dr. Hunt, also a Board certified allergist, indicated claimant had a history as a child of reaction to weeds, roses, and grasses (until she was 25 years old) and then continuing reaction to these substances in the summer. He diagnosed claimant as having a very obvious problem of conjunctivitis of many years in duration. He noted claimant's

"symptoms" were aggravated by smoke, fumes, inhalant allergens, and nervous tension. Dr. Hunt felt claimant's allergic illness had become more severe in recent years and she needed studies to determine what other factor might cause her allergic reaction such as "inhalant factors, chemicals and very possibly foods in her diet".

The Board finds the weight of the medical evidence does not support the compensability of claimant's claim. Dr. Minor does not find claimant's condition related to her work. Dr. Hunt felt claimant's conjunctivitis was of many years duration and aggravated by numerous things. The Board finds claimant has failed to prove her claim by the preponderance of the evidence. Therefore, the Board reverses the Referee's order and affirms the Fund's denial.

ORDER

The Referee's order, dated November 15, 1979, is reversed in its entirety.

The State Accident Insurance Fund's denial, dated February 28, 1979, is reinstated and approved.

WCB CASE NO. 78-9461 June 17, 1980

RICHARD STINSON, CLAIMANT
Bloom, Ruben, Marandas & Sly,
Claimant's Attys.
Thomas Mortland, Employer's Atty.
Request for Review by Claimant
Cross-appealed by Employer

Claimant and the employer seek Board review of the Referee's order which remanded this claim to the employer-carrier for reopening as of December 11, 1978 until closed and granted claimant's attorney a fee. Claimant contends he is entitled to temporary total disability compensation from June 8, 1978 to December 11, 1978, and thereafter until the claim is closed, reinbursement of the cost of medical bills and reports, penalties and attorney's fees for the employer-carrier's refusal to reopen the claim. The employer-carrier contends the Referee should not have ordered the claim reopened.

FACTS

The Board finds the facts set forth in the Referee's order are correct and adopts them. A copy of the Referee's order is attached to this order.

BOARD ON DE NOVO REVIEW

Based on the facts as recited by the Reference, the Board affirms in part and reverses in part.

The Determination Order, dated July 3, 1978, terminated temporary total disability compensation as of June 8, 1978. Dr. Carr found claimant's condition was medically stationary as of June 9, 1978, but noted claimant would have continuing complaints of pain in his neck. The Board does not find this claim was prematurely closed.

The next issue is, has claimant proved an aggravation claim? In October 1978, Dr. Cannard indicated claimant's condition was not stationary. Dr. Hoff, in December 1978, reported his neurological examination was normal. Dr. Carr, in September 1978, had placed various restrictions on claimant's work. Dr. Edwards began treating claimant in December 1978 with chiropractic adjustments. Dr. Seres, in March 1979, reported he did not feel claimant needed any additional therapy. Also, in March 1979, Dr. Edwards indicated he felt this claim had been prematurely closed. However, in April 1979, Dr. Edwards reported claimant's condition was the same as it had been when this claim was closed. The date of the last award or arrangement of compensation in this case was the July 3, 1978 Determination Order. The preponderance of the evidence does not indicate claimant's condition has worsened since the date of that order.

The Board concurs with the Referee's rationale and conclusion that the facts in this case do not justify the awarding of penalties and attorney's fees. Further, the Board agrees that claimant's attorney is not entitled to reimbursement for the medical reports submitted by his attorney. The medical reports were secured in preparation for litigation. The cost of such "medical-legal" reports is not recoverable in Workers' Compensation cases.

The sole remaining issue left is the extent of disability. Claimant is 41 years old and has a high school education with some college training. His regular work has been as a truck driver. Dr. Seres felt claimant could return to work as a truck driver if he were so motivated. Dr. Carr, however, felt claimant would not be able to return to that type of work. Claimant returned to work driving a truck for this employer, but feels he does not have the stamina he had prior to this injury. The Board finds, considering all the evidence in this case, claimant has proved loss of wage earning capacity and, therefore, grants him an award of compensation equal to 48° for 15% unscheduled disability for his neck injury.

ORDER

The employer-carrier's denial of April 6, 1979 is affirmed.

Claimant is hereby granted compensation equal to 48° for 15% unscheduled disability for his neck injury. This is in lieu of all previous awards of unscheduled disability for this injury.

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.

All other relief sought by claimant is denied.

CLAIM NO. A4CC15529 4MR June 18, 1980

LEONARD COBB, CLAIMANT
Edwin S. Nutbrown, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

On August 24, 1979, claimant, by and through his attorney, requested the Board to reopen his claim for an August 30, 1972, right knee injury. Claimant's claim was first closed on October 18, 1972 and his aggravation rights have expired. Claimant submitted medical reports indicating he was having problems with his right knee, but the doctors didn't feel he was a candidate for surgery.

Dr. Seacat reported claimant had a recurrent subluxation of the patella with associated synovitis. He opined, on March 21, 1979, that there was a direct causal relationship between the original injury and his present condition. He felt claimant was disabled for even sedentary type of work. Dr. Seacat recommended claimant be paid time loss benefits.

The Board issued an Own Motion Order on October 4, 1979, that remanded this claim back to the carrier for acceptance and payment of compensation commencing on March 21, 1979 until closed pursuant to ORS 656.278. The Evaluation Division advised the Board, on April 18, 1980, that the carrier had voluntarily reopened this claim on July 13, 1976 and it had never been closed. Therefore, the Board then set aside its order. Later, it was determined this order was in error. This claim had been reopened for payment of medical bills only by the carrier. The Board then republished the first Own Motion Order in this case.

Claimant suffered another compensable injury on October 25, 1977 which was covered by Universal Underwriters. They denied further responsibility for claimant's right knee once it returned to a pre-injury (October 1977) status.

Claimant appealed the denial from Universal Underwriters and requested a hearing to determine who was responsible for his knee condition. The Opinion and Order, dated May 6, 1980, affirmed the denial issued by Universal Underwriters relieving them of responsibility for claimant's knee condition. It was further ordered that the Board's Own Motion Order, dated October 4, 1979, should be affirmed.

On May 11, 1979, Dr. Dresher opined that he didn't think claimant was a good candidate for surgery. He saw no reason why claimant shouldn't be actively employed. This report implies claimant was medically stationary as of the date of the letter.

On June 3, 1980, Evaluation Division recommended to the Board that claimant be granted 15° for 10% loss of right leg and no temporary total disability.

The Board agrees with the recommendation from the Evaluation Division, but finds claimant is entitled to temporary total disability from March 21, 1979 thru May 11, 1979.

ORDER

Claimant is hereby granted additional temporary total disability compensation from March 21, 1979 through May 11, 1979 and compensation equal to 15° for 10% loss of the right leg. These awards are in addition to any previous awards claimant has been granted for his 1972 injury.

Claimant's attorney has already been granted all attorney fee by the May 28, 1980 Own Motion Order.

CLAIM NO. C 153689 June 18, 1980

HAROLD CURRY, CLAIMANT
Welch, Bruun, Green & Caruso,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On May 28, 1980, the Board issued an Own Motion Determination Order which granted claimant an award of additional temporary total disability compensation. Claimant, by and through his attorney, on June 6, 1980 requested the Board reconsider that order. Attached to this request was a May 20, 1980 report from Dr. Howard Cherry. In that report, Dr. Cherry indicated claimant had an extreme increase in pain and had pain "in the area of the donor site and the midline scar". He felt claimant could not perform any lifting. Dr. Cherry felt claimant was "not properly employed" and that he might require further retraining.

After reconsidering its order and after considering Dr. Cherry's May 20, 1980 report, the Board finds no reason to change its original order. Therefore, the Board affirms its Own Motion Determination Order, dated May 28, 1980.

IT IS SO ORDERED.

WCB CASE NO. 78-7566 June 18, 1980
WCB CASE NO. 78-2884

MARION KIZER, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Amended Order

On May 23, 1980, the Board issued an Order On Review and an Amended Order on June 10, 1980. Those orders referred to WCB Case No. 78-2884 and 78-4942 and claim Nos. PC 31956 and YD 156431. The WCB No. should be 78-2884 and 78-7566. The Claim No. should be PC 31956 and YD 156431. Therefore, the Board amends its order to reflect this correction.

IT IS SO ORDERED.

CLAIM NO. C 291837 June 18, 1980

JAMES LAVIN, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

On March 3, 1971, claimant suffered compensable injury when he was struck by a piece of metal in the right eye. This claim was originally closed by a Determination Order dated January 19, 1972, which awarded claimant temporary total disability compensation. No award was made for permanent partial disability. A stipulation provided claimant an award of permanent disability compensation for 5% loss of the right eye. Claimant's aggravation rights have expired.

In May 1973, Dr. Christensen, who had treated claimant in 1970 diagnosed retinal detachment of the right eye which he felt was post-traumatic. On May 10, 1973, he performed surgery on the eye. The claim was reopened and then closed by a second Determination Order dated January 17, 1974, which awarded claimant additional temporary total disability compensation and additional compensation equal to 5 degrees for 5% loss of vision in the right eye.

On September 19, 1979, Dr. Christensen reported to the State Accident Insurance Fund (Fund) he had found an elevated detached retina above the site of previous surgery. He felt there was a casual relationship between that condition and the original injury. Claimant was hospitalized on September 18, 1979, for corrective surgery which was performed by Dr. Christensen. This surgery consisted of a cornial transplant.

The Board on November 19, 1979, reopened this claim under its own motion jurisdiction effective September 18, 1979, and until closed pursuant to ORS 656.278.

Dr. John Unruh, who had also been treating claimant for this injury, released claimant for work on November 26, 1979, after the surgery. In April 1980, Dr. Unruh reported that claimant's vision was 20/40 plus in the right and 20/20 in the left eye. He reported that claimant did not need any correction to improve his vision. He indicated that the right eye looked very well and the retina was perfectly healed. He found no evidence of detachment and there was no retinal edema. Claimant was reported symtom free and without any complaints.

On May 2, 1980, the Fund requested a determination of claimant's disability.

The Evaluation Division of the Workers' Compensation Department on May 30, 1980, recommended that claimant be granted an award of additional temporary total disability compensation from September 18, 1979, through November 25, 1979. It also recommened an additional award of 5% scheduled disability of the right eye in addition to that previously granted.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted an award of additional temporary total disability compensation from September 18, 1979 through November 25, 1979 and an award of compensation equal to 5% scheduled disability for loss of vision of the right eye in addition to that which had been previously granted.

CLAIM NO. C 14099 June 18, 1980

GERALD MOORE, CLAIMANT
Cheney & Kelley, Claimant's Attys.
Lang, Klein, Wolf, Smith, Griffith & Hallmark, Employer's Attys.
Own Motion Order

On February 14, 1972, claimant sustained a compensable injury to his right knee. Industrial Indemnity Insurance Company provided Workers' Compensation coverage for his employer. Claimant, on January 22, 1974, while with the same Employer injured his left knee. CNA Insurance Company provided Workers' Compensation coverage for his employer at that time. Both claims were closed and claimant's aggravation rights have expired.

Dr. Howard E. Johnson, on March 7, 1980, wrote to both insurance carriers regarding claimants knee condition. Dr. Johnson reported, regarding the February 1972 right knee injury, claimant had originally undergone a medial meniscectomy followed by a period of slow rehabilitation. He reported that claimant continued to have a rather severely painful knee with swelling, crepitation, and pain which had gradually worsened. He felt that claimant was in need of a medial compartment debridement and wedge osteotomy to bring the knee back in to alignment with the femur. He requested the claims be reopened.

Claimant requested his claims be reopened under the Board's own motion jurisdiction. The Board advised both of the carriers of claimant's request and asked for their response thereto. The

Board was advised that both carriers authorized the surgeries recommended by Dr. Johnson. However, neither carrier authorized any payment of temporary total disability compensation during the periods claimant was hospitalized, nor approved of closure under ORS 656.278 when claimant's conditions again become stationary. The Board was further advised that claimant underwent surgery on his left knee as a result of his 1974 injury.

The Board finds that the evidence submitted to it is sufficient to order a reopening of claimant's claim for his January 22, 1974 injury while employed by Home Dairies, whose Workers' Compensation insurance coverage was provided by CNA Insurance Company. The Board orders that claimant's claim for his January 22, 1974 left knee injury which occurred while employed by Home Dairies, be remanded to CNA Insurance Company for acceptance and payment of compensation and all benefits

provided for by law effective the date claimant was hospitalized for by law effective the date claimant was hospitalized for the surgery to his left knee, recommended by Dr. Johnson and until closed pursuant to ORS 656.278.

IT IS SO ORDERED.

CLAIM NO. 273344 June 18, 1980

DENNIS PADGETT, CLAIMANT
Thomas J. Flaherty, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order

On April 24, 1980, the Board issued an Own Motion Order denying reopening of this claim under its own motion jurisdiction. The State Accident Insurance Fund (Fund), on May 16, 1980, advised the Board it did not oppose an Own Motion Order allowing temporary total disability compensation while claimant was enrolled at the Northwest Pain Center. It authorized claimant to do so. The Board, on May 30, 1980, issued an Own Motion Order reopening this claim effective the date claimant entered the Northwest Pain Center program.

Claimant's attorney, on June 5, 1980, requested the Board to amend its last order and grant him an attorney fee. Claimant's attorney indicated he had performed various services on behalf of claimant, the last one being a phone call on April 8, 1980.

The Board does not find claimant's attorney is entitled to a fee in this case. All of claimant's attorney's services were performed prior to the Board's order denying own motion relief. The claim was reopened, with no opposition by the Fund when claimant enters the Northwest Pain Center program. There is no evidence claimants attorney was instrumental in obtaining any additional benefits for claimant. Therefore, the Board's Own Motion Order, dated May 30, 1980, is correct and does not require amending.

ORDER

Claimant's attorney's request that the Board amend its May 30, 1980 order is denied.

CLAIM NO. YC 306439 June 18, 1980

FRED C. STEINHAUSER, CLAIMANT
Emmons, Klye, Kropp & Kryger,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order On Reconsideration

Claimant, by and through his attorney, on May 22, 1980, requested the Board reconsider its Own Motion Order, dated October 31, 1979. In that order, the Board granted claimant an award of additional temporary total disability. Claimant based his request for reconsideration on additional reports from Dr. Donald Slocum, and Dr. Robert Steele.

Dr. Slocum, in January 1980, had reported that claimant had some tenderness in the upper end of his osteotomy on the left side. Claimant indicated he had difficulty kneeling because of this. He stated he was unable to go upstairs foot over foot. Dr. Slocum did not find any swelling in either knee. He did find that claimant still had marked osteophytosis in both knees and crepitation beneath the patellectomized extension mechanism on the right. He felt the patellar crepitation was mild. He stated that it would be best if claimant used a U-shaped pad when he was required to be down on his hands and knees coaching.

In May 1980, Dr. Steele reported that he was unable to tell if claimant's knee condition was better or worse than it had been a year previously. Dr. Steele found marked crepitation under the patella and indicated that claimant's symptoms were reproduced by pressing the patella against the femur. He reported that the left leg "scores when compared to other men of his age group in our office rate about 75% of normal".

The Board, after reviewing this additional evidence, finds that it is not sufficient to require a change in the Own Motion Order. These reports do not indicate that claimant is entitled to any additional disability. Dr. Steele's report indicates that he is unable to determine if claimant's condition is either better or worse than it was in 1979. Dr. Slocum's report, likewise, does not indicate that claimant is entitled to an award of additional disability. Therefore, the Board, after reconsideration of this claim, affirms its Own Motion Determination order, dated October 31, 1979.

IT IS SO ORDERED.

WCB CASE NO. 78-8200 June 19, 1980

GEORGE BENNETT, CLAIMANT
Bloom, Ruben, Marandas, Berg
& Sly, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Claimant seeks Board review of the Referee's order which found claimant had not timely requested a hearing on the February 16, 1978 Determination Order and found claimant was not entitled to temporary total disability compensation and medical care subsequent to June 15, 1979. Claimant contends the Referee erred in denying his aggravation claim.

FACTS

Claimant, a 41-year-old truck driver with Mt. Hood Trucking Inc., on December 13, 1977, injured his back while tightening binders on a load. Dr. Joseph Dobbes diagnosed this injury as a low back syndrome and released claimant for work as of December 19, 1977, but claimant returned to him complaining of back pain.

In January 1978, Dr. John Hardiman indicated claimant had a history of intermittent back pain for several years. He diagnosed chronic mild recurrent back strain with early degenerative disc disease.

Dr. Dobbes found claimant's condition medically stationary on "1/6/76" and released claimant for regular work on January 9, 1978. This claim was initially closed by a Determination Order, dated February 16, 1978, which granted claimant temporary total disability compensation.

In June 1979, Dr. A. B. Willeford reported claimant, in April 1977, had suffered an on-the-job back injury. He indicated claimant, in June 1979, returned complaining of back pain. Dr. Willeford requested this claim be reopened for additional treatment. He noted claimant had suffered time loss from work for the period of June 11, 1979 through June 15, 1979.

On August 6, 1979, the State Accident Insurance Fund (Fund) advised claimant it would pay the verified temporary total disability compensation, but was denying further responsibility for treatment and/or time loss for his back condition. Its information indicated claimant's pre-existing back problem was causing further symptoms or aggravation of his back problems.

In August 1979, Dr. Dobbes opined claimant had a low back syndrome due to an April 1977 injury. He felt claimant should change jobs and would need occasional manipulative therapy.

Dr. Hardiman, in September 1979, reported claimant had had several episodes of back discomfort of varying degrees. In October 1979, claimant advised Dr. Hardiman he had quit his truck driving job upon the advice of Dr. Dobbes. He said Dr. Dobbes told him in 1977 and again in August 1979 to quit driving truck. Claimant said he experienced low back pain with prolonged sitting. Dr. Hardiman felt claimant should continue his program of back exercises, body mechanics and follow other suggested forms of back care.

Dr. Willeford, in October 1979, indicated he originally had not been told of claimant's December 1977 injury. He felt claimant probably recovered from his April 1977 injury and had a more severe injury in December 1977. He asked that the claim be reopened. Dr. Willeford felt claimant should limit his lifting and bending.

In November 1979, Dr. Dobbes felt claimant's December 1977 incident probably aggravated his back problems. He concurred with Dr. Willeford that claimant probably had recovered from the April incident and that his current problems were related to the December 1977 incident.

Claimant testified that in April 1977 he experienced back pain and went to Dr. Willeford. He had fallen in December 1976 and felt this was the cause of his back pain. After the December 1977 injury, claimant stated he returned to truck driving and experienced continuous, but intermittent chronic lower back pains. On June 11, 1979, while at home, claimant reached for a towel and experienced severe back pain. Claimant said he was off work until June 15, 1979. On August 22, 1979, claimant said he again strained his back

on the job. He indicated he felt severe back pain after the December 1977 incident which he had not felt before. He felt the December 1976 slip and fall was minor and the December 1977 incident was more serious.

On September 21, 1979, claimant filed a request for hearing protesting the Determination Order, dated February 16, 1978, the denial, dated August 6, 1979, and other issues.

The Referee found the appeal of the Determination Order was not timely. Further, the Referee found claimant was not entitled to additional medical care and temporary total disability compensation subsequent to June 15, 1979 as a result of his December 9, 1977 injury. Therefore, the Referee denied all relief claimant requested.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, affirms the Referee's order. The Board concurs with the Referee that claimant's appeal of the Determination Order was not timely. The Determination Order was dated February 16, 1978 and a request for hearing was not filed until September 21, 1979 and received on September 24, 1979 by the Board. ORS 656.319(3) requires with respect to a Determination Order, that a hearing or objection shall not be granted unless a request for hearing is filed within one year after the copies of the determination were mailed to the parties. In this case, claimant did not comply with this statute and, therefore, is not entitled to a hearing on that Determination Order.

The Board finds claimant has failed to prove his aggravation claim. The payment by the Fund of temporary total disability compensation for a short period of time in June 1979 does not preclude the later denial of the claim. The medical evidence in this case does not indicate claimant's condition has worsened since his last award or arrangement of compensation. Claimant has a history of periodic back pain for which he has received palliative treatment. Therefore, since claimant's condition resulting from the compensable injury has not become worse, there has been no aggravation and the Board affirms the Fund's denial.

ORDER

The Referee's order, dated December 7, 1979, is affirmed.

CLAIM NO. C 393204 June 19, 1980

JOHN L. BESS, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

Aggravation rights having expired under the above claim, and Peter A. Nathan, M.D. having reported that surgery is indicated on claimant's right hand, in a letter addressed to the State Accident Insurance Fund, dated May 28, 1980, and

It appearing that said surgery should be performed and State Accident Insurance Fund by letter to the Board dated June 12, 1980, advised that it would not oppose an Own Motion Order reopening the above claim for the proposed surgery,

Therefore, the Board orders this claim reopened and remands it to the State Accident Insurance Fund for acceptance and payment of compensation and other benefits provided for by law, effective on the date surgery is performed, and until closed pursuant to the provisions of ORS 656.278.

IT IS SO ORDERED.

CLAIM NO. HC 455427 June 19, 1980

JOHN CHURCH, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

On August 12, 1973, claimant sustained a compensable injury to his left leg and hand. This claim was originally closed by a Determination Order, dated July 31, 1974, which granted claimant an award of temporary total disability compensation and compensation equal to 75 degrees for 50% loss of his left leg and 7.5 degrees for 5% loss of his right forearm. This claim was subsequently reopened and then again closed by a Determination Order, dated May 20, 1975, which awarded claimant additional temporary total disability. Claimant's aggravation rights have expired.

A Stipulation was entered in January 1980 which provided this claim would be reopened for further medical care and treatment and related time loss benefits retroactive to November 8, 1979, and those benefits should continue until closure is effective pursuant to ORS 656.268. The Stipulation further provided that the State Accident Insurance Fund (Fund) would reimburse claimant's attorney for payment of Dr. Wilson's examination and report and

awarded claimant's attorney a fee out of the increased temporary total disability compensation, not to exceed $750.

On November 8, 1979, Dr. Wilson requested this claim be reopened for the removal of screws from claimant's left medial malleolus. He reported that the post-traumatic arthritis of claimant's left ankle might also require treatment. This surgery was performed on December 3, 1979, by Dr. Wilson.

Dr. Wilson, on May 8, 1980, reported that he and claimant had discussed the left ankle and left leg condition and that claimant felt he had returned to essentially the same status he had prior to his recent treatment for removal of the fixation screw in his left ankle. Dr. Wilson felt that claimant's claim could be closed and that there appeared to be no change in claimant's disability status because of the recent left ankle surgery.

On May 22, 1980, the Fund requested a determination of claimant's disability. The Evaluation Division of the Workers' Compensation Department on June 5, 1980 recommended that claimant be granted additional temporary total disability compensation from November 8, 1979 through May 8, 1980 with no additional award of permanent partial disability.

The Board concurs with this recommendation. The Board would like to point out in this case this claim was reopened after claimant's aggravation rights had expired. The Board has jurisdiction under ORS 656.278 over all claims after the expiration of aggravation rights. The parties cannot by stipulation or any other mechanism abrogate the Board's statutory own motion jurisdiction. Therefore, regardless of the stipulation, this claim must be closed under ORS 656.278 and not ORS 656.268.

ORDER

Claimant is hereby granted an award of additional temporary total disability compensation from November 8, 1979 through May 8, 1980.

Claimant's attorney has already been granted a reasonable attorney fee by the Stipulation.

CLAIM NO. EC 344304 June 19, 1980

DOROTHY E. CURTIS, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

On September 22, 1971, claimant suffered a compensable injury to her low back. This claim was initially closed by a Determination Order, dated August 31, 1972, which granted claimant an award of temporary total disability compensation and compensation equal to 10% unscheduled disability for her low back injury. The claim was subsequently reopened for additional surgery on May 16, 1977 and again closed on April 21, 1978 by a Determination Order which granted an additional award of temporary total disability compensation and an additional 10% unscheduled disability for her low back injury. Claimant's aggravation rights have expired.

Claimant continued to have further difficulty with her back. In late July 1979, claimant was hospitalized for a period of traction and various other forms of conservative treatment. On July 24, 1979, a myelogram was performed which revealed no change in the appearance of her back since the previous myelogram in 1977.

Dr. Lynch, who had performed the back surgery in 1977, on September 27, 1979, performed a laminectomy at the L4 level and bilateral intradural dorsal resection of the fifth lumbar nerve roots.

An Own Motion Order, dated November 1, 1979, reopened this claim effective the date claimant was hospitalized in late July 1979 and until her claim was closed pursuant to ORS 656.278.

Dr. Lynch, on May 2, 1980, reported that claimant's condition was stable. He reported claimant still had some coccydynia and occasional pains in the leg. She indicated that the leg pains had been reduced by about 50%. He recommended that this claim be closed and recommended that claimant be granted an award of compensation equal to 20% permanent partial disability as compared to the whole man.

On May 9, 1980, the State Accident Insurance Fund requested a determination of claimant's disability. The Evaluation Division of the Workers' Compensation Department, on May 22, 1980, recommended closing this claim with an additional award of temporary total disability compensation from July 17, 1979 through May 2, 1980 and an award of 15% unscheduled disability for the low back which would be in addition to the previous awards.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted an award of additional temporary total disability compensation from July 17, 1979 through May 2, 1980 and an additional award of compensation for 15% unscheduled disability for the low back condition as a result of this injury.

CLAIM NO. HA 651034 June 19, 1980

FOREST H. MAGDEN, JR., CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

On January 15, 1958, claimant sustained a compensable injury to his right knee. After surgery, the claim was initially closed by a Determination Order, dated July 23, 1958, which granted claimant temporary total disability compensation and compensation equal to 10% loss of the right leg. Claimant's aggravation rights have expired.

After the original closure, claimant returned to his regular work with the State Highway Department. He required frequent hydrocortisone injections in the knee area.

On December 29, 1978, Dr. Howard Cherry requested the claim be reopened. He felt that arthrograms and possibly further knee surgery was indicated in this case.

Dr. Butler, in March 1979, stated that he felt claimant was a candidate for an arthroscopy for evaluation of the current status of the knee, primarily with the thought of what could be done in terms of reducing a very significant quantity of pain. He recommended a debridement procedure or possible osteotomy might be in order. Claimant was referred to Dr. Fitch.

The arthroscopy was performed on April 10, 1979 and on June 12, 1979 Dr. Butler performed a right proximal tibial osteotomy.

By an Own Motion Order, dated August 22, 1979, this claim was reopened under the Board's own motion jurisdiction.

On April 11, 1980, Dr. Butler reported that claimant's condition was stable. He indicated that claimant was currently working on a full time basis. Claimant continued to have

occasional symptoms of dull, aching discomfort in the medial compartment of his right knee, but had no symptoms of instability. Dr. Butler felt claimant's clinical condition had certainly been improved by this additional treatment. He felt claimant's residual disability consisted of the underlying diagnosis of the osteoarthritis or post-traumatic arthritis secondary to rotary instability as well as apparent discomfort, not to mention claimant's multiple surgical procedures.

On April 29, 1980, the State Accident Insurance Fund requested a determination of claimant's disability. The Evaluation Division of the Workers' Compensation Department, on May 22, 1980, recommended that claimant be granted additional temporary total disability compensation from April 10, 1979 through January 19, 1980, and recommended an award of 10% scheduled disability of the right leg in addition to that which had previously been granted. Claimant had been released for work on January 20, 1980.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted temporary total disability compensation from April 10, 1979 through January 19, 1980, less time worked, and an additional award of compensation for 10% scheduled disability for loss of the right leg.

CLAIM NO. DC 368493 June 19, 1980

ROBERT A. NASH, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

On April 7, 1972, claimant suffered a compensable injury to his right knee. This claim was initially closed by a Determination Order, dated August 1, 1972, which awarded claimant temporary total disability compensation. Claimant's aggravation rights have expired.

In April 1973, Dr. H. Freeman Fitch reported that claimant had a tear of the medial meniscus as a result of this injury. He suggested that claimant undergo an arthrotomy and a removal of the medial meniscus. He suggested this claim should be reopened for that purpose. In November 1977, Dr. Fitch again reported he had seen claimant on October 28, 1977 and that claimant still had a tear of the medial meniscus of the right knee which had gradually gotten worse. He felt the claim should be reopened and ordered that an arthrogram

and, if indicated, surgical removal of the meniscus should be performed. The Board, under its own motion jurisdiction, reopened this claim effective October 28, 1977 and until closed pursuant to ORS 656.278, less time worked. The Board's order was dated May 24, 1978. However, on May 12, 1978, Dr. Fitch reported that claimant indicated his knee "felt pretty darn good". Dr. Fitch did not see any indication of the need for surgery at that time.

In March 1979, Dr. William Duff reported that claimant had mild chondromalacia of the patella of the right knee and possible chronic internal derangement. He felt that claimant should proceed to have an arthrogram and arthroscope of the knee to determine what the condition was. He felt that claimant was fit for work but should avoid such activities which required climbing ladders, repeated squatting, running and/or jumping.

On April 11, 1979, the arthrogram of the knee was performed which revealed a complex tear involving the middle and posterior third of the medial meniscus. On April 17, 1979, Dr. James Baldwin performed an arthroscopy and arthroscopic medial meniscectomy of the right knee. Claimant continued to have difficulty with the right knee and another arthroscopy was performed in July 1979 along with shaving of the medial meniscus and a partial medial meniscectomy.

Dr. Baldwin, on October 29, 1979, released claimant for regular work. In November 1979, Dr. Baldwin reported that claimant knee had essentially full range of motion with no effusion and no quadricep atrophy. He stated that he released claimant for work as of November 26, 1979..

On March 19, 1980, claimant was examined by the Orthopaedic Consultants. They felt that claimant's condition was stationary and the claim could be closed. They suggested the claimant be offered vocational assistance in some other occupation of a medium status. They rated the impairment of the right lower extremity as a result of this injury as mildly moderate.

On December 7, 1979, the State Accident Insurance Fund requested a determination of claimant's disability. It should be noted that the Fund denied responsibility for a psychiatric condition from a left hand injury claimant contends was related to this injury. The Evaluation Division of the Workers' Compensation Department, on May 28, 1980, recommended claimant be awarded additional temporary total disability compensation from October 28, 1977 through May 12, 1978 and further temporary total disability compensation from April 11, 1979 through March 19, 1980 and be granted an award of compensation equal to 37.5° for 25% loss of the right leg.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted temporary total disability compensation from October 28, 1977 through May 12, 1978 and from April 11, 1979 through March 19, 1980 and compensation equal to 37.5° for 25% loss of the right leg. These awards are in addition to all previous awards claimant has been granted for this injury.

WCB CASE NO. 79-3015 June 19, 1980

JESSE SHAY, JR., CLAIMANT
Cynthia L. Barrett, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant
Cross-appeal by the SAIF

Claimant and the State Accident Insurance Fund (Fund) seeks Board review of the Referee's order which: (1) found the inclusion of the overtime claimant worked in calculating the rate of temporary total disability compensation was not warranted; (2) found the Fund's underpayment of temporary total disability compensation was unreasonable and assessed a 25% penalty on it; (3) found claimant had not suffered any loss of wage earning capacity as a result of his injury; and (4) awarded claimant's attorney a fee of $1,000. Claimant contends he is entitled to an award of permanent partial disability and additional temporary total disability compensation. The Fund contends the penalty and attorney fee awarded by the Referee were excessive.

FACTS

The Board adopts the Referee's finding of facts as set forth in the Opinion and Order, a copy of which is attached to this order.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, modifies the Referee's order. The Board concurs with the Referee that the evidence does not support any award of unscheduled disability. The evidence does not establish claimant has lost any wage earning capacity as a result of this injury. Further, the

evidence does not establish claimant is entitled to additional temporary total disability compensation. Dr. Utterback reported claimant's condition was medically stationary on March 15, 1979 and claimant was granted temporary total disability compensation to that date. There is no evidence claimant's condition worsened or became not stationary after that date.

The evidence does show that claimant was underpaid temporary total disability compensation. This error was apparently caused by the employer's insertion of the wrong hourly wage. After being advised of this error the Fund did finally pay claimant the correct amount of temporary total disability compensation he was due. However, after it knew all the facts, it delayed payment of compensation. The delay in payment was unreasonable and justifies the awarding of penalties and attorney's fees. The Board finds the amount of the penalty and attorney fees awarded by the Referee are excessive and would modify those awards. The Board, based on the Fund's unreasonable delay in payment, would assess a penalty equal to 10% of the $1,316.08 underpayment and $400 attorney fee.

ORDER

The Referee's order, dated October 31, 1979, is modified.

That portion of the Referee's order which granted claimant a penalty equal to 25% of the $1,316.08 underpayment of temporary total disability compensation, as and for unreasonable delay in the payment of compensation and awarded claimant's attorney a $1,000 attorney fee is modified as described below.

The State Accident Insurance Fund is hereby ordered to pay claimant an amount equal to 10% of the $1,316.08 underpayment of temporary total disability as a penalty for the unreasonable delay in the payment of compensation and claimant's attorney is awarded a fee of $400 as and for a reasonable fee in this case.

The remainder of the Referee's order is affirmed.

CLAIM NO. C 370287 June 19, 1980

RONALD C. WRIGHT, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On May 15, 1972, claimant sustained a compensable injury. The claim was closed and his aggravation rights have expired.

Claimant returned to Dr. Edward Berkeley on April 24, 1980, complaining of pain in both legs radiating to the front as well as the back of the thighs and sometimes to the knees and feet. Claimant was hospitalized for complete bedrest and traction. Dr. Berkeley indicated claimant was totally disabled and unable to work. By May 6, 1980, Dr. Berkeley reported claimant's condition had improved considerably. He did not feel claimant's condition was medically stationary.

On June 3, 1980, the State Accident Insurance Fund (Fund) provided the Board with the above information. The Fund advised it did not oppose an Own Motion Order reopening this claim from April 24, 1980.

The Board finds the evidence it has received warrants reopening of this claim under its own motion jurisdiction at this time. This claim is remanded to the Fund for reopening and payment of compensation and other benefits provided by Law effective April 24, 1980 and until closed pursant to ORS 656.278.

CLAIM NO. D 59292 June 19, 1980

HELEN J. YOUNG, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On November 19, 1974, claimant sustained a compensable injury to her right foot. The claim was closed and claimant's aggravation rights have expired.

Dr. Curtis Long, on May 1, 1980, reported claimant had continued to complain of a great deal of pain in her right foot since her injury. He found a neuroma in the third intermetatarsal space. Dr. Long felt that this could be surgically treated and afterwards her foot would be completely asymptomatic. He felt the neuroma was the result of the trauma to her foot.

The State Accident Insurance Fund, on May 28, 1980, forwarded this information to the Board. It advised the Board it would not oppose an Own Motion Order reopening this claim as of the date of the surgery suggested by Dr. Long.

The Board finds this claim should be reopened under its own motion jurisdiction. The Board remands this claim to the State Accident Insurance Fund for acceptance and payment of benefits and compensation provided for by law effective the date claimant is hospitalized for the surgery recommended by Dr. Long and until closed pursuant to ORS 656.278.

IT IS SO ORDERED.

CLAIM NO. A 713115 June 20, 1980

HAROLD COMBS, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Referring Order For Hearing

On March 6, 1980, claimant, by and through his attorney, requested the Board exercise its own motion jurisdiction and reopen his claim for his February 6, 1959 back injury. Attached to this request were various medical reports.

In November 1979, Dr. Howard Johnson opined claimant's condition had worsened since the time of his original injury. He felt claimant had a chronic pain situation and felt claimant's emotional and physical condition would deteriorate. Mr. Johnson recommended claimant attend the pain clinic.

The Orthopedic Consultants in May 1980 reported they had also examined claimant in July 1978. They felt claimant's condition was stationary and recommended claim closure. They rated claimant's impairment the same as what it was in 1978; moderately severe.

The State Accident Insurance Fund (Fund) on June 5, 1980, advised the Board it opposed and Own Motion Order reopening this claim. This opposition was based on the Fund's opinion the medical reports did not indicate any worsening of claimant's condition.

The Board finds that it would be in the best interest of the parties if this case was referred to the Hearing Division. A hearing shall be scheduled. At the hearing,

the Referee shall decide: (1) if claimant's condition has in fact worsened; (2) if it has, is the worsened condition related to the original injury; and (3) if so, what date should the claim be reopened. At the conclusion of the hearing, the Referee shall cause a transcript to be prepared and forwarded along with the evidence introduced at the hearing and a recommendation on claimant's request for own motion relief.

IT IS SO ORDERED

WCB CASE NO. 79-1198 June 20, 1980

TOM L. CROCKETT, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary, Claimant's Attys.
Lang, Klein, Wolf, Smith, Griffith & Hallmark, Employer's Attys.
Request for Review by Claimant

Claimant seeks Board review of the Referee's order which approved the employer's denial of claimant's claim for asthma.

FACTS

In August 1978, claimant was hospitalized for pain in his chest. Dr. V. B. Brasseur found evidence of pneumonia, which claimant had had, but felt claimant "may have caught asthma". Dr. David Bice reported claimant had "asthma/pneumonia/bronchitis" and felt it was not related to claimant's employment. He indicated claimant first developed symptoms of these conditions on July 2, 1978.

In September 1978, Dr. John Kazmierowski, an allergist, reported claimant continued to have difficulty with shortness of breath and wheezing. He noted claimant smoked two packs of cigarettes a day. The diagnosis made was asthma which was allergic in etiology. Skin testing revealed claimant reacted to early and late tree mix, minor grass, western weeds, eastern weeds, molds and mites. Dr. Kazmierowski felt claimant had "extrinsic asthma". Late in September 1978 claimant reported he experienced an exacerbation of his problem while in the sawmill. Claimant had another asthma attack in October 1978. Dr. Kazmierowski, on October 14, 1979, released claimant to return to work.

On January 2, 1979, Dr. Bice reported claimant had "asthma aggravated by chemical at work". He noted the asthma may be due to other factors as well, but the main factor seemed to be chemicals at work. Claimant was advised not to work for seven days in January 1979 by Dr. Bice.

On January 24, 1979, claimant, then a 25-year-old planer chain puller and grader trainee with Guy Roberts Lumber Company, filed a claim for his lung condition. Claimant indicated the Permatox and Anti-stain treatment used in the mill caused this condition. On February 6, 1979, the carrier denied this claim on the basis that this condition did not arise out of and during the course and scope of his employment.

Dr. Bice, on February 9, 1979, indicated claimant's asthma arose out of claimant's employment. He reported claimant had been unable to work from January 6, 1979. Dr. Bice felt claimant's condition was due to claimant's inhalation of chemical fumes at work.

On February 15, 1979, Dr. Kazmierowski reported claimant's intrinsic asthma may very well be made worse by his work environment where he was exposed to an irritating mist.

Dr. Joseph Morgan, on May 8, 1979, reported claimant had a bronchial asthma condition. Claimant gave Dr. Morgan a history of exposure to a Permatox spray at work with increase of symptoms at work. Claimant showed adverse reactions to a variety of fumes and odors in tests performed by Dr. Morgan. Dr. Morgan opined claimant's illness was causally related to the exposures he experienced on the job. He felt claimant might need hospitalization.

In July 1979, Dr. Emil Bardana, Acting Head, Division of Immunology Allergy and Rheumatology of the University of Oregon Health Sciences Center, reported claimant had told Dr. Bice he had a family history of asthma. Claimant denied this when questioned by Dr. Bardana. Dr. Bardana noted claimant's condition in January 1979 worsened after he stopped working and had worsened with upper respiratory infection. Claimant stated that since he quit work, his condition had not improved. Dr. Bardana visited the employer's premises and observed claimant's work site. He estimated

claimant's work station was 25-30 feet and the grader's position 25-30 feet from the sprayer. He felt the area had good ventilation. Dr. Bardana also examined the chemical sprayed and the sprayer itself. The level of the fumes was considered minimal and within safe levels. Dr. Bardana diagnosed: (1) Bronchial asthma initially triggered by a severe upper respiratory infection, . . . with some minor contribution from environmental pollens; however, most of

his disease is non-IgE mediated. (2) Bronchitis, subacute, associated with: a) pneumonia, by history; b) viral infection, by history; c) cigarette smoking . . . ". Dr. Bardana found claimant had developed an adult-onset of asthma. Claimant noted reaction to a series of odors, including cigarette smoke. It was Dr. Bardana's opinion claimant's asthma was triggered by an infection but was not caused by his work. He felt the asthma was not triggered by the fumes encountered at claimant's work in any manner different from the effect of any exertion he would perform and not to the same extent as claimant's persistent cigarette smoking habit. Dr. Bardana also explained he disagreed with Drs. Bice's and Morgan's opinion relating claimant's asthma to his work.

In late July 1979, Dr. Bice reported claimant's lung condition had deteriorated since the beginning of 1979. Claimant reported persistent chest pain.

Dr. Kazmierowski, in September 1979, reported he felt claimant had developed intrinsic asthma which had probably begun during one of his "infectious episodes in the months prior" to his seeing claimant. He felt claimant's wheezing was made worse at times by his exposure at work.

The Referee approved the denial. He relied upon the findings and conclusions of Dr. Bardana. The Referee noted a temporary worsening under current law was not compensable and that the evidence did not establish that the work exposure either caused the asthma or permanently exacerbated the condition.

BOARD ON DE NOVO REVIEW

The Board concurs with the Referee that the employer-carrier's denial must be affirmed. Since this case was decided by the Referee the Supreme Court has ruled on a series of cases with similar fact situations. In Hutcheson v. Weyerhaeuser Co., 288 Or 51, ____ P2d ____ (1979), the Court held that the work environment must cause a temporary exacerbation of claimant's pre-existing condition so as to require medical services that would not otherwise have been necessary. The more persuasive evidence in this case, is that claimant's work exposure to fumes or spray at work did not cause nor even temporarily aggravate the respiratory condition. The Board finds that Dr. Bardana, as an expert in the field, is more persuasive than the other physicians. Dr. Bardana performed a very thorough and comprehensive review of the facts in this case. He examined the other medical reports, claimant, claimant's work site, and tested the chemical claimant alleged caused his asthma. Dr. Bardana is quite clear in his opinion that claimant's work did not cause claimant's asthma condition. He notes that the work exposure, as well as claimant's smoking and other irritants could make claimant's condition worse. The Board cannot

single out the exposure to the chemical fumes or spray at claimant's work stations as being causative of claimant's problems. Therefore, the Board affirms the denial.

ORDER

The Referee's order, dated October 19, 1979, is affirmed.

CLAIM NO. C604-14077 June 20, 1980

JOSEPH DAVIS, CLAIMANT
Welch, Bruun & Green, Claimant's Attys.
Souther, Spaulding, Kinsey, Williamson & Schwabe, Employer's Attys.
Own Motion Order Referring For Hearing

On May 23, 1978 the Board remanded for a hearing, claimant's request for Own Motion relief and included two issues for the Referee to decide; aggravation of a left hand/elbow condition and if claimant's condition had worsened, did claimant waive the right to request additional total temporary disability and permanent partial disability compensation for said condition by entering into a stipulation dated March 6, 1979 and an order of dismissal.

By a letter dated May 27, 1980 the defendent's attorney brought to the Board's attention an additional issue to be decided by the Referee at the hearing:

Whether claimant is barred from seeking additional temporary total disability and permanent partial disability compensation after having stipulated to permanent total disability in a October 13, 1976 stipulation.

The Referee shall consider this additional issue and, after conducting a hearing, shall cause a transcript of the proceedings to be prepared and forwarded to the Board together with other evidence introduced and his recommendation based on the evidence.

IT IS SO ORDERED.

WCB CASE NO. 79-5805 June 20, 1980

PETER R. DIZICK, CLAIMANT
R. Ray Heysell, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Claimant seeks Board review of the Referee's order which dismissed claimant's claim for medical services pursuant to ORS 656.245 and affirmed the State Accident Insurance Fund's (Fund) denial, dated August 10, 1979, of claimant's aggravation claim.

FACTS

The Board finds the facts recited in the Referee's order are correct and adopts them. A copy of the Referee's order is attached to and incorporated into this order.

BOARD ON DE NOVO REVIEW

Based on the facts of this case, the Board modifies the Referee's order.

Claimant is entitled to continuing medical care and treatment for the residuals of his original compensable injury. ORS 656.245. There is no time limitation placed on such treatment and care. Claimant is receiving treatment from Dr. Blandino for his back injury. The evidence does not indicate claimant is receiving treatment of his back for other conditions, as contended by the Fund. Therefore, the Board reverses that portion of the Referee's order which denied claimant's claim for medical services. Claimant's attorney is entitled to a fee for overcoming the Fund's denial.

The Board concurs with the Referee that claimant has failed to prove his condition has worsened since the last award or arrangement of compensation for his original injury. Dr. Dunn did not find any objective worsening of climant's condition. Dr. Tennyson was unable to say if claimant's condition had worsened. Dr. Blandino felt claimant's condition had worsened due to the lack of assistance being given to claimant in his rehabilitation and employment. The Board, like the Referee, finds the evidence is insufficient to establish claimant's condition has worsened since the last award or arrangement of compensation. Therefore, it affirms the Fund's denial of claimant's aggravation claim.

ORDER

The Referee's order, dated January 17, 1980, is modified.

That portion of the Referee's order which dismissed claimant's claim for medical services pursuant to ORS 656.245 is reversed. The State Accident Insurance Fund's denial of responsibility for continuing medical care and treatment related to claimant's original injury is reversed. Claimant's claim for medical services is remanded back to the Fund for acceptance and for payment of medical care and treatment related to claimant's original injury pursuant to ORS 656.245.

Claimant's attorney is granted as a reasonable attorney's fee for his services before the Referee and the Board a sum equal to $150.

The remainder of the Referee's order is affirmed.

WCB CASE NO. 78-10,276 June 20, 1980

LOWELL GATLIFF, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Attys.
Lang, Klein, Wolf, Smith, Griffith
& Hallmark, Employer's Attys.
Request for Review by Claimant
Cross-appeal by Employer

Claimant and the employer seek Board review of the Referee's order which found claimant was entitled to temporary total disability compensation from March 6, 1979 to March 26, 1979 and awarded claimant's attorney a fee out of the increased temporary total disability compensation. Claimant contends he is entitled to temporary total disability compensation from January 12, 1979 through March 26, 1979. The employer contends claimant is not entitled to the additional temporary total disability.

FACTS

The Board adopts the Referee's findings of facts in the Opinion and Order (a copy of which is hereto attached).

BOARD ON DE NOVO REVIEW

The Board, after de novo review, reverses the Referee's order. The medical evidence indicates that claimant would benefit from a total knee replacement, but he declined to undergo it until March 6, 1979. Claimant was hospitalized

and the total knee replacement was performed on March 27, 1979. The employer reopened the claim at that time. However, the medical evidence indicates claimant's condition had remained unchanged and stationary from the date the claim was closed, December 20, 1978, until he was hospitalized and underwent the surgery. The Board finds no evidence that claimant's condition was not stationary up until the time he underwent the total knee replacement. Therefore, the Board concludes claimant is not entitled to additional temporary total disability compensation from January 12, 1979 through March 26, 1979 and reverses the Referee's order in its entirety.

ORDER

The Referee's order, dated December 27, 1979, is reversed in its entirety.

CLAIM NO. FC 139143 June 20, 1980

PETER V. GATTO, CLAIMANT
Galton, Popick & Scott, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

On July 23, 1968 claimant sustained compensable injury to his back and right leg. This claim was initally closed by a Determination Order dated April 1, 1969 which granted claimant temporary total disability compensation. This claim was subsequently reopened and closed by a second Determination Order dated March 27, 1974 which granted claimant additional temporary total disability compensation and compensation equal to 224 degrees for 70% unscheduled disability for his back injury. Claimant's aggravation rights have expired.

Claimant continued to have difficulty with low back pain and was hospitalized in March 1979 because of it. On July 2, 1979 claimant under went a left lumbar sympathectomy for disabling paresthesias in the left lower leg. Claimant was diagnosed as having mild diabetes mellitus, arteriorclerotic heart disease with chronic Atrial Fibrillation, chronic low back pain, exogenous obesity, and a mylogram was performed which revealed a large defect at the L3-4 level and possibly at the L4-5 level. Dr. Lawrence Cohen on July 25, 1979 performed a laminectomy at the L3-4, L4-5 and L5-S1 levels.

By an Own Motion Order dated September 21, 1979, the Board ordered this claim reopened the date claimant was admitted to the hospital, on March 12, 1979 until the claim was closed pursuant to ORS 656.278 less any time worked. This order also provides that claimant's attorney should be granted a fee equal to 25% of the additional temporary total disability compensation granted claimant not exceed a maximum of $750.00.

On November 2, 1979, claimant was hospitalized complaining of fever and headache. The diagnosis was a metabolic disturbance of undetermined etiology, hypertensive arteriosclerotic heart disease, artial fibrillation, diabetes mellitus, and gout.

In January 1980, Dr. John Flannery reported that claimant was hospitalized in November 1979 due to fever, staph, mental-confusion, headaches and progessive weakness which had presisted since his previous back surgery. Examination revealed the presence of meningitis which was strongly felt to be staph meningitis secondary to the previous back injury.

On February 7, 1980, Dr. Cohen opined that claimant would never be able to carry on a gainful occupation again. He reported that claimant's back was "painful permanently with limitation of movement." He noted that claimant's entire situation was complicated by a heart condition. He found it difficult to separate the back problems from the heart condition relative to claimant's capacity to work. Dr. Cohen opined that claimant was permanently and totally disabled. He felt that claimant would not be working because of his back problems regardless of his heart condition. Dr. Cohen felt that claimant's condition was slowly but steadily getting worse however, found that claimant's back condition was stationary.

On April 7, 1980, the Orthopedic Consultants reported claimant's condition was stationary as far as back condition was concerned. They felt that claimant had a moderate level of residual impairment and that if claimant's only problems were related to his back that he probably could tolerate a sedentary type of work. However, because of claimant's multiple problems they felt claimant was realistically precluded from tolerating gainful employment at that time.

On February 29, 1980 the Fund denied responsibility for claimant's hospitalization in November of 1979. A hearing is currently pending on this denial.

On May 5, 1980, the State Accident Insurance Fund requested a determination of claimant's current disability. The Evaluation Division of the Workers' Compensation Department on May 23, 1980 recommended that claimant be granted an award of additional temporary total disability from March 2, 1979 through April 7, 1980. They opined that there was no change in claimant's permanent disability.

The Board concurs in this recommendation.

Claimant is hereby granted temporary total disability compensation from March 2, 1979 through April 7, 1980, less time worked.

Claimant's attorney has already been granted a reasonable attorney fee by the September 21, 1979 Own Motion Order.

CLAIM NO. A640359 June 20, 1980

LEWIS GREGORY, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant, on November 12, 1957, suffered injuries to both feet. The claim was originally closed by a Determination Order, dated July 10, 1958, which granted claimant an award of temporary total disability compensation and compensation equal to 40% loss of the right foot and 20% loss of the left foot. Claimant's aggravation rights have expired.

On May 30, 1979, Dr. Charles Weeks advised the State Accident Insurance Fund (Fund) that claimant was 82 years old and continued to complain of problems with his right ankle. He reported that x-rays demonstrated a marked loss of the tibial talar articulation as well as the previously healed fractures of the tibia and fibula. He reported that there was almost a complete obliteration of the ankle mortise. Dr. Weeks felt that claimant had traumatic osteoarthritis which was significant and produced pain with minimal weight bearing activity and resulted in a marked limitation of motion of the ankle. He felt that in view of claimant's age and excellent health, a total ankle arthrodesis to regain movement as well as relief of pain, would be a feasible solution in this case.

By an Own Motion Order, dated July 11, 1979, the Board reopened this claim effective May 30, 1979, the date of Dr. Weeks' examination.

Dr. Weeks, on July 13, 1979, performed a total ankle replacement utilizing an Oregon-type ankle prosthesis on claimant's right ankle.

In February 1980, the Orthopaedic Consultants reported that claimant's condition was approaching a stationary status. They felt that a good result had been achieved from the surgery and the incapacitating ankle pain had been alleviated. They felt the residual impairment of the right ankle as a result of the injury remained in the moderate category.

Dr. Weeks, on May 14, 1980, reported that claimant's condition was stationary and the case could be closed. He agreed with the Orthopaedic Consultants's report and rated claimant's injury residuals as moderate.

In March 1980, the Fund requested a determination of claimant's disability. The Evaluation Division of the Workers' Compensation Department, on June 4, 1980, recommended that claimant be granted an additional award of temporary total disability compensation from May 30, 1979 through May 14, 1980 and no award of permanent partial disability due to this injury in excess to that granted by the July 10, 1958 order.

The Board concurs in this recommendation.

ORDER

Claimant is hereby granted an additional award of compensation for temporary total disability from May 30, 1979 through May 14, 1980, less time worked.

WCB CASE NO. 78-9227 June 20, 1980

GORDON M. HANEY, CLAIMANT
Coons & Anderson, Claimant's Attys.
Lang, Klein, Wolf, Smith, Griffith & Hallmark, Employer's Attys.
Request for Review by Employer

The employer seeks Board review of the Referee's order which granted claimant an award of temporary total disability compensation from February 8, 1979 through April 16, 1979 and an award of compensation equal to 208° for 65% unscheduled disability for his low back injury in lieu of all previous awards. The employer contends these awards are not supported by the evidence.

FACTS

Claimant, a 31-year-old bander operator with Publishers Paper Company, injured his back on July 8, 1974 when, while straightening a load of 2' x 4's, he slipped off of a catwalk. This injury was diagnosed as an acute lumbar strain. Claimant received conservative treatment and the claim was initially closed by a Determination Order, dated January 30, 1975, which awarded claimant temporary total disability compensation.

In May 1976, Dr. Thad Stanford reported claimant had been having increasing difficulty with low back pain radiating into the left leg and had been unable to work. Claimant indicated he had continued to work as a bander operator and he had continuing intermittent back pain.

Dr. Robert Ho, in June 1976, diagnosed a chronic lumbosacral strain. Claimant also complained of stomach aches which were associated with ulcers for approximately the last two to three years.

In September 1976, Dr. John Hazel found that claimant presented "a diagnostic enigma". He felt claimant probably had a degenerative intervertebral disc disease although he could not see nor measure this by clinical or radiographic means. Claimant gave a history of never being completely symptom-free from back pain since his original injury in July 1974. Dr. Hazel felt that claimant's present condition was probably an aggravation of that industrial injury.

Dr. Harold Higley, in September 1976, while claimant was hospitalized by Dr. Ho, diagnosed a chronic lumbosacral strain, associated anxiety and depression, a personality type which was passive-agressive, and associated psychophysiologic gastrointestinal system reaction. Claimant had been hospitalized by Dr. Ho for bedrest, pelvic traction, physical therapy, including acupuncture. Dr. Ho opined claimant's emotional factors were a secondary problem with claimant and felt a myelogram was not warranted. Dr. Ho felt claimant did have permanent impairment and he must avoid strenuous and repetitive use of his back.

Also, in September 1976, Dr. Harry Sirounian concurred that claimant had chronic lumbosacral strain with no radiculopathy. He did not find any clinical evidence of a herniated nucleus pulposus and did not feel a myelogram was indicated. He felt that claimant would need vocational rehabilitation.

On December 21, 1976, claimant was involved in an automobile accident which totalled his pickup and injured his upper and lower back.

Dr. Ho, in early January 1977, reported that claimant had completed a course of electro-acupuncture therapy and transcutaneous nerve stimulation. However, claimant continued to have low back pain. Claimant indicated that on December 21, 1976 he had been involved in an automobile accident and he felt worse after that incident than he did before. Dr. Ho felt that claimant continued to have low back pain as a result of his auto accident and that his condition in relation to the industrial injury was stationary. He rated the impairment of the spine as 21.5% of the whole man.

In February 1977, claimant attended a Disability Prevention Center program. He complained of pain in the low back and pain in both legs. Their diagnosis in addition to the chronic lumbosacral sprain was an anxiety reaction, psychophysiologic gastrointestinal system reaction, hypercholesterolemia and mild obesity. Dr. Carl Holm, medical examiner, concluded that claimant had a vocational handicap because of the lack of marketable skills within his physical and psychological limitations. He felt claimant had a capacity for light to medium work. Claimant was referred to the Vocational Rehabilitation Division for the establishment of an educational program and implementation of a vocational plan.

On April 27, 1977, Dr. Ho reported that claimant continued to complain of low back pain and indicated that it was at about the same level as it had been in February 1977. He opined that claimant's condition was stationary and that claimant had permanent partial impairment of the function of his back. He noted that claimant may require additional palliative treatment in the future.

On April 18, 1977, claimant was interviewed by a vocational counselor. Claimant indicated he had worked as a greenchain puller in a lumber mill, a truck driver, and a foundry worker. He stated he had a tenth grade education and obtained a GED. In May 1977, claimant began a vocational rehabilitation program with a vocational goal of becoming a radio/T.V. repairman. Claimant became dissatisfied with this program; consequently his training program was changed to a computer program.

Dr. Ho, in August 1977, reported that claimant had an aggravation of his chronic lumbosacral strain and myositis. He prescribed a transcutaneous nerve stimulator and other forms of physical therapy to reduce claimant's symptoms. By November 1, 1977, Dr. Ho reported claimant's condition was stationary and no further treatment was planned at that time.

In July 1978, claimant returned to Dr. Ho complaining of recurrent low back pain which had worsened for about the last two to three weeks. Claimant reported that movements of the low back or sitting for prolonged periods of time increased his back pain. Dr. Ho again prescribed manipulative treatment and other physical therapy measures. On September 29, 1978, Dr. Ho reported that he discontinued treatment and that claimant's condition again appeared to be stationary.

Claimant's vocational rehabilitation program was terminated effective October 27, 1978.

A Second Determination Order, dated November 20, 1978, awarded claimant additional temporary total disability compensation from April 17, 1976 through October 27, 1978 and compensation equal to 64° for 20% unscheduled disability for his low back injury.

In January 1979, claimant returned to Dr. Ho for a re-evaluation. Claimant indicated to Dr. Ho he felt about the same as he did in September 1977. Claimant stated he had dropped out of the computer programing course because of an inability to study. Claimant said he was not using his back support or taking any analgesics. However, he indicated he was continuing to use his transcutaneous nerve stimulator. Claimant said he experienced a catch in his low back once in a while. Dr. Ho felt that claimant's condition was approximately the same, or "possibly" a little worse than it had been in September 1978, but claimant's condition remained stationary and no additional treatment was planned. He released claimant to return to sedentary work in the mill.

In February 1979, Dr. Ho reported claimant returned to him complaining of increased pain. He began electroacupuncture therapy. In March 1979, Dr. Ho reported the treatment he was giving claimant was palliative rather than curative. He felt that claimant's present condition represented an exacerbation of his chronic problem caused by his industrial injury. He did not feel that claimant was capable of regular employment. Dr. Ho did indicate "in his stationary condition his capabilities of handling a job are quite limited to what might be sedentary". Dr. Ho did not feel claimant's condition was stationary at that time and asked that the claim be reopened.

At the hearing claimant testified that he has pain in his low back which radiates down his legs. He stated he is unable to lift, twist, or to turn, to stoop or to bend, or to sit for any length of time and can walk only short distances. He indicated he uses Darvon and wears his back brace occasionally. Claimant stated he can no longer drive machinery because of the bouncing involved. Further, he stated that he has limited his day-to-day personal activities. Claimant indicated he attempted to work in a grocery store, but quit that job because it entailed too much lifting and stretching, which increased his back pain. Claimant stated that he changed his vocational rehabilitation program because the lifting and repairing T.V. sets hurt his back. He indicated he did not complete the courses in computer programing because of financial difficulties. At the time of the hearing, claimant was working as a desk clerk in a hotel. He indicated this did not require lifting and that he was allowed to sit or stand as he desired. Claimant has a 10th grade education with a GED. Claimant's past work experience has been as an orderly in a nursing home, aluminum plant worker, receiving clerk, farm laborer and truck driver.

The Referee found: (1) that the November 20, 1978 Determination Order "correctly terminated the claim"; (2) that claimant was entitled to temporary total disability compensation from February 8, 1979 to April 17, 1979, the date he was again employed as a hotel desk clerk; (3) that based on the limitations imposed on claimant he had lost a larger portion of his wage earning capacity than that awarded by the Determination Order, mailed November 20, 1978; and (4) the Referee did not find that claimant was entitled to any compensation in January 1979 because he had not established that he was unable to work because of his industrial injury. Therefore, in lieu of that award, the Referee granted claimant an award of compensation equal to 208° for 65% unscheduled disability for his low back injury.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, modifies the Referee's order. The medical evidence indicates that claimant has a chronic lumbosacral strain and could not return to his previous employment or to similar employment. Claimant is capable of medium to light work. He has a 10th grade education and has obtained a GED. Further, he enrolled in two vocational rehabilitation programs, neither of which was completed. The Board, after reviewing all the evidence in this case, finds that the award granted by the Referee is excessive. Based on the same evidence, the Board finds claimant is entitled to an award of compensation equal to 96° for 30% unscheduled disability in lieu of all previous awards of unscheduled disability.

The Board finds that claimant is not entitled to any additional temporary total disability compensation. The medical evidence does not support the Referee's finding on that issue. Claimant did experience a flare-up of his condition in February 1979 and received palliative care from Dr. Ho for this condition. Claimant did not establish any worsening of the underlying condition entitling him to additional temporary total disability compensation. Therefore, the Board reverses the Referee on that issue.

ORDER

The Referee's order, dated December 17, 1979, is modified.

That portion of the Referee's order which granted claimant an award of temporary total disability compensation from February 8, 1979 through April 16, 1979 and granted him an award of compensation equal to 208° for 65% unscheduled disability for his low back condition in lieu of that granted by the Determination Order of November 20, 1978 is reversed.

Claimant is hereby granted an award of compensation equal to 96° for 30% unscheduled disability for his low back injury. 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. 77-2897-E June 20, 1980

OLIVER HANNA, CLAIMANT
Ben Lombard, Jr., Claimant's Atty.
Lindsay, Nahstoll, Hart & Krause,
Employer's Attys.
Order On Remand

On June 30, 1978, the Referee ordered claimant's aggravation claim accepted and remanded it to McGrew Brothers, Inc. And Argonaut Ins., Co., (Argonaut) for payment of compensation and benefits provided for by law; ordered Argonaut to make the necessary adjustment with Employee Benefit Insurance Company (EBI) for such payments it had made pursuant to an Order Designated Paying Agent; ordered Argonaut to pay the expert witness fee and expenses incurred by Dr. Weinman because of his attendence at the hearing as a witness; and ordered Argonaut to pay claimant's attorney a fee. The Board in its Order of Review, dated May 31, 1979, affirmed the Referee's order. An appeal was filed by Argonaut with the Court of Appeals.

The Court of Appeals, in an opinion dated January 28, 1980, held claimant's claim was not barred by his failure to appeal Argonauts denial of his claim and that claimant had proven an aggravation of his 1972 back injury. However, the Court found Argonaut did not have to pay the expert witness fee and expenses of Dr. Weinman. It found Dr. Weinman was EBI's witness and his fee and expenses were its responsibility. The Court affirmed the award of attorney's fee. On May 29, 1980, the Judgment and Mandate was issued.

The Board, pursuant to the Judgment and Mandate, modifies its Order on Review. The Board reverses that portion of the Referee's order which ordered Argonaut to pay Dr. Weinman's expert witness fee and his expenses. The remainder of the Referee's order is affirmed.

IT IS SO ORDERED.

WCB CASE NO. 79-4296 June 20, 1980

DON E. HELVIE, CLAIMANT
Pozzi, Wilson, Atchison, Kahn
& O'Leary, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Claimant seeks Board review of the Referee's order which affirmed the denial of his claim for an aggravation of his pre-existing coronary artery disease.

FACTS

The Board finds the facts in the Referee's Opinion and Order are correct and adopts them. A copy of the Referee's Opinion and Order is attached to this order.

BOARD ON DE NOVO REVIEW

Based on the Board's de novo review in this case, the Board modifies the Referee's order. The preponderance of the medical evidence in this case supports a finding that claimant experienced a temporary worsening with a narrowing of his coronary arteries and a temporary worsening of his angina. Claimant experienced a temporary aggravation of his underlying coronary artery disease due to his body's reaction to the blow to the chest. Claimant's emotional status, i.e., he felt he was having another heart attack, after this incident resulted in a temporary narrowing of his coronary arteries. Therefore, the Board finds this temporary worsening terminated when claimant was released from the hospital. The Fund's denial is reversed to this extent and it is ordered to accept and pay compensation and other benefits for claimant's claim for a temporary worsening of the underlying coronary artery disease and angina up to the date he was released from the hospital. The Board finds the preponderance of the evidence does not establish that claimant's underlying coronary heart disease and angina were materially and permanently aggravated by this injury.

ORDER

The Referee's order, dated November 13, 1979, is modified.

The State Accident Insurance Fund's denial is reversed to the extent that claimant has proved a temporary aggravation of his underlying coronary artery disease and angina and the claim for that condition is remanded to it for acceptance and payment of compensation consistent with the Board's findings on de novo review. Claimant's attorney is granted a fee of $200 for partially prevailing on overcoming the denial.

WCB CASE NO. 78-6361 June 20, 1980

ALMERON W. HINTON, CLAIMANT
Welch, Bruun & Green, Claimant's Attys.
Cheney & Kelley, Employer's Attys.
Request for Review by Employer

The employer seeks Board review of the Referee's order which granted claimant an award of compensation equal to 32° for 10% unscheduled disability in addition to the August 1, 1978 Determination Order award of compensation and granted claimant's attorney a fee out of this increased compensation. The employer contends claimant is not entitled to this additional award of compensation.

FACTS

On November 17, 1977, claimant, a 52-year-old loader operator with this employer, was struck in the head, right eye and face by a haul back cable which had broken. Dr. Bryce Young diagnosed this injury as an inferior and superior orbital laceration of the skin and traumatic contusion of the globe "O.D. with dislocation of lens and shallowing of A.C. superiorly".

Dr. Young, in December 1977, reported claimant's visual acuity of the right eye was "O.D. Hand Motion only, O.S. 20/20". He found a mild iritis present, shallowing of the anterior chamber superiorly with dislocation of the lens, and prolapse of the vitreous anterior to the lens. There were also scattered retinal hemorrhages present. In February 1978, Dr. Young, released claimant to modified work as of January 2, 1978, but this later was changed to regular work. He reported claimant had lost almost 100% of the useful vision in the right eye.

On March 28, 1978, Dr. Gordon Leitch diagnosed: "O.D. Dilated fixed pupil Secondary to Trauma Vitreous in O.D. anterior chamber, O.D. Macular hold, rear of retina, ?O.D. Disc Pallor, O.U. Refractive Error". He felt claimant's condition was medically stationary.

The claim was initially closed by a Determination Order, dated August 1, 1978, which awarded claimant temporary total disability compensation and compensation equal to 100% loss of the right eye.

In October 1978, Dr. L. L. Koorenny, an optometrist, reported the right eye was "dead" for all visual intent and had no chance of improvement of function. Dr. Koorenny, in August 1979, reported claimant had a dull ache in the right eye. He noted binocular vision was not possible and claimant

had no depth perception. He felt an affect of claimant's loss of stereoscopic function would reduce reading time and cause fine tasks of hand and eye coordination to be less functionally performed and would increase nervous tension under conditions of stress where eye use of maximum efficiency was necessary. Dr. Koorenny attributed a reduction of driving in snow, rain, and at night to the loss of usable vision in the right eye. In response to claimant's reported headaches, he felt these were attributable to either increased load of vision of one eye with more visual fatigue or possibly cranial scar tissue forming in the area where the blow to the head occurred. He could not attribute any alleged personality changes to claimant's loss of vision. He felt such activities as hunting, shooting and hiking would be restricted with the loss of vision and might cause some depression.

Claimant returned to work on January 3, 1978 for this employer and at the time of the hearing was still working as a loader operator. He said he can only read or watch television for short periods of time. Claimant indicates his eyes get irritated and he is more tempermental and moody. He says his eyes are sensitive to light and dust. He says he gets headaches. He can no longer hunt and does not drive at night. However, claimant is able to work full time and overtime when available. He works as many hours now as prior to his injury. Claimant has an 8th grade education and has worked mainly in sawmills and in logging. Claimant worked in the spring of 1978 as a mechanic.

The Referee found the evidence supported certain of claimant's problems in addition to the loss of acuity to the right eye and its accompanying loss of depth perception. Based on the evidence, the Referee found the unusual fatigue of the left eye, the irritability and sensitivity to light as well as the headaches and the dull ache of the right eye were conditions which resulted in claimant losing some of his wage earning capacity. Therefore, the Referee granted claimant an award of additional compensation equal to 32° for 10% unscheduled disability and granted claimant's attorney a fee out of the increased compensation.

BOARD ON DE NOVO REVIEW

The evidence in this case does not support the award granted by the Referee. In Russell v. SAIF, 281 Or 353, _____ P2d _____ (1978), the Supreme Court stated:

> "It appears, however, that certain of the sequelae such as irritability, nervousness, and headaches, if found to be a result of the injury to the eye, are just as compensable as the structural damage to the eye and the sequelae which are confined to the eye itself. The proper award for unscheduled disability should be determined by taking into consideration all sequelae established by the evidence."

The medical evidence in this case does not support claimant's contention that all of his complaints of headaches, moodiness, instability, sensitivity to light and dust, and limitations on reading and watching television are limited to his eye injury. The Board does not find Dr. Koorenny's, an optometrist, opinion that claimant's loss of eye sight reduces his ability to drive a car, hunt, hike and depression, to be persuasive. Claimant has been able to return to his former job and perform it in a satisfactory manner. He works at it full time and when necessary works overtime. He works just as much now as he did prior to this injury. The Board does not find claimant has lost any wage earning capacity because of this injury because the medical evidence does not causally relate his current complaints to that injury.

Even if the Board did not so find and if it had found claimant's complaints were related to his eye injury, it would still reverse the Referee's order. The Board finds the evidence in this case does not establish claimant has lost any of his wage earning capacity because of his injury and his current complaints. Therefore, it would still have reversed the Referee's order.

ORDER

The Referee's order, dated November 27, 1979, is reversed in its entirety.

The Determination Order dated August 1, 1978, is restored and affirmed.

CLAIM NO. BC 228414 June 20, 1980

JOHN L. HOLLENBECK, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury to his right leg on January 19, 1970 when he tripped over an air hose in the employer's shop. Claimant suffered a fracture of his right fibula and tibia. He also suffered comminuted fracture of the distal one/third of the tibia. On May 6, 1971, this claim was closed by a Determination Order which granted claimant compensation equal to 30 degrees for 20% partial loss of the right leg and no unscheduled disability. Claimant's aggravation rights have expired.

Claimant requested the Board, on April 22, 1980, to exercise its own motion jurisdiction and reopen his claim. The State Accident Insurance Fund (Fund) opposed reopening of this claim for time loss, but was unopposed to an order allowing an additional award if the Evaluation Division felt this was warranted. The Fund provided medical reports from Dr. Steele.

On April 17, 1980, Dr. Robert Steele opined that claimant's symptoms were not great enough to warrant surgical correction which would entail a tibial osteotomy. No additional medical treatment was indicated. He felt that claimant had a permanent physical impairment of the external rotational deformity which was causing increased wear in his ankle joint, would decrease his ability to walk on rough terrain, and perform running and jumping activities.

On May 2, 1980, Dr. Steele cited the development of degenerative arthritis in claimant's ankle with narrowing of the joint space and early osteophyte formation, as the major difference between Dr. Cooper's 1971 examination and his recent examination.

On May 22, 1980, the Board requested the Evaluation Division of the Workers' Compensation Department to review this case and make a recommendation on the extent of claimant's permanent partial disability.

The Evaluation Division, on June 3, 1980, recommended claimant be granted additional permanent partial disability compensation equal to 22.5 degrees for 15% loss of the right leg.

The Board concurs in this recommendation.

ORDER

Claimant is hereby granted an additional award of compensation equal to 22.5 degrees for 15% loss of the right leg.

WCB CASE NO. 80-3866 June 20, 1980
WCB CASE NO. 80-3867

ROBERT D. JOHNSON, CLAIMANT
Allan H. Coons, Claimant's Atty.
Keith D. Skelton, Employer's Atty.
Own Motion Order

Claimant sustained a compensable injury on September 23, 1972, to his back. The claim was initially closed by a Determination Order dated June 4, 1973, which granted an award of temporary total disability compensation and compensation equal to 32° for 10% unscheduled disability for his back injury. Claimant's aggravation rights have expired.

In October 1979, Dr. John Lott reported that on July 28, 1979, claimant had been picking up wet sawdust and experienced back pain. Dr. Smith, in December 1979, reported claimant had two previous lumbar laminectomies He felt claimant had continuing back and lower extremity pain probably related to post-operative changes associated with the two surgeries. Dr. Smith felt claimant's condition had worsened and that he was in need of hospitalization and a myelogram.

On January 9, 1980, a myelogram was performed. It was interpreted as revealing a shallow extradural defect at L4-5 on the right which was consistent with a surgical defect to an area of spondylosis. Dr. Smith concurred and felt claimant should be referred to an orthopedic surgeon for possible surgery.

Liberty Mutual (Liberty), on March 10, 1980, advised claimant his aggravation rights had expired and that claimant was entitled to continuing medical care.

Dr. N.J. Wilson, is April 1980, opined claimant's symptoms were related to mechanical low back instability, based upon degenerative disc disease and settling causing nerve root irritation. He felt claimant would benefit from a two-level fusion and scheduled it for May 9, 1980.

On April 22, 1980, claimant, by and through his attorney, requested a hearing on Liberty's de facto denial and alleged he was entitled to medical treatment, temporary total disability compensation, penalties and attorney fees for Liberty's delay and resistance. The date of the injury was alleged to be July 28, 1979. Also, on April 22, 1980, claimant, by and through his attorney, filed another request for hearing raising the de facto and written denial of March 10, 1980, contending claimants condition had become aggravated. A second request for hearing was filed on April 30, 1980 dealing with the March 10, 1980 denial.

On June 3, 1980, claimant's attorney advised the Board claimant had had surgery performed on May 9, 1980 and that May 5, 1980 was the last day he had worked. Claimant felt he should be receiving benefits at that time and requested his own motion application be remanded for a consolidated hearing on Liberty's denials. The Board has treated claimant's attorney's letter if May 1, 1980 as a request for own motion relief.

The Board finds that based on the evidence provided to it, it would be in the best interest of the parties if claimant's own motion request was consolidated with the two hearings pending in this case (WCB #80-3866, and #80-3867.)

The Referee shall decide if claimant's condition as a result of the September 19, 1972 injury has worsened or if claimant, on July 28, 1979, had suffered a new injury which is responsible for current condition. Upon the conclusion of the hearing, the Referee shall cause a transcript of the proceedings to be prepared and forwarded to the Board with his recommendation on claimant's own motion request. The Referee shall enter appropriate orders in the other cases.

IT IS SO ORDERED.

WCB CASE NO. 79-4549 June 20, 1980

RANDY L. JONES, CLAIMANT
Olson, Hittle, Gardner & Evans,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Claimant seeks Board review of the Referee's order which granted claimant an award of compensation equal to 5% scheduled disability for loss of his left knee, compensation equal to 5% unscheduled disability for injury to his right shoulder, this award being in addition to the 15% unscheduled disability award for injury to the low back, ordered the previous award of 15% unscheduled disability be for the injury to claimant's mid and low back, and granted claimant's attorney a fee out of the increased compensation granted by the order. Claimant contends he is entitled to an award of compensation equal to 25% scheduled disability for his left knee injury and an award of compensation equal to 40-50% unscheduled disability for his mid and low back and right shoulder injuries.

FACTS

The Board finds that the Referee correctly recited the facts in the Opinion and Order and would adopt them. A copy of the Referee's Opinion and Order is attached to this order.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, affirms the Referee's order. The Board finds the Referee correctly rated the total loss of wage earning capacity claimant has suffered. The Oregon Workers' Compensation Act is based on a rating of the whole man. In this case, the Referee distinguished or separated out the awards made for unscheduled disability for claimant's loss of wage earning capacity. The Board finds that such an approach is incorrect. The Referee should determine the total loss of wage earning capacity claimant suffered as a result of the injuries. In so doing, the Referee must consider the injuries to the various unscheduled body parts; having done so, he should then evaluate the loss of wage earning capacity resulting from the combined affects of the unscheduled injuries. In this case, the Board finds that the total loss of wage earning capacity as awarded by the Referee is accurate. Further, the Board finds that the award of scheduled disability in this case is also accurate. Therefore, the Board would affirm the Referee's order.

ORDER

The Referee's order, dated December 19, 1979, is affirmed.

WCB CASE NO. 77-1507 June 20, 1980

ESTHER LENOX, CLAIMANT
Rick McCormick, Emmons, Kyle,
Kropp & Kryger, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Order On Remand

This matter having come on for consideration of remand by the Workers' Compensation Board to Marilyn Nichols, Referee; claimant appearing by her attorney, Rick McCormick of Emmons, Kyle, Kropp, & Kryger and the State Accident Insurance Fund appearing by Larry Hall, of counsel.

And it appearing to the Board that through mistake or oversight a certain medical report of Stephen R. Jones, M.D., dated December 31, 1979, was omitted from the record of the hearing, and that the parties have represented to the Board that the above entitled matter should be remanded to the Referee for the inclusion of this report in the record and consideration thereof, by the Referee, and it further appearing that Larry Hall shall have the option of examining Stephen R. Jones, as to said medical report of December 31, 1979, and the Board being fully advised.

IT IS ORDERED that the records and files of the above matter be and the same are hereby remanded to Marilyn Nichols, Referee, for the purposes of admitting the report of Stephen R. Jones, M.D. dated December 31, 1979, as an exhibit in the record of the above matter. A copy of said medical report is attached hereto and made a part hereof.

IT IS FURTHER ORDERED that Larry Hall, counsel, shall advise Referee Nichols as to his option to examine Dr. Jones.

IT IS FURTHER ORDERED that Referee Nichols shall consider the report of Dr. Jones, dated December 31, 1979, and issue her final opinion and order herein.

CLAIM NO. C 237789 June 20, 1980

CHESTER L. MILLS, CLAIMANT
David A. Vinson, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On May 20, 1980, claimant by and through his attorney, requested the Board to exercise its own motion jurisdiction and reopen his claim for an injury sustained on March 31, 1970. Claimant's claim was originally closed by a Determination Order dated December 23, 1970, and his aggravation rights have expired. Attached to the request were medical reports in support of claimant's request.

On January 7, 1980, claimant underwent a C.T. scan of his skull which showed the presence of a left Frontal lesion. Claimant had suffered a depressed skull fracture in 1970 which required a surgery to relieve the pressure. An E.E.G. from this exam showed frequent seizure discharges eminating from that location. There was no evidence to support a theory that exposure to the job sprays were responsible for his seizure. Dr. Englander investigated the chemicals used and they were not responsible for causing seizures. Dr. Englander opined this was a post-traumatic seizure in that the abnormal discharges seen on the E.E.G. eminated from the area of claimant's previously known head injury and although ten years had elapsed since that injury, it was well described that post-traumatic seizures could begin that remotely, though it was more common for seizures to begin within the first one to four years.

Chart notes by Dr. Englander indicate a continuation of seizures. laimant is taking medication to aid in controlling the seizures.

On April 17, 1980, State Accident Insurance Fund (Fund) , informed laimant that his aggravation rights have expired and he should peti- ion the Workers' Compensation Board.

On June 3, 1980, Fund informed the Board they would not oppose an wn Motion Order claim for claimant's recent time loss.

The Board, after considering the evidence before it, concludes nat claimant has proved his condition has worsened. The Board finds laimant's worsened condition is related to his May 31, 1970 injury. ne Board remands this claim to the State Accident Insurance Fund as f January 6, 1980, for acceptance and payment of compensation and ther benefits provided for by law until the claim is closed pursuant o ORS 656.278.

Claimant's attorney is entitled to a reasonable attorney fee equal o 25% of the increased temporary total disability granted by this order, ayable out of said compensation as paid not to exceed $750.

IT IS SO ORDERED.

CLAIM NO. C 107629 June 20, 1980

ONNIE SAPP, CLAIMANT
AIF, Legal Services, Defense Atty.
wn Motion Order

On December 17, 1967, claimant sustained a compensable injury o his back. This claim was initially closed by a Determination rder and claimant's aggravation rights have expired.

Dr. Hubert Spady on November 29, 1979, reported that claimant as suffering from chronic low back problems dating back to an in- ury "in 1966 (sic)". He stated that claimant wished to have his laim reopened. He saw no contradiction to the interpretation that ne current condition was a continuation of the original condition. r. Spady prescribed a course of physical therapy and authorized ten ays of time loss at that time. On December 12, 1979, Dr. Spady au- norized additional time loss until January 1, 1980.

On November 29, 1979, Dr. Leroy Nickila, D.C., authorized the aimant to stay off work for the entire month of December 1979. He eported that he was treating claimant for a lumbar strain/sprain.

In April 1980, Dr. Spady reported claimant had a recurrence of his back pain with radiation into the right leg, and also tenderness of the greater trochanter. He indicated he injected this area with DepoMedrol.

On May 13, 1980 the Orthropedic Consultants reported claimant's condition was medically stationary. Claimant stated he continued to see Dr. Spady on an "as necessary" basis. He indicated he did not have any arrangements for return visits with Dr. Spady at that time. The Orthopedic Consultants reported that Dr. Spady had treated claimant with injections of cortisone approximately three weeks prior to their examination and recommened that claimant have an additional course of therapy. The Orthopedic Consultants felt claimant was not in need of additional treatment and was capable of performing some type of light work. It was their opinion that Dr. Spady's treatment was justifiable at the time. They found at the time of the examination claimant had no symptoms, his condition had improved and they felt the claim could be closed. They felt that claimant's low back symptoms were related to his injury of 1967.

The State Accident Insurance Fund on May 28, 1980, forewarded this file to the Board with the various medical reports attached. The Fund advised the Board it would not oppose an Own Motion Order reopening this claim for time loss from November 29, 1979 through January 1, 1980. The Board after reviewing all the evidence in this case concludes that this claim should be reopened as of November 29, 1979 per Dr. Spady's report. The Board finds the medical evidence is unclear whether or not claimant's condition is now stationary and whether the claim should be closed. Therefore, the Board orders this claim reopened as of November 29, 1979 and until closed pursuant to ORS 656.278: less time worked and or verified time loss due to this injury.

IT IS SO ORDERED.

WCB CASE NO. 79-199 June 20, 1980

GREGORY REID, CLAIMANT
Doblie, Bischoff & Murray,
Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order On Remand

On October 11, 1979, the Board issued an Order on Review in this case reversing the Referee's order. The Board affirmed the State Accident Insurance Fund's (Fund) denial of claimant's aggravation claim. The Referee, on April 12, 1979, reversed the Fund's denial and ordered it to reopen this claim as recommended by Dr. Maurer, and provide claimant benefits to which he was entitled and granted claimant's attorney a $800.00 attorney fee. This case was appealed to the Court of Appeals.

On February 25, 1980, the Court of Appeals in an opinion, reversed the Board's order and instructed it to reinstate the Referee's order. On May 30, 1980, the Judgment and Mandate in this case was filed.

The Board in accordance to the Court of Appeals' instructions, reverses its Order on Review and reinstates and affirms the Referee's order. No briefs were filed at the Board level, therefore no attorney fees awarded.

ORDER

The Board's Order on Review, dated October 11, 1979, is reversed. The Referee's order, dated April 12, 1979, is reinstated and affirmed and adopted.

WCB CASE NO. 77-3430 June 20, 1980

BERNETTA ROLL, CLAIMANT
Charles Paulson, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order On Remand

The Board having now received the Judgment and Mandate of the Court of Appeals, issued June 12, 1980 in the above entitled matter, and in compliance therewith Orders as follows.

The Order of the Workers' Compensation Board, dated September 28, 1979 is hereby withdrawn and held for naught, and

The Order of the Referee dated February 8, 1979 is hereby reinstated and the same is hereby adopted as the Board order herein

The petitioner, Bernetta Roll shall recover from Respondent, costs and disbursements in the Court of Appeals in the amount of $161.62, and in the further sum of $1000.00 as attorney's fees on appeal to said Court, all as ordered and mandated by the Court of Appeals.

WCB CASE NO. 79-2719 June 20, 1980

MARIE H. SPRATLEN, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Attys.
Gary D. Hull, Employer's Atty.
Request for Review by Employer

The employer seeks Board review of the Referee's order which granted claimant an award of compensation equal to 80° for 25% unscheduled disability for her low back injury. It contends this award is excessive and not supported by the evidence.

FACTS

The Board attaches a copy of the Referee's Opinion and Order to this order and thereby adopts the Referee's recital of the facts.

BOARD ON DE NOVO REVIEW

Based on these facts, the Board reaches a conclusion different from that of the Referee. Dr. Buza found minimal objective findings. The Orthopaedic Consultants rated the loss of function of claimant's back as mild, as did Dr. Anderson.

Claimant stated she is unable to perform any of the jobs she previously performed, such as drill press operator, secretarial and personnel duties, receptionist, waitress or reprint writer in a photographic shop. Claimant is 52 years old, has a high school education and one year of training in a business college. After her injury, claimant returned to work for this employer and worked there until May 18, 1978.

Mr. Gross reported claimant had turned down one job because of the pending hearing in this case. Claimant refused to take jobs which required evening (or swing shift) work. She also placed various restrictions on what she would and would not do. Mr. Green indicated claimant's job placement efforts were seriously hampered by her insistence that she find work in which she could spend most of her time walking. However, the medical evidence indicates claimant could perform secretarial work and does not restrict claimant to only "walking" types of employment.

Based on all the evidence, the Board finds the award of 25% unscheduled disability granted by the Referee is excessive. We conclude the medical evidence alone does not support this award. We further conclude claimant has "questionable" motivation to return to work. She has refused employment and has been very definite in what types of work she will and will not perform.

The Board does find claimant's back injury has resulted in a loss of wage earning capacity. The Board grants claimant an award of compensation equal to 48° for 15% unscheduled disability for her low back injury.

ORDER

The Referee's order, dated January 16, 1980, is modified.

Claimant is hereby granted compensation equal to 48° for 15% unscheduled disability for her back injury. This is in lieu of any previous awards for unscheduled disability claimant has been granted for this injury.

The remainder of the Referee's order is affirmed.

WCB CASE NO. 79-3612 June 20, 1980

JAMES EARL WILSON, CLAIMANT
Edward Olson, Claimant's Atty.
Eugene Buckle, Employer's Atty.
Amended Order On Review

On June 10, 1980 the Board issued its Order on Review in the above entitled matter.

The case was appealed to the Board by the employer on the issue of compensability and the Board affirmed the Referee's holding. Therefore, claimant's attorney was entitled to a reasonable attorney fee for prevailing at Board review, which was inadvertantly omitted in the original order.

ORDER

Claimant's attorney is hereby granted as and for a reasonable attorney fee for his services at Board review, the sum of $350, payable by the employer.

WCB CASE NO. 79-1641 JUNE 20, 1980

RICHARD L. WINE, CLAIMANT
Jerry Gastineau, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order

On April 18, 1980, the Board issued an Order on Review in this case. The Board approved the State Accident Insurance Fund's denial of claimant's claim. Claimant, on May 27, 1980, requested the Board reconsider its order. This request was not timely and therefore denied.

Claimant, on June 4, 1980, requested the Board suspend its rules and allow reconsideration of this case under the Board's own motion jurisdictsion.

The Board does not find claimant is entitled to own motion relief in this case. It does not feel that under the facts of this case it should exercise its own motion jurisdiction and reconsider this case. Therefore, claimant's request is denied.

IT IS SO ORDERED.

CLAIM NO. YA 583543 June 23, 1980

JERRY J. BOWEN, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

On November 26, 1956, claimant sustained a compensable injury to his right arm. This claim was initially closed by an order dated December 26, 1956 which awarded claimant temporary total disability compensation. Claimant's aggravation rights have expired.

On November 6, 1979, Dr. John Erkkila removed the plate and screws from claimant's right forearm, irrigated and debrided the area with removal of metallic corrosion debris. Dr. Erkkila felt claimant's treatment was related to the right forearm injury, which had occurred in 1956.

On December 10, 1979, claimant requested that his claim be reopened under the Boards own motion jurisdiction. He stated that he returned to work on December 10, 1979 and that he'd lost 23 days from work because of the surgery. He indicated that Dr. Erkkila warned him that a severe twisting injury or a severe blow to the arm could cause further damage.

The Board on February 8, 1980, reopened this claim effective the date Dr. Erkkila hospitalized him for surgery and until the claim was closed under ORS 656.278.

On December 3, 1979, Dr. Erkkila reported that he had released claimant to return to work on December 10, 1979.

In April 1980, Dr. Erkkila reported right-left wrist comparative range of motion findings which generally reflect loss of motion of the right wrist.

On May 1, 1980, the State Accident Insurance Fund requested the determination of claimants disability.

The Evaluation Division of the WCB on June 5, 1980 recommended that claimant be granted additional temporary total disability compensation from November 5, 1979 through December 9, 1979 and no additional permanent partial disability. They indicated that claimant's current examination was quite similar to that performed by Dr. Cooper in 1957. They felt that based on claimant's previous award of 60% scheduled disability for the right arm that no further increase of permanent partial disability was warranted.

The Board concurs with the recommendation of the Evaluation Division of the Workers' Compensation Department.

ORDER

Claimant is hereby granted an award of additional temporary total disability compensation from November 5, 1979 through December 9, 1979.

CLAIM NO. SC 288027 June 23, 1980

BESSIE BUSH, CLAIMANT
Pozzi, Wilson, Atchison, Kahn
& O'Leary, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On February 2, 1971, claimant sustained a compensable injury to her left knee. This claim was closed by a Determination Order, dated September 25, 1972, which granted claimant an award of temporary total disability and compensation equal to 45° for 30% loss of the left leg. The claim was subsequently reopened and then closed by a Second Determination Order, dated November 4, 1974, which granted claimant an additional award of temporary total disability and compensation equal to 45° for 30% loss of her left leg. Claimant's aggravation rights have expired.

In November 1978, claimant injured her left leg. She indicated her left knee gave out and she fell.

On August 8, 1979, claimant requested the Board reopen her claim under its own motion jurisdiction. The State Accident Fund opposed this request and asked that it be consolidated with a pending case before the Hearings Division.

On September 10, 1979, the Board remanded this case to the Hearings Division to be consolidated with WCB case No. 79-4222.

A hearing was held on March 26, and on June 3, 1980. The Referee issued an advisory opinion. The Referee recommended the Board reopen this case under its own motion jurisdiction.

The Board concurs with the Referee's recommendation and adopts it. A copy of the Referee's order is attached to this order and hereby made a part of this order. The Board orders this claim remanded to the State Accident Insurance Fund for acceptance and payment of compensations and other benefits provided for by law effective June 3, 1980, the date the Board found claimant's condition was not stationary, 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 temporary total disability granted by this order, payable out of said compensation as paid, not to exceed $750.00.

WCB CASE NO. 77-13 June 23, 1980

BARBARA A. CLARK, CLAIMANT
Warner E. Allen & Associates,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

The State Accident Insurance Fund (Fund) seeks Board review of the Referee's order which ordered it to accept claimant's aggravation claim, setting aside its denial; awarded claimant an amount equal to 25% of the temporary total disability compensation due and owing, as a penalty; awarded claimant an amount equal to 25% of the medical expenses related to claimant's aggravation claim as a penalty for its unreasonable resistance to payment of compensation and unreasonable delay in accepting or denying the claim; and awarded claimant's attorney a fee of $1,000. The Fund contends this was in error.

FACTS

Claimant was employed as a printer for Mt. Hood Community College and on March 16 and March 17, 1975 she lifted stacks of paper and again while attaching a spring loaded plate to a press experienced back pain. The claim was accepted as non-disabling, treatment was conservative, and the diagnosis was dorsal/lumbar subluxation and sprain.

In December 1975, claimant quit working for Mt. Hood Community College and took a printers job with the U.S. National Bank.

On February 27, 1976, claimant lifted card stock and again injured her back and her neck and filed her Form 801 on May 5, 1976 for this injury.

On March 17, 1976, Dr. Darrell Tyner reported claimant had a "reaggravation claim". He indicated claimant's current problems were the same as those for which Dr. Cannard had treated her. Claimant indicated she had injured her back on February 27, 1976 "lifting something heavy".

On September 5, 1978, Industrial Indemnity, the carrier for U.S. National Bank, wrote to the Workers' Compensation Department requesting a .307 order.

Dr. Theodore Pasquesi, in September 1978, reported claimant told him she had not completely recovered from the 1975 injury at the time of February 27, 1976 injury. He diagnosed persistent cervical, dorsal and lumbar instability with pain dating back to 1975 to an accident prior to the accident for which he was seeing claimant and from which she

had not completely recovered. He indicated claimant was still under treatment at the time of the February 27, 1976 injury. Dr. Pasquesi found her medically stationary and apportioned claimant's disability as 1/3 related to pre-existent scoliosis and mild degenerative changes, 1/3 to the 1975 injury and 1/3 to the 1976 injury. He rated claimant's total impairment as 10% of the whole man.

On September 18, 1978, the Fund's attorney wrote to the Workers' Compensation Department requesting no issuance of a .307 order as a hearing on aggravation versus new injury was already requested.

Claimant quit her employment with U.S. National Bank in May 1976 and moved to Washington.

In November 1978, Dr. Tyner stated he felt claimant's February 27, 1976 injury caused an aggravation of the March 1975 symptoms and a new injury to the left sacroiliac joint.

A disputed claim settlement, dated April 9, 1979, was entered into by claimant and her employer, U.S. National Bank. It provided claimant's claim for a neck, left hip and back injury on February 27, 1976 which had been denied, was settled for the sum of $2,500.

The Referee concluded all the evidence supported claimant's aggravation claim and remanded it to the Fund for acceptance and payment of compensation. Further, the Referee noted claimant had not requested penalties and attorney's fees and found the Fund's failure to timely accept or deny the claim was unreasonable resistance and refusal to process the claim and so he assessed penalties and attorney's fees.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, reverses the Referee's order in its entirety. The evidence in this case indicates claimant's first injury was accepted as a non-disabling claim. The claimant's second injury was, in the Board's view of the evidence, clearly a new and compensable injury, which resulted in claimant suffering disability. However, that claim was settled by a bona fide disputed claim settlement. This "new injury" clearly, under the last injurious exposure rule, would have made that employer responsible for the payment of compensation, medical care and treatment claimant receives for her back. The preponderance of the evidence does not establish that claimant had suffered an aggravation of her 1975 injury.

Further, the Board does not find claimant filed a true ggravation claim. The second or new injury caused claimant) be disabled and seek additional medical care and treatment. here being no claim for aggravation filed with the Fund, it ad nothing to accept or to deny. There is nothing in the acts of this case which give rise to the awarding of penal-ies and attorney's fees as the Referee did. Therefore, the oard reverses the Referee's order in its entirety.

RDER

The Referee's order, dated November 29, 1979, is reversed n its entirety.

WCB CASE NO. 78-8385 June 23, 1980

ANICE M. MASON, CLAIMANT
ozzi, Wilson, Atchison, Kahn
& O'Leary, Claimant's Attys.
erten & Saltveit, Employer's Attys.
equest for Review by Claimant
ross-appeal by Employer

Claimant and the employer seek Board review of the Referee's rder which approved the employer-carrier's denial of responsibility or additional medical care and treatment and performance of a yelogram after this claim was closed, and awarded claimant comp-nsation equal to 96 degrees for 30% unscheduled disability for her ow back injury. Claimant contends the employer-carrier is respon-ible for the doctor bills and medical expenses related to claimant's ospitalization following the Determination Order. The employer-arrier contends that the award of unscheduled disability is xcessive.

ACTS

Claimant, a 34-year old stapler with The Hervin Company, on ovember 30, 1977, injured her back when she fell backwards off a tool. Her injuries were first diagnosed as a probable fracture of he coccyx. Claimant was released to return to regular work on ecember 27, 1977. Claimant developed a back pain and this was re-ated to her fall off the stool. Dr. Daniel Risser diagnosed this ondition as a lumbosacral strain.

In March 1978, Dr. Stephen Thomas reported he felt at that ime that claimant should not be employed in a job requiring any ifting over five pounds; she should be able to sit or stand as equired and, she should not be required to perform any twisting otions. Claimant complained of pain in her back which radiated own the left leg into the buttocks and into the upper knee. She

indicated this pain is worse with coughing, sneezing or bending and with prolonged sitting or standing. On March 30, 1978, Dr. Thomas hospitalized claimant for a period of traction, daily diathermy and massage. He indicated that she had been employed in a dog food factory and was required to lift bags of dog food and twist which caused a re-exacerbation of pain and rendered claimant unable to work. X-rays revealed a mild scoliosis in the lumbar region.

In June 1978, claimant attended the Disability Prevention Center. Dr. R.P. Embick, medical examiner, reported claimant continued to complain of low back pain. The diagnosis was chronic lumbar strain, mild to moderate postural deficit, mild muscular deficit and probable left trochanteric bursitis. Dr. Embick did not feel claimant's condition was stationary. Dr. Monty Johnson, a psychologist, reported that claimant stated she had some emotional problems in the form of tension and worry because of the cumulative effect of a relatively recent divorce and the back injury. Dr. Johnson felt that claimant could be considered moderately emotionally disturbed and was showing evidence of a basically hysterical personality picture, possibly involving some conversion tendencies. He felt claimant was motivated to return to work. Dr. Halferty reported that in mid-July claimant indicated that the activities at the Center were aggravating her conditon and she was bothered by "migraines". He felt claimant's motivation was questionable. It was his feeling that claimant would not be able to return to her previous occupation, but could return to a modified occupation in the category of light to medium with the maximum lifting of 35 pounds and repetitive lifting of 15 pounds with moderate amounts of walking and standing. He indicated claimant was using a transcutaneous nerve stimulator and reported that she had good results in the reduction of her pain and elimination of muscle spasms.

On September 25, 1978, Dr. Thomas reported that he felt claimant's condition was medically stationary. He felt she could begin a job that required no lifting over five to ten pounds, no recurrent bending or stooping, and allowed her to sit as it became necessary.

Dr. Paul Blaylock, in early October 1978, reported that he would like to attempt a "therapeutic trials" before he released claimant to return to work. He started claimant on Motrin and requested permission to do a lumbar myelogram to rule out the possibility of a pinched nerve or ruptured disc. Dr. Thomas in response to this recommended strongly against a myelogram because people with claimant's psychological make-up have a greater risk of complications. He also recommended against any considerations for surgical procedures at that time. He considered her condition medically stationary as of September 20, 1978.

On October 16, 1978, Dr. Thomas reported that claimant had returned to his office with recurrence of her problems. He asked that the claim be reopened. He indicated claimant had taken a job as a waitress and worked only three days before her pain had become severe. He felt claimant's pain was the same as she had previously and felt that she would benefit from referral to the Pain Clinic at Emanuel Hospital.

Dr. Blaylock reported on October 24, 1978, that he felt claimant probably does merit a myelogram and E.M.G. to rule out the possibility that she could have a herniated disc. Claimant has agreed to undergo the procedure and has been scheduled into the hospital.

On October 26, 1978, the carrier corresponded with Dr. Blaylock informing him that claimant's treating physician Dr. Thomas opposed the myelogram. The carrier informed claimant by letter that Dr. Thomas recommended she be seen in consultation and they advised her the dates of the appointments. Also informed claimant that Dr. Thomas recommended very strongly that a myelogram not be done until after the examination by Orthopaedic Consultants and Dr. Quan.

The claim was initially closed by a Determination Order, dated October 27, 1978, which awarded claimant temporary total disability compensation and compensation equal to 16 degrees for 5% unscheduled disability for her back injury.

On January 12, 1979, Dr. Thomas reported claimant had been working for approximately two weeks as a bartender. There was no specific incident but claimant felt she had re-exacerbated her symptoms.

Claimant was admitted to the hospital for physical therapy and traction. Dr. Thomas reviewed the April 1978, EMG and reported it was negative. He said if claimant didn't improve he would consider another EMG.

Dr. Arlan Quan, a psychiatrist, opined January 16, 1979, that claimant had a mixed personality disorder with passive-dependent hysterical features with associated anxiety and sematic preoccupation. He felt that claimant clearly had a pre-existing psychiatric disorder. The situational and marital stresses seemed to be the primary difficulty. Her low back pain played only a minor part in the mild increase of psychiatric problems. She over dramatized her physical difficulties. She may benefit from counseling. Her psychiatric problems would not preclude her from performing gainful employment.

On January 22, 1979, Orthopaedic Consultants opined claimant was stationary and her claim should be closed. They diagnosed a chronic lumbosacral strain, severe functional overlay, conversion type, and obesity. They felt that any further treatment or hospitalization was not necessary. Claimant could return to work to her same occupation without limitations. The total loss of function of the back was rated as minimum with the total loss due to this injury also rated as minimum.

Dr. Blaylock reported on February 9, 1979, that claimant was admitted to the hospital because of an acute exacerbation of her back symptoms. He opined that claimant did not have a neurological problem and he felt she had a psychological problem with her pain. There were no objective findings to support her complaints. Dr. Blaylock recommended that claimant be rehospitalized for a myelogram to rule out a possible disc lesion.

On February 22, 1979, the carrier reported to Dr. Berkeley that they received his neurological consultation notes regarding the claimant dated February 8, 1979 and inquired who referred the claimant to his office. They informed Dr. Berkeley that claimant had been seen by several doctors in the past fourteen months. Most recently at carrier's request claimant was examined by Orthopaedic Consultants who concluded that claimant was stationary. Claimant's treating physician, Dr. Thomas, concurs. The carrier apparently enclosed a copy of Dr. Quan's report to Dr. Berkeley.

Dr. Berkeley reported to the claimant's attorney on February 23, 1979, that claimant's symptoms were severe and a myelogram with a view towards surgery was recommended. On February 27, 1979, Dr. Berkeley reported claimant had been hospitalized because of increasing low back pain and left sciatic pain paresthesia of the left leg and foot. On February 28, 1979, claimant underwent a myelogram. Dr. Berkeley considered the myelogram normal. His final diagnosis was a chronic lumbar strain. The bill for this hospitalization was $1,827.50. Other medical bills unrelated to this procedure were also entered into the record.

On March 9, 1979, Dr. Berkeley reported to the carrier that claimant came to see him on her own accord. He stated that he read the Orthopaedic Consultants' report and Dr. Quan's report and differs with them on the basis that claimant had further deterioration since the examination took place.

At the hearing, claimant testified that she had worked as a cabinet maker and worked for a dog food manufacturer. She felt she could no longer tolerate standing or sitting for a long period of time, but felt that she could be retrained to be a secretary because she would be able to get up and move around. She indicated she currently uses pain pills and tranquilizers. She stated she is unable to sit through an entire movie. She said she no longer does the prescribed exercise programs because they hurt her. She testified that Dr. Berkeley had told her that the insurance company had not authorized the myelogram and, in effect, had told her the matter of payment could be resolved at a hearing pending before the Workers' Compensation Board's Hearing Division.

The Referee found that the employer-carrier's issue about not being responsible for certain medical expenses could be raised at a hearing especially when claimant had raised that issue. The Referee was of the opinion that the evidence did not indicate that the claim should be reopened on the theory that the claimant was not stationary at the time of claim closure or that she had subsequently become non-medically stationary. The Referee felt the evidence indicated a very serious question whether Dr. Berkeley's hospitalization and myelogram were reasonable and necessary. Based upon the totality of the evidence, the Referee was of the opinion that neither Dr. Berkeley's treatment of claimant nor her hospitalization expenses were reasonable or necessary.

As far as claimant's loss of wage earning capacity in this case, the Referee found that the claimant could return to a modified job with no lifting over approximately five to ten pounds, with no recurrent bending or stooping and that would enable her to sit if necessary. It was noted that claimant could not return to her regular work. The Referee found claimant's pre-existing psychological problems were materially involved in the rating of claimant's disability. Based upon claimant's removal from the type of work and the consequences of her low back strain, he placed a loss of wage earning capacity of 30% unscheduled disability and granted an award to that amount. The Referee ordered that Dr. Berkeley's medical expense and the hospitalization expense (February 27, 1979, to March 7, 1979) of claimant by him was not necessary and was not the responsibility of the employer.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, modifies the Referee's order. ORS 656.283 (1) provides that any party may request a hearing at any time on any question concerning a claim. The Board concurs with the Referee that the employer in this case has the right to raise its contention that it was not responsible for these medical expenses at the hearing, especially since claimant had also raised that same issue. The Board concurs with the REferee's finding that Dr. Berkeley's medical expense and hospitalization expense (for the period from February 27, 1979, and until March 7, 1979) was not reasonable or necessary and is not the responsibility of this employer. Dr. Thomas and the Orthopaedic Consultants both opined claimant was not in need of any further treatment in early 1979 and it was specifically found that it was contra indicated that claimant undergo a myelogram. The performance of medical services which are and may be unnecessary is not authorized under the Workers' Compensation Department's rules. The Board, in this case, finds that the preponderance of the evidence establishes that Dr. Berkeley's treatment and hospitalization in February to March 1979 was not reasonable or necessary, therefore, is not the responsibility of this employer-carrier.

Further, the Board finds that the Referee's award of unscheduled disability in this case is excessive. The Orthopaedic Consultants opined that due to claimant's injury in this case, she had suffered minimal impairment of her low back. Dr. Thomas released claimant to work requiring no lifting over five or ten pounds, no recurrent bending or stooping, and enabling claimant to sit and stand as she felt necessary. Dr. Halferty felt claimant could return to a modified occupation and placed a lifting maximum of 35 pounds on claimant and repetitive lifting limit of 15 pounds on her. He felt claimant could be employed in a job which had moderate walking and standing.

Dr. Quan felt that claimant's injury played only a minor part in the increase of her psychiatric symptoms. Dr. Quan felt that the marital stress appeared to be the primary difficulty claimant was experiencing.

Claimant has the equivalency of a junior in high school education and has worked in a variety of jobs. The Board finds, after considering all the relevant factors in this case, that claimant has lost 20% of her wage earning capacity. Therefore, the Board grants claimant an award of compensation equal to 64 degrees for 20% unscheduled disability for the low back injury. This award is in lieu of the previous awards claimant has been granted.

ORDER

The Referee's order, dated April 30, 1979, is modified.

Claimant is hereby granted an award of compensation equal to 64 degrees for 20% unscheduled disability for the low back injury. This award is in lieu of any previous awards of unscheduled disability for this injury. The remainder of the Referee's order is affirmed.

WCB CASE NO. 77-2965 June 23, 1980

JOHN D. McCARTER, CLAIMANT
Robert A. Lucas, Claimant's Atty.
Souther, Spaulding, Kinsey, Williamson & Schwabe, Employer's Attys.
Order On Remand

The above entitled matter having been appealed to the Court of Appeals from an Order of the Workers' Compensation Board dated June 21, 1979,

And the Court of Appeals by Judgment and Mandate having reversed the Order of the Board and remanded the cause for further proceedings pursuant to the Court's decision and opinion rendered April 14, 1980.

Now therefore, in compliance with said Mandate and Order and the opinion of the Court, the Board hereby orders that its Order of June 21, 1979 be and the same is hereby withdrawn and held for naught, and the Opinion and Order of the Referee dated August 14, 1978, as amended and corrected on August 22, 1978 and amended and corrected on August 29, 1978, is affirmed and the same is ordered to be the Order of the Board.

It is further ORDERED that Crown Zellerbach Corporation (petitioner) recover from respondents in said Court of Appeals' proceeding, costs and disbursements in the amount of $212.00 as ordered by the Court.

WCB CASE NO. 79-9515 June 24, 1980
WCB CASE NO. 79-3364

BILLIE G. MATTHEWS, CLAIMANT
Thomas M. Evans, Claimant's Atty.
Scott M. Kelley, Employer's Atty.
Stipulation In Settlement

This stipulation pertains to both captioned claims as designated. The low back injury occurred on December 19, 1977, and the nose and neck injury occurred on October 17, 1978.

A hearing was held on the low back injury, being WCB Case No. 79-3364, and the claimant appealed the opinion and order of the referee on October 17, 1979, which matter is still pending.

The claimant made a request for hearing pertaining to his nose and neck injury and appealed from the determination order of October 10, 1979, contending, primarily, that he was entitled to an award of permenent partial disability. The referee in his opinion and order pretaining to the low back allowed no permanent partial disability, and the determination order of October 10, 1979 made no provision for permenent partial disability.

All issues pertaining to both claims have now been resolved ans settled as follows:

1. The claimant's appeal to the Workers' Compensation Board in WCB Case No. 793364 is to be dismissed, and the parties agree to such and request the Workers' Compensation Board to enter an order to that effect.

2. The claimant's request for hearing under WCB Case No. 79-9515 is to be dismissed, and the parties request the approval of this stipulation to such effect from the Hearings Division of the Workers' Compensation Board.

3. The claimant is to receive, in a lump sum, an award of ten per cent (10%) unscheduled disability for low back, upper back, and neck injury for both of the injuries, which is of the equivalent sum of TWO THOUSAND SEVEN HUNDRED TWENTY DOLLARS ($2,720).

4. Out of the foregoing sum of $2,720, there shall be deducted and paid to Olson, Hittle, Gardner & Evans, claimant's attorneys, the sum of $680.00.

The foregoing is agreed to by the undersigned this 12th day of May 1980.

THE FOREGOING SETTLEMENT STIPULATION IS APPROVED, the claimant's appeal to the Workers' Compensation Board in WCB Case No. 79-3364 is dismissed and claimant's request for hearing under WCB Case No. 79-9515 is dismissed based upon the stipulation entered into by the parties.

WCB CASE NO. 78-6810 June 25, 1980
WCB CASE NO. 79-7682

CECIL AUSTIN, CLAIMANT
Jolles, Sokol & Bernstein,
Claimant's Attys.
Schwabe, Willaimson, Wyatt, Moore
& Roberts, Employer's Attys.
Request for Review by Employer

The employer seeks Board review of the Referee's order, as amended, which granted claimant an award of additional compensation equal to 80° for 25% unscheduled disability for his back injury and granted claimant's attorney a fee out of this increased compensation. A Determination Order, dated August 29, 1979, granted claimant an award of temporary total disability and compensation equal to 48° for 15% unscheduled disability for his back injury. The employer contends the award of additional compensation is excessive.

FACTS

The Board adopts the facts as recited by the Referee and attaches a copy of his Opinion and Order.

BOARD ON DE NOVO REVIEW

Based on these same facts, the Board reaches a different conclusion from that of the Referee. The Referee's order is modified.

Claimant's injury was diagnosed as a low back strain for which he has received conservative treatment. Claimant is now 59 years old, has a 10th grade education, and has obtained a GED. Claimant has worked in the shipyards, loaded meat trucks, worked in a grocery store, and for 21 years has worked for Sunshine Dairy as a route driver-salesman. This job involved mainly route driving and delivery of milk. After this injury, claimant obtained his GED and completed a sales training program.

In July 1978, Dr. Waldram reported he did not feel claimant was capable of performing work requiring lifting over 25-30 pounds, repetitive bending, or heavy machinery driving. He felt claimant was capable of light to moderate work requiring a combination of sitting and walking. He felt claimant should not sit for longer than two hours at a time and not more than four to five hours in the course of a day. Claimant's disability was described as chronic back strain with some sciatic irritation.

The Orthopaedic Consultants, in November 1979, felt claimant's condition had changed since Dr. Waldram's report. They considered that the total loss of function of claimant's back due to this injury was in the range of "mild".

Claimant testified he has constant low back pain which periodically radiates down both of his legs. He still plays golf and bowls, but is limited on occasions because of back pain. He has difficulty remaining in position for prolonged periods of time.

Claimant is currently employed as a salesman for Portland Machinery. His son is the manager of this company. Claimant's job is renting mobile scaffolding. Other employees in claimant's job category are required to do some heavy lifting, but he is not. Claimant is paid on a salary basis.

The Board, after reviewing all of the evidence in this case, finds the award granted by the Referee is excessive. Since his injury, claimant has been retrained, re-employed, and is capable of performing his new job. Claimant is bright. The medical evidence indicates that claimant has a mild loss of function due

to this injury. Based on all the evidence, the Board finds claimant is entitled to an award of compensation equal to 80° for 25% unscheduled disability for his back injury. This is in lieu of all previous awards of unscheduled disability for this injury.

ORDER

The Referee's order, dated January 10, 1980, and as amended on January 23, 1980, is modified.

Claimant is hereby granted an award of compensation equal to 80° for 25% unscheduled disability for his back injury. This 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. 79-2395 June 25, 1980

JOE ROY FLOWERS, CLAIMANT
Alex Christy, Claimant's Atty.
Lang, Klein, Wolf, Smith, Griffith & Hallmark, Employer's Attys.
Request for Review by Employer
Cross-appeal by Claimant

The employer seeks Board review of that portion of the Referee's order which granted claimant additional compensation for 35% unscheduled disability. The employer contends the award is excessive.

Claimant cross-appeals contending he is permanently and totally disabled.

FACTS

For a recital of the facts, see the Referee's Opinion and Order, a copy of which is attached to this order. The Board finds the facts as recited by the Referee are correct.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, modifies the Referee's order.

Claimant is now 47 years old and has a ninth grade education. He has previous work experience as a truck driver, machine operator, A-frame crane operator, engine and machine mechanic and physically handling steel. He has experience as a supervisor and was a member of the U.S. Army Reserves.

Claimant enrolled in a vocational rehabilitation program where he learned skills as a machinist. Claimant received additional training as a machinist at Tektronix at his own expense. Upon completion of the Tektronix program claimant qualified for employment at Tektronix but had to be able to lift 50 pounds repetitively. He felt that he could and requested his doctor to ease his lifting restrictions. Dr. Keizer, claimant's primary treating physician, would not change the lifting restrictions because of the high risk of aggravating claimant's back condition. Claimant contends that he is permanently and totally disabled with Dr. Keizer's physical restrictions. The claimant, in his testimony, relates subjective symptoms which he claims materially affect his ability to function. He claims his activities are restricted to the extent that he is unable to engage in any sustained employment at a gainful occupation which is either suitable or for which he is trained.

The preponderance of the medical evidence indicates claimant has the physical capacity to be gainfully employed; the reports from the Callahan Center are persuasive in that regard. Dr. Keizer concurred with the Center's assessment of the claimant's physical limitations.

The employer submitted surveillance films into the evidence. These films recorded observations of claimant engaged in various activities that required repetitive bending, stooping, twisting and lifting. Although the Board does not find the surveillance films determinative on the issue of claimant's loss of wage earning capacity, it does find the activities the claimant is depicted performing are indicative of physical capabilities beyond the limitations recited by the claimant. The activities depicted are closer to the physical capabilities supported by the greater weight of the medical evidence than to the limitations testified to by the claimant.

The Board finds the claimant failed to prove by a preponderance of the evidence that he is permanently and totally disabled.

The Board finds the claimant has proved only a partial loss of wage earning capacity which in this case entitles him to an award of compensation equal to 48° for 15% unscheduled disability for his low back injury.

ORDER

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

Claimant is hereby granted an award equal to 48° for 15% unscheduled disability for his low back. This award is in lieu of the unscheduled award granted by the Referee's order.

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

WCB CASE NO. 79-1408 June 25, 1980

JEANETTE GRIMALDI, CLAIMANT
Green & Griswold, Claimant's Attys.
Schwabe, Willaimson, Wyatt, Moore & Roberts, Employer's Attys.
Order Of Dismissal

A request for review, having been duly filed with the Workmen's Compensation Board in the above-entitled matter by the claimant, and 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. 79-6256 June 25, 1980

FRED L. HOLMQUIST, CLAIMANT
Bischoff, Murray & Strooband, Claimant's Attys.
R. Ray Heysell, Employer's Atty.
Request for Review by Claimant

Claimant seeks Board review of the Referee's order which affirmed the Determination Order, dated July 6, 1979, which gratned claimant temporary total disability only.

FACTS

The Board adopts the facts as recited in the Referee's order, a copy of which is attached to this order and made a part hereof.

BOARD ON DE NOVO REVIEW

Based on the facts of this case, the Board modifies the Referee's order. The Board agrees with the Referee that claimant's testimony concerning the work activity he can or cannot do is questionable. However, Dr. Woolpert doubted claimant was going to be capable of steady work activity because of the chronic dorsal strain as well as the degenerative joint disease of his back. He felt claimant should engage in lighter work.

Dr. Matthews felt claimant could perform light to moderate types of work. He felt claimant could probably perform his regular work as a forklift operator. However, Dr. Matthews felt it would be desireable if cliamant limited his work activity to lighter work.

In May 1979, Dr. Woolpert reported claimant had localized tenderness, a moderate amount of back deformity, and good range of back motion. He felt claimant could return to work and placed work restrictions on claimant of no lifting over 50 pounds, no repetitive lifting over 30 pounds, elimination of repetitive bending or working in a prolonged bent-over position.

Dr. Woolpert rated claimant's permanent partial disability as in the mildly moderate range.

The Board concludes, based on all of the evidence, that claimant has lost some wage earning capacity. This conclusion is based on evidence of medically supported restrictions on claimant's work capacity. Therefore, the Board grants claimant an award of compensation equal to 32 degrees for 10% for his back injury. Claimant's attorney is granted a fee equal to 25% of this increased compensation not to exceed $3,000.

ORDER

The Referee's order, dated January 14, 1980, is modified.

Claimant is hereby granted an award of 32 degrees for 10% unscheduled disability.

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

WCB CASE NO. 78-9826 June 25, 1980

IRENE V. PENIFOLD, CLAIMANT
Malagon & Yates, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Order On Reconsideration

On June 18, 1980, claimant, by and through her attorney, requested that the Board reconsider its Order on Review, dated May 16, 1980. The Board has already thoroughly reconsidered this case as a result of an earlier request for reconsideration from the claimant. The Board's position is unchanged and its Order on Review should be affirmed. Claimant's appeal rights will continue to run from the date of the June 13, 1980 Order on Reconsideration.

IT IS SO ORDERED.

WCB CASE NO. 79-3617 June 25, 1980

ALBERT F. STEWART, CLAIMANT
Ricardson, Murphy & Nelson, Claimant's Attys.
Lang, Klein, Wolf, Smith, Griffith & Hallmark, Employer's Attys.
Request for Review by Employer

The employer seeks review of the Referee's order which awarded claimant permanent total disability. The employer, Raygo Wagner, Inc., contends that this award is excessive.

FACTS

Claimant, now 54 years old, was employed with Raygo Wagner, Inc. as a mechanic in its heavy equipment manufacturing plant. On August 25, 1975 the claimant suffered a compensable injury to his right shoulder when the wrench he was using slipped loose causing him to fall.

On August 26, 1975, Dr. Mueller, diagnosed a ruptured rotator cuff of the right shoulder. Claimant did not improve with conservative treatment so on December 5, 1975 Dr. Mueller performed an arthroplasty of the right shoulder with repair of the torn rotator cuff.

Claimant returned to work on July 12, 1976, and worked till August 10, 1976; he left work that day because of pain. Dr. Mueller opined that claimant would not be able to return to his former work and that claimant should consider vocational rehabilitation.

Claimant received notice of referral for Vocational Rehabilitation after Dr. Logan released him to return to regular work on November 22, 1976. Vocational Rehabilitation withdrew the referral because claimant had returned to his previous job.

On April 1, 1977, claimant experienced severe low back discomfort at Raygo Wagner coincidental to a bending movement. On April 8, 1977, Dr. Mueller diagnosed lumbosacral strain and recommended claim closure with minimal back impairment.

On August 16, 1977, Dr. Mueller reported claimant had been working regularly but has been experiencing pain in both shoulders. Dr. Mueller took claimant off work again as of August 15, 1977, for treatment of his shoulders. He opined claimant should be trained for light work and if this were not done claimant could become permanently totally disabled.

A Determination Order, dated January 12, 1978, awarded claimant temporary total disability from April 4, 1977 through May 22, 1977 and 5% disability for his April 1977 injury.

On May 9, 1978, Dr. Mueller, reported claimant was not able to work. He recommended claim closure with moderate permanent partial impairment of the right shoulder. He said claimant was not able to work due to a number of physical complaints and findings including limitations of the left shoulder and chronic low back strain.

A Second Determination Order awarded claimant temporary total disability from August 25, 1975 through May 9, 1978, less time worked, (medically stationary December 13, 1976 and non-medically stationary January 15, 1977) and 30% unscheduled disability.

In August 1977 vocational rehabilitation services were again offered to claimant, but referral was again withdrawn because claimant refused the services. He had poor attendance in the program and later advised that he would be returning to his former employer. Efforts by the Field Services Division were unsuccessful.

On March 30, 1979, an administrative Determination Order granted temporary total disability from December 18, 1978 through January 23, 1979. A re-determination awarded 144° for 45% unscheduled disability in lieu of that granted by the Determination Order, dated June 23, 1978.

On May 1, 1979, Dr. Mueller reported to the Vocational Rehabilitation Division that claimant appeared to be "genuinely" disabled from any type of active work.

On June 8, 1979, Dr. Colbach, a psychiatrist, evaluated claimant. Dr. Colbach reported claimant left no doubt that he had no intention to return to the work force. Claimant displayed a great deal of pain but Dr. Colbach felt it was intended to convince him of claimant's distress. Claimant was taking strong narcotic medication and was possibly dependent on them. Dr. Colbach recommended the Pain Center to help claimant with his pain. Claimant was not "too enthusiastic" about referral to the Pain Center.

Dr. David Rollins, a Vocational Services Consultant, reported on August 22, 1979 that claimant had acquired some meaningful work skills over a period of several years and still possessed a potential for employability despite a number of obvious limitations. Claimant focused on his residual incapacities. Claimant directs his effort towards qualifying for compensation programs rather than re-establishing himself in the job market. If claimant were committed he could return to the work force in certain light or sedentary type jobs. Dr. Rollins was deposed on October 11, 1979 and said claimant had good mechanical abilities and aptitudes. He could qualify for about fifty different types of job descriptions within the private sector of employment. There were training programs available designed specifically for people like claimant who have physical disabilities and educational limitations.

On October 11, 1979, Ms. Katherine Bennett, a rehabilitation consultant, reported she contacted claimant for an evaluation as requested by the Field Services Division of the Workers' Compensation Department. Claimant indicated to her some question as to whether this evaluation would be beneficial to him. Claimant informed Ms. Bennett he had experienced physical pain and difficulty in concentration while attending the St. Vincent rehabilitation program. Ms. Bennett contacted claimant's attorney and she reported he had confirmed that he advised claimant against meeting with her. (Claimant's attorney subsequently submitted a letter to the Referee clarifying that he had advised Ms. Bennett that he believed her efforts would be futile, nonetheless, he did not advise claimant not to meet with her.)

On October 19, 1979, the Orthopaedic Consultants opined claimant was stationary from an orthopedic standpoint. Claimant could not go back to the same occupation even with limitations. He could do sedentary type jobs. He would need vocational assistance to get some sort of employment. They rated claimant's disability of the back as mild and his disability in both shoulders as mildly moderate.

Claimant testified he had a 6th grade education with no special training. He had several prior injuries and had always worked as a manual laborer.

The Referee found that claimant is permanently and totally disabled as of the date of his order. The Referee erroneously refers to Dr. Rollins (Ph.D. Vocational Services Consultant) as a psychologist. The Referee found, even though claimant made some concessions to Dr. Rollins, there was no convincing evidence that Dr. Mueller is not correct in his opinion that claimant is genuinely disabled.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, reverses the Referee's award of permanent total disability. The medical evidence alone does not establish that claimant is permanently and totally disabled. The consensus of all the doctors is that if claimant could receive vocational assistance for retraining in a light duty or sedentary type job he could return to gainful employment. The evidence indicates claimant has not fully cooperated with the vocational specialists and has refused to participate in the vocational rehabilitation effort. The rehabilitation specialists' reports indicate that claimant is not motivated to work. Further, the evidence indicates claimant has not shown that he is willing to seek gainful employment and that he has not made reasonable effort to obtain such employment. The Board does not find that the residuals of claimant's injuries are so severe that he can be excused from his obligation to reduce the disabling affect of his injury not withstanding other relevant factors such as his age (54 years of age),6th grade education, and his work history in heavy manual labor. Therefore, the Board reverses the Referee's finding that claimant is permanently and totally disabled.

However, based on the same evidence, the Board finds claimant is entitled to 240° for 75% unscheduled disability for his low back and shoulder injuries. This award is in lieu of and not in addition to all previous awards for unscheduled disability awarded claimant for his August 25, 1975 injury.

ORDER

The order of the Referee, dated December 7, 1979, is modified.

Claimant is hereby granted an award equal to 240° for 75% unscheduled disability for injury to his back sustained on August 25, 1975. This award is in lieu of all other awards claimant has been granted for his August 1975 injury.

The remainder of the Referee's order is affirmed.

WCB CASE NO. 77-5741 June 25, 1980

DALE R. THENNES, CLAIMANT
Allan H. Coons, Claimant's Atty.
Keith D. Skelton, Employer's Atty.
Order Of Dismissal

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

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

WCB CASE NO. 79-3147 June 25, 1980

LARRY E. VANCE, CLAIMANT
Dennis M. Odman, Claimant's Atty.
Schwabe, Williamson, Wyatt, Moore & Roberts, Employer's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On May 23, 1980, claimant, by and through his attorney, requested the Board exercise its own motion jurisdiction with respect to a claim against Liberty Mutual Insurance Company (Liberty) and combine this case with the claim against the State Accident Insurance Fund (Fund) which is already pending before the Hearings Division. The issues to be decided were: 1) whether Liberty should be responsible for claimant's condition resulting in hospitalization for a protruded disc and neurolysis, 2) further medical care and treatment, 3) additional temporary total disability, 4) attorney fees, and 5) additional permanent partial disability if claimant is found to be medically stationary.

On May 29, 1980, the Board advised the Fund and the attorney for Liberty of claimant's request and asked for their response. The Fund responded in favor of consolidating the matters for hearing. Liberty responded to the own motion request, forwarding a deposition of claimant, and objected to the Board's exercise of own motion as well as being involved in the hearing before the Referee.

The Board, after thoroughly considering the evidence before it, concludes that claimant's request for own motion relief should be consolidated with WCB Case No. 79-3147

presently set for hearing on July 8, 1980 before Referee Menashe. The Board directs that the Referee should make a determination as to which carrier is responsible for claimant's current condition or if either carrier is responsible. Upon conclusion of the hearing, the Referee shall cause a transcript to be forwarded to the Board together with his recommendation with respect to the Liberty Mutual case. An appealable Opinion and Order should be issued by the Referee disposing of the State Accident Insurance Fund case.

WCB CASE NO. 79-2581 June 26, 1980

LINDA WILSON, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Disputer Claim Settlement

WHEREAS, the above named claimant on or about September 19, 1977 was employed at Agripac whose insurance carrier was and is SAIF. At that time claimant sustained a compensable injury to her right knee which claim was accepted by the State Accidnet Insurance Fund and subsequently closed with a determination order allowing 5 percent permanent disability to the leg; and

WHEREAS, on or about March 16, 1979, the State Accident Insurance Fund entered its denial of claimant's back condition, which said back condition allegedly occurred as a result of her September 19, 1977 previous compensable injury; and

WHEREAS, the claimant duly filed an appeal from said denial; and

IT BEING THE CLAIMANT"S CONTENTION that as a result of her industrial injury she sustained injury to her low back which was treated by Dr. Herbert Freeman, chiropractic physician, and which physician says her low back is related to her industrial injury; and

IT IS THE DEFENDANT-CARRIER'S CONTENTION that the claimant did not injure her low back in the compensable injury of September 19, 1977; that there is no adequate medical information to verify the compensability since there was no mention of any back complaints for several months follwoing said industrial injury and that Dr. Freeman's report, when considered with all of the other medical reports, does not form a preponderance of the medical evidence and, therefore, the claim is not compensable; and

The parties being desirous of settling their differences in this matter DO HEREBY STIPULATE AND AGREE that the State Accident Insurance Fund will pay unto the claimant the sum of $500 in full and final settlement of this claim; IT BEING SPECIFICALLY UNDERSTOOD AND AGREED that by payment of said money that the State Accident Insurance Fund does not accept claimant's back condition as compensable and in fact it is stipulated by the claimant that the denial of March 16, 1979 shall remain in full force and effect; and

IT IS FURTHER HEREBY STIPULATED AND AGREED that claimant's attornty, J. David Kryger, shall receive as and for a reasonable attorney fee the sum of $loo, which said sum shall be a lien upon and payable out of the compensation payable to the claimant by the State Accident Insurance Fund; and

IT IS FURTHER STIPULATED AND AGREED that claimant's request for hearing shall be withdrawn and dismissed.

WCB CASE NO. 77-7194-SI June 27, 1980

TELEDYNE WAH CHANG
Lang, Klein, Wolf, Smith, Griffith & Hallmark, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Order On Review

On April 28, 1980, the Referee submitted a proposed order that the Determination Order, dated October 24, 1977, regarding the Second Injury Benefit Petition of Teledyne Wah Chang for the increased Workers' Compensation costs for the May 27, 1975 myocardial infarction suffered by Loy Conrad be set aside and that the petitioner be granted Second Injury Benefits as petitioned and which were consonant with the laws and regulations pertaining to such benefits.

FACTS

On May 27, 1975, Loy Conrad, claimant, suffered a myocardial infarction. He has a history of hypertensive vascular disease for which he had been treated for a number of years. The petitioner-employer, on September 14, 1977, filed a Request for Second Injury Relief. This request was denied on October 24, 1977. The denial was based on the employer's alleged failure to establish an obstacle for employment or re-employment or knowledge of the disability at the time of hiring, rehiring, or retention. On October 31, 1977, a Request for Hearing was filed on this denial.

A Determination Order, dated September 8, 1978, granted Loy Conrad an award of temporary total disability compensation for his May 27, 1975 myocardial infarction. No award was made for any permanent disability. This Determination Order was not appealed by either the employer or Loy Conrad. Therefore, it became a final order.

The parties stipulated that under the rules applicable to Second Injury Relief, Sections A, B, D, and E of Rule IV, criteria for eligibility, had been met. The sole issue left to be decided was the requirement under Rule IV(C) that there must have been a subsequent compensable injury that resulted in permanent disability or death. Specifically, the parties contested the issue of permanent disability as a result of the subsequent injury.

The Workers' Compensation Department took the position that the Determination Order had not awarded the injured worker any permanent disability and Rule IV(C) had not been met. Therefore, the employer was not entitled to Second Injury Relief as sought. It argued that it was that agency's duty to administer the Second Injury Relief program rather than the Board or the Referee's duty. It asked the Board to uphold the agency's interpretation of its rule. The Department also argued that to allow an employer to attack in a separate proceeding the issue of whether an injured worker had any permanent disability as a result of a second injury was not one of the purposes of the Second Injury program and only promulgated litigation.

The employer argued that Rule IV(C) requires a showing that permanent disability exists from the industrial injury. It contends that there is no requirement that such disability be shown through a Determination Order.

BOARD'S DECISION

After thoroughly reviewing the facts in this case, the Board does not adopt the Referee's recommendation and affirms the Second Injury Determination Order, dated October 24, 1977. There has not been any award of permanent disability granted in this case. No evidence of any handicap to re-employment has been presented.

The criteria to be used in determining if a second or subsequent injury results in any permanent disability is made by the Evaluation Division of the Workers' Compensation Department which determines the permanent disability, if any, which results from such injuries. The determination of

permanent disability should be based on the record submitted to the Evaluation Division. It should not be based on or established on evidence which is submitted outside the record. The Department has the duty and the responsibility to administer the Second Injury program. It has the duty and the responsibility to make the determination of whether or not the second or subsequent injury results in any permanent disability.

Therefore, the Board finds the determination by the Workers' Compensation Department under its rules that no permanent disability resulted from the subsequent injury in this case is conclusive. In this case no permanent disability was awarded because of the subsequent injury. The petitioner has failed to comply with Rule IV(C) and, therefore, is not entitled to Second Injury Relief as requested.

ORDER

The Referee's Proposed Order, dated April 28, 1980, is not approved.

The Second Injury Determination Order, dated October 24, 1977, is affirmed.

WCB CASE NO. 79-1194 June 27, 1980

WILLIAM R. CHURCH, CLAIMANT
C.H. Seagraves, Jr., Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

The State Accident Insurance Fund (Fund) seeks review by the Board of that portion of the Referee's order which found claimant permanently and totally disabled as of the date of the hearing.

FACTS

Claimant, 57 years of age, was employed as a milker by Five Star Dairy and on September 14, 1975 a cow pinned him against an iron rail.

The first medical report of record is a chart note of Dr. Kendall, dated January 16, 1976, indicating claimant's complaints were back pain which radiated into the right buttock and thigh. The diagnosis was chronic lumbosacral sprain.

On February 11, 1976, Dr. Tennyson examined and reported a diagnosis of lumbosacral strain with possible protruded L5-S1 disc.

On February 25, 1976, claimant underwent a cervical myelogram and lumbar myelogram. The cervical myelogram was normal but the lumbar myelogram showed a protruded disc.

On March 1, 1976, Dr. Tennyson performed a hemilaminectomy with disc excision surgery.

By May 1976, much functional overlay was noted and by July 1976 claimant's complaints were "strictly intermittent".

In October 1976, claimant was complaining of his condition being worse with leg, sacroiliac and back pain. A myelogram on October 26, 1976 revealed a herniated nucleous pulposis L4-5 on the right.

Claimant came under the care of Dr. James and on November 22, 1976 he performed a bilateral L4-S1 posteriolateral fusion and Dr. Tennyson performed a laminectomy.

Dr. James' chart note of July 1977 indicates claimant was doing well, wearing his back brace and had been doing some fishing. The doctor felt that claimant's psychological makeup would not allow him to improve quickly but the doctor felt claimant would slowly recover completely.

By late November or early December 1977, Dr. James found claimant's condition medically stationary and that he was capable of light employment with no prolonged sitting or standing and no heavy lifting over 20 pounds.

Dr. James didn't see claimant again until March 8, 1978. At that time claimant was found to be markedly overweight. The diagnosis was continued mechanical low back pain and postural low back pain secondary to poor muscle development and control. Dr. James believed claimant would never get back to work, nor would his pain improve until he lost weight.

A Determination Order, dated April 10, 1978, granted claimant compensation for temporary total disability and an award of 160° for 50% unscheduled low back disability.

A vocational rehabilitation summary of May 11, 1978 notes that claimant was drawing Social Security disability and claimant had indicated there was absolutely no way he could work for anyone else as he could only maintain one position for 20 minutes.

Claimant had a psychological evaluation by Dr. Taylor who diagnosed psychoneurotic psychophysiological reaction. Dr. Taylor said from a psychiatric point of view the prognosis for employment was negative and even if claimant's pain were to be overcome, "he would find other ways for his body to betray him".

Dr. James' chart note of June 7, 1978 indicates claimant returned and his physical examination was unchanged and he was medically stationary. It was noted claimant had been doing some yard work and fishing. The doctor recommended intensive vocational rehabilitation efforts be implemented.

A chart note of September 2, 1978 indicates that claimant looks better every time the doctor sees him. Claimant told Dr. James he was doing a lot of activities around home but said he hadn't found a job. The doctor felt he probably never would.

The December 4, 1978 chart note of Dr. James reported claimant's symptoms now were intermittent and vague. Claimant said he was walking long distances every day.

On May 29, 1979, Dr. Sloan reported claimant's employment was now limited to no lifting, stooping, prolonged sitting or standing.

Dr. Stipek, vocational rehabilitation specialist, reported on November 16, 1979, that it was his opinion that claimant was unemployable becuase of his back pain and his age.

Dr. James reported, on November 14, 1979, that claimant was obviously not doing his exercises and the doctor felt claimant would never work again, primarily on a functional basis. Claimant's physical impairment was minimal but he was precluded from heavy work. Claimant could perform "a lot of things" if he didn't lift over 15-20 pounds, sit over 20-30 minutes, stand in one place over 20-30 minutes and he should be able to do "a lot of walking". Claimant did have significant functional overlay.

Claimant has not worked nor sought any employment since this injury. He views himself as permanently and totally disabled. He has a ninth grade education with past work experience as a mechanics helper, foreman of a cabinet making department for a mobile home plant, dry waller and painter.

Claimant is partial owner of a truck stop gas station and restaurant and testified that he "drives up there" and spends sometimes 2-4 hours a day there as "therapy".

Claimant testified he must lie down at mid-day. He wears a back brace but takes no medication. He testified, contrary to the medical reports, that he could only walk one block and that the most he has walked was two blocks. He is not capable of doing yard work or work in his garden.

A vocational rehabilitation consultant, testified that claimant's learning ability was high average to above average and that with his physical limitations there were jobs claimant could perform.

The Referee found claimant has significant physical disability. He has had two back surgeries and medical evidence indicates he can only perform light or sedentary work, with activity restrictions. The Referee concluded that claimant was incapacitated from performing any gainful and regular occupation and granted him permanent total disability. The Referee also found claimant was not entitled to additional compensation for temporary total disability.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, would reverse the award granted by the Referee.

The Board finds that claimant has not sustained his burden of proving he is entitled to an award of permanent total disability. Claimant's treating physician, Dr. James, rated claimant's physical impairment as minimal, and felt he was physically capable of light work. Further, the claimant has not complied with the statutory requirement of ORS 656.206(3) and has not demonstrated any effort to seek employment.

It is true that Dr. James placed rather significant restrictions on claimant's activities, but the Board concludes that the award granted by the Determination Order of 50% unscheduled disability adequately compensates claimant for his loss of wage earning capacity by his preclusion from heavier types of employment.

ORDER

The order of the Referee, dated January 4, 1980, is modified.

That portion of the order which granted claimant an award of permanent total disability is reversed.

The Determination Order, dated April 10, 1978, is hereby affirmed.

The remainder of the Referee's order is affirmed.

WCB CASE NO. 79-3044 June 27, 1980

DAN A. HALTER, CLAIMANT
January Roeschlaub, Claimant's Atty.
Schwabe, Williamson, Wyatt, Moore
& Roberts, Employer's Attys.
Order On Reconsideration

On June 18, 1980, the employer, by and through their attorney, requested that the Board reconsider their Order on Review, dated June 17, 1980, whereby the employer's denial of claimant's claim was reversed. The employer requested the Board to address that portion of Olsen v. SAIF, 29 Or Ap 235, 562 P2d 1234 (1977), which causally connected the injury to the employment and its applicable relationship in this case.

The Board, after thoroughly reconsidering this case, concludes that their Order on Review should remain unchanged. The Board found that this case is similar to the case of Olsen; claimant was involved in activities condoned by and participated in by claimant's supervisor during a regular lunch break on the job site, i.e., competitive contests of strength, in the course of regular employment. The Board concludes their Order on Review should be affirmed.

ORDER

The Board's Order on Review, dated June 17, 1980, is hereby affirmed in its entirety.

CLAIM NO. C 401465 June 27, 1980

DAVID JEROME, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order & Determination

On June 20, 1980, the State Accident Insurance Fund advised the Board it would not oppose reopening claimant's claim under the Board's own motion jurisdiction for an injury sustained on October 17, 1972. Attached to the Fund's letter were several medical reports from Dr. Courogen.

On April 25, 1980, Dr. Courogen advised the Fund that he saw claimant on April 10 with complaints of increasing pain in the back and left leg similar to that which he had experienced many times in the past subsequent to his 1972 injury. He was admitted to the hospital for a period of bedrest, traction and physical therapy. Dr. Courogen related claimant's current condition to his earlier industrial

injury. On June 4, 1980, Dr. Courogen indicated that claimant's condition had improved "modestly" and he felt he was stationary as of May 10, 1980.

The Board, after consideration of the evidence before it, concludes that claimant's claim should be reopened as of the date he entered the hospital, April 10, 1980, and closed as of May 10, 1980, the date he was found to be medically stationary. Claimant is not entitled to any permanent partial disability as a result of this temporary worsening.

ORDER

Claimant is hereby granted temporary total disability compensation from April 10, 1980 through May 10, 1980.

WCB CASE NO. 79-6294 June 27, 1980

RANDY KIMBALL, CLAIMANT
Foss, Whitty & Roess, Claimant's Attys.
Lang, Klein, Wolf, Smith, Griffith
& Hallmark, Employer's Attys.
Request for Review by Employer

The employer seeks Board review of the Referee's order which referred the claim back to Employee Benefits Insurance Company (EBI) to accept the aggravation claim as compensable.

FACTS

The claimant is a 25-year-old man with an 11th grade education. He was employed with JBS Construction on July 20, 1978 laying pipe in trench when a load of gravel was dumped on him. Claimant did not return to work for JBS Construction after the date of the injury.

Claimant went to Dr. Donald Baker on July 21, 1978 who diagnosed multiple contusions. He reported diffused back pain, headaches, extremely painful and tender spine and paraspinous muscle groups.

Dr. Kenneth Freudenberg reported, on September 12, 1978, that claimant had a slowly resolving acute lumbosacral strain with possible annulus fibrosis tear, 5th lumbar disc.

Dr. Baker re-examined claimant on September 14, 1978 and found severe soft tissue contusions. He considered claimant disabled and unable to perform active regular duties.

The Orthopedic Consultants reported, on November 8, 1978, claimant had a chronic lumbosacral strain, by history; headaches resolved; cervical and dorsal strain, resolved. They felt his condition was probably stationary. He could return to the same kind of work he had been performing but with limitations on bending and lifting or if that didn't work out he should be retrained. He should continue to use his back brace. They rated the loss of function of claimant's back as minimal.

Claimant was released for regular work on November 2, 1978. On December 29, 1978, a Determination Order awarded temporary total disability from July 21, 1978 to November 27, 1978 and 16° for 5% unscheduled permanent partial disability.

Claimant then worked at R & C Construction as a framer for two days and was laid off when the regular employees arrived on the job from Seattle,Washington. He didn't have any difficulties doing the job for that short period of time.

Claimant testified he moved to Bend, Oregon and went to work for R & K Moulding Company as a laborer on the greenchain for about 3-1/2 weeks. He was then assigned to load box cars, which was too much for him. His back problem worsened from this type of work; he denied that any specific new injury had occurred.

Claimant went to Dr. Lyle Zurflueh, a chiropractor, who requested the claim be reopened during a trial course of treatment. He opined the recurrence of claimant's back problems were related to his job injury.

On July 25, 1979 the carrier issued a letter denying any further responsibilty.

Dr. Freudenberg reported, on August 21, 1979, he re-examined claimant on July 6, 1979 and found no objective change in his condition. He felt it had not substantially worsened since the claim was closed on December 29, 1978.

Dr. Charles McCrory, a chiropractor, reported on August 29, 1979 claimant was suffering from chronic lumbar, lumbosacral and right sacroiliac strain stemming from the industrial injury. He requested the claim be reopened.

At hearing Ms. Georgia McBride testified in behalf of the employer. She stated she had worked with claimant for about six to eight weeks on the greenchain at R & K Moulding Company. She said she observed claimant fall and land on the concrete floor. She said he also complained of hurting

his back. She said he was off work three days. She stated he returned to work and a few days later he was fired. She could not remember exact dates, but thought the fall occurred in January 1979. In February 1979, Ms. McBride was transferred to another department and no longer worked in the greenchain area.

Claimant stated he didn't recall ever working with Ms. McBride and that he didn't start work at R & K Moulding until the middle of March and he only worked ther two or three weeks. He said he never fell on that job and he never had any contact with Ms. McBride.

The employer paid temporary total diability from April 25, 1979 through July 3, 1979. A denial letter, dated July 25, 1979, declined to pay Dr. Zurfleuh's medical bills after May 9, 1979. Claimant moved back to Coos Bay and received treatment from Coos Chiropractic Clinic from July 2, 1979 through September 1979. These medical bills were also denied by the carrier.

The hearing was held open to receive the employment records from the employer to resolve the conflict in the testimony between claimant and Ms. McBride.

The Referee concluded, based on a letter, dated December 28, 1978, that Ms. McBride had been mistaken when she testified regarding the alleged "fall" claimant had at R & K Moulding. The documentary evidence established she had been transferred from the claimant's work area before he was employed, therefore the Referee rejected her testimony.

The Referee found the only medical testimony before him supported and aggravation claim. He referred the claim back to EBI for reopening and payment of compensation as authorized until closure pursuant to ORS 656.268. He also ordered the carrier to pay 25% penalties on temporary total disability due to claimant from January 3, 1979 to January 25, 1979 for failure to pay compensation for a period of 14 days before issuing the denial.

BOARD ON DE NOVO REVIEW

The Board does not find claimant experienced a new injury while employed by R & K Moulding. Claimant did not start work with that employer until the middle of March 1979 and denied falling. Ms. McBride stated she worked with claimant in December 1978 or January 1979 and saw him fall and injure his back. The Board agrees with the Referee that Ms. McBride was mistaken in her observation.

Dr. Smith, in May 1979, opined claimant's current condition was related to claimant's July 1978 injury and asked the claim be reopened. Dr. Zurflueh also related claimant's current

complaints to that injury. He felt claimant had never completely recovered from that injury. However, Dr. Freudenberg did not feel claimant's condition had substantially worsened since his claim was originally closed. Dr. McCrory also felt reopening of this claim was not warranted.

In order to prevail on his aggravation claim, claimant must show his condition, as related to the original injury, has worsened since the last award of arrangement of compensation for that injury. Only a worsening of the condition is required. It need not be a significant worsening. The Board finds that the preponderance of the evidence indicates claimant's condition has worsened since the last award or arrangement of compensation; in this case made by the December 29, 1978 Determination Order. His current condition is related to the original injury. Therefore, the Board would affirm the Referee's order.

ORDER

The Referee's order, dated January 10, 1980, is affirmed.

Claimant's attorney is hereby granted as a reasonable attorney's fee a sum equal to $300.00, payable by the employer and its carrier.

WCB CASE NO. 79-4684 June 27, 1980

MATTHEW M. LUKE, CLAIMANT
Pozzi, Wilson, Atchison, Kahn
& O'Leary, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

The State Accident Insurance Fund (Fund) seeks review by the Board of that portion of the Referee's order which found claimant's aggravation claim to be compensable.

FACTS

Claimant, 20 years of age, originally suffered a compensable injury when he twisted his left knee while employed on a survey crew on August 7, 1978. The claim was accepted and claimant was off work approximately three weeks. The claim was closed by a Determination Order of September 26, 1978 which granted him compensation for temporary total disability only.

On February 1, 1979, claimant contends his knee was aggravated while playing a game of intramural basketball at Oregon State University. On that day, claimant saw Dr. Sargent and gave a history of the original injury and the incident of February 1, 1979. Dr. Sargent diagnosed probable meniscal tear or some posterolateral capsule and/or possible lateral collateral ligament damage.

On February 14, 1979, claimant was examined by Dr. Cronk who reported claimant have a history of an injury in August 1978 and said he had had continuing intermittent difficulties with the knee. An arthrogram was performed and revealed a tear through the anterior horn of the left medial meniscus. Dr. Cronk requested that the carrier reopen the claim.

On April 16, 1979, Dr. Cronk reported to the carrier that the only reason he felt claimant's left knee problems were related to the original injury of August 1978 was based on the history given to him by the claimant, that he had had intermittent difficulties since that injury.

On May 3, 1979, the Fund issued its denial on the grounds that claimant's present problems were not the result of the August 7, 1978 industrial injury but were the result of the basketball injury of February 1, 1979.

By a report of October 19, 1979, Dr. Bert refused to give an opinion on the effect of claimant's playing basketball upon his original injury as he had not previously seen the claimant and had no way of judging the status of his knee at that time.

Claimant testified at the hearing that between September and December 1978 he had had occasional swelling of his knee and trouble climbing stairs. Claimant worked out on weight machines and played sports to help to strengthen the knee.

The Referee found that the medical report of Dr. Cronk establishes medical causation of the February 1979 incident resulting from the original injury of August 1978. The Referee found claimant to be credible and therefore remanded his claim for aggravation to the Fund for acceptance and the payment of benefits to which he was entitled.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, reverses the order of the Referee.

The Board finds the testimony of the claimant clearly indicates that the February 1, 1979 incident was a new injury. Claimant testified while playing basketball he heard a loud pop and he immediately experienced pain and swelling. Claimant further testified that this incident was much more severe than the injury of August 1978. Claimant further testified he would not have sought medical treatment in February without the basketball incident. Dr. Sargent examined claimant on February 1, 1979 and reported an injury of February 1, 1979.

If the February 1, 1979 incident had occurred during the course and scope of claimant's employment, the Board, under current law, would have found a new and subsequent intervening injury. The Board fails to find how any aggravation claim in this case could be established.

ORDER

The order of the Referee, dated January 10, 1980, is reversed.

The denial issued by the State Accident Insurance Fund, dated May 3, 1979, is affirmed.

WCB CASE NO. 79-611 June 27, 1980

EUNICE McMANAMA, CLAIMANT
Thomas E. Howser, Claimant's Atty.
Heysell, Velure & Pocock, Employer's Attys.
Request for Review by Claimant
Cross-request by Employer

The claimant seeks review and the employer cross-requests review by the Board of the order of the Referee which granted claimant compensation for temporary total disability from October 2, 1978 through March 31, 1979, set aside the denial and remanded the case to the employer/carrier for payment of psychiatric treatment, and affirmed the Determination Order with respect to permanent partial disability.

FACTS

Claimant, 57 years of age, was employed as a nurse's aide at Golden Age Nursing Home and on December 10, 1976 she strained her low back lifting a patient.

Dr. Griffin provided conservative care and released her for work on January 8, 1977 and on February 17, 1977 found her condition was medically stationary.

A Determination Order, of March 15, 1977, granted compensation for temporary total disability only.

Claimant was examined by Dr. Weinman on June 2, 1977 and he diagnosed lumbosacral strain aggravating some degenerative joint disease of the thoracolumbar junction, cervical strain, obesity, left carpal tunnel syndrome and questional interarticular loose body in the left hip. His treatment was by injections.

By August 1977 claimant had a left leg limp but Dr. Weinman, on August 31, indicated only the cervical and lumbar problems were related to this industrial injury.

By December 20, 1977, Dr. Weinman found all conditions had resolved and claimant was medically stationary with minimal loss of function.

On January 28, 1978, claimant was hospitalized and had a left hip arthrogram and a lumbar myelogram. The myelogram revealed a herniated nucleus pulposus at L5. On February 8, Dr. Weinman performed a hemilaminectomy at L5-S1 with L5-S1 disc excision.

On May 23, 1980, Dr. Campagna examined claimant whose complaints were low back pain, left leg pain and numbness of the left foot. Dr. Campagna found much functional overlay which clouded the organic picture.

On June 8, 1978, Dr. Campagna reported that EMG studies were abnormal and recommended a myelogram. Claimant's left leg and gait difficulties were on a functional basis. The doctor recommended psychiatric evaluation.

A myelogram of June 22 was entirely normal.

Claimant was evaluated by Dr. Shapiro, a psychiatrist, on June 28, 1978, who continued to have sessions with claimant through August. All of these sessions included conversations only about claimant's childhood, family problems and illnesses and friend's personal problems which upset her. On July 27, Dr. Shapiro found her medically stationary.

On September 25, 1978, Dr. Weinman found claimant's condition medically stationary with minimal low back disability and claimant could return to modified employment.

On October 17, 1978 Dr. Campagna indicated claimant's disability should be reinstated from October 1, 1978 through April 1, 1979 and he gave no reason for this opinion.

Claimant was evaluated by Dr. Gardner, a psychiatrist, on October 26, 1978. It was his opinion, after the interview, that claimant's emotional problems and nervousness were not injury-related nor aggravated thereby.

On November 27, 1978, the employer-carrier issued a denial of any psychological condition.

A Second Determination Order, dated November 30, 1978, granted claimant an award of 32° for 10% unscheduled low back disability.

Dr. McCook, a psychiatrist, reported on July 9, 1979, his diagnosis was reactive depression and he found claimant was both physically and mentally disabled from her employment.

Claimant has not worked nor looked for work since June 1978. She has a seventh grade education with past work experience in laundries and as a cook and waitress.

Claimant testified she has low back and left leg pain and can sit comfortably only 10 minutes, walk 8-10 blocks and since her surgery she limps. She takes one pain pill a week.

Claimant belongs to the Eagles and attends their functions three to four times a week. In June 1978 she was elected President of the Women's Auxiliary. The Eagles have dinners and claimant helps in food preparation and service. She worked in a concession booth at Shady Cove from 10 a.m. to 5 p.m. for the organization.

The Referee found palliative psychiatric treatment is covered by ORS 656.245 and the denial must be overturned. The Referee further found claimant was entitled to additional compensation for temporary total disability from October 2, 1978 through April 1, 1979 based upon the report of Dr. Campagna. The Referee found no merit whatever to claimant's contention that she is permanently and totally disabled and concluded that the award made by the Second Determination Order was adequate.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, reverses the order of the Referee.

On the issue of compensability of the psychiatric treatment, the Board finds that the treating psychiatrist, Dr. Shapiro, makes no mention of any causal relationship of claimant's emotional problems to the industrial injury. Dr. Gardner, another psychiatrist, also found no relationship of claimant's emotional problems to the industrial injury and, therefore, the Board affirms the employer-carrier's denial.

Regarding the issue of compensation for temporary total disability, the Board finds that in September 1978 claimant's treating physician, Dr. Weinman, found her condition to be medically stationary and released her for modified work. Dr. Campagna, in October 1978, indicates compensation should be reinstated without indicating any need for further medical services or giving any justification for that opinion. The Board concludes claimant is not entitled to further compensation for temporary total disability.

The Board concurs with the Referee that claimant is not permanently and totally disabled. However, the Board finds that the award of 10% granted by the Second Determination Order is inadequate. Based on claimant's age, her past work experiences in laundries and restaurants only, and the fact that she is now precluded from heavy employment of any kind and is limited to moderate work, constitutes greater loss of wage earning capacity than previously granted. The Board concludes claimant is entitled to an award of 64° for 20% unscheduled disability.

ORDER

The order of the Referee, dated November 21, 1979, is reversed.

The employer-carrier's denial of November 27, 1978 is affirmed.

Claimant is hereby granted an award of 64° for 20% unscheduled disability for her low back injury. This award is in lieu of all prior awards previously granted to claimant.

Claimant's attorney is granted as a reasonable attorney fee the 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. 78-6621 June 27, 1980

JUDITH MOATS, CLAIMANT
Welch, Bruun & Green, Claimant's Attys.
Schwabe, Willaimson, Wyatt, Moore & Roberts, Employer's Attys.
Request for Review by Claimant

Claimant seeks Board review of that portion of the Referee's order which affirmed the employer's denial of her claim. Claimant contends her employment caused a worsening of her underlying condition resulting in an increase in pain to the extent that produced disability and/or required medical services.

FACTS

Claimant was employed by Wilf's Restaurant as a waitress; this was her first work experience as a waitress. Claimant testified she had no prior medical problems but right after she commenced this employment her arms began to ache and by April 1978 the ache turned to pain and her arms became immobile.

Claimant testified that as a waitress she lifted trays about three feet long and at times served parties of 9 to 21 people. Claimant worked only during the lunch period which usually lasted 2-1/2 hours a day.

In April 1978, claimant sought medical treatment from Dr. Crumpacker who reported that electrical studies were compatible with bilateral carpal tunnel syndrome. On May 30, 1978 claimant filed her claim for an occupational disease arising out of her work as a waitress.

Claimant testified that her work required her to carry many plates of food together with cups and saucers which she had to lift and place on her shoulders. This loaded tray weighed approximately 30-35 pounds. Claimant indicated that she advised her employer on two occasions that she was having problems with her arms and was going to see a doctor about it.

The employer testified that he never saw claimant carrying a tray containing more than four salad plates. He denied that she ever complained to him of physical problems although he did note that she had been off work for several days. He said he terminated claimant on April 15 because he felt she would never become an efficient waitress.

Dr. Randall Gore, a diagnostician and internist, in June 1978, diagnosed tendinitis of the biceps as well as bilateral carpal tunnel syndrome. He had treated claimant with anti-inflammatory medication and heat. He reported these were not successful in resolving claimant's symptoms.

On July 14, 1978, the employer denied claimant's claim. The basis of their denial was the fact that claimant's work with this employer had in no way caused or aggravated her condition. It was their opinion that there was no medical evidence to substantiate claimant's claim.

In August 1978, Dr. Gore took exception to the employer's denial of this claim. He felt "any reputable physician would support the contention that repetitive lifting would have at least aggravated the problem". Later, in November 1978, in response to a letter from a claims representative, Dr. Gore reported that to his knowledge there was no evidence that claimant's condition existed prior to her repetitive lifting of trays, carrying the trays, and the performance of other tasks associated with her employment. He indicated that he could elicit no history of any activity other than employment related that could reasonably have caused claimant's problems. Therefore, he indicated he was forced to conclude that in all likelihood, claimant's activities as a waitress precipitated the carpal tunnel syndrome and biceps tendinitis.

Dr. Peter Nathan, in December 1978, diagnosed bilateral carpal tunnel syndrome and borderline sensory changes of the left ulnar nerve. He felt that although claimant's job had been one of carrying heavy trays, he doubted very strongly if the work itself was responsible for the onset of her problems. He indicated that the changes in her nerves would probably have become clinically manifested over a period of time whether or not she was employed as a waitress. Claimant told Dr. Nathan she had not performed this type of work before. She indicated that after performing it for a short period of time, she started experiencing a hurting and burning sensation. She indicated that she was unable to lift her arm and could not perform her job, so she quit work. Claimant also complained of inability to do her yardwork. Dr. Nathan reported that the muscle aches claimant was experiencing in her right upper extremity might be attributed to some abnormal scapular thoracic movement components as were ascertained during the physical and occupational therapy evaluation. He could not confirm whether this was a direct result of her employment. Claimant's grip strength was found to be six pounds less on the right than on the left. The range of motion of her right shoulder was within normal limits, however, there was pain and limitation of motion upon full flexion and adduction of the shoulder.

The Referee concluded based on the medical evidence that claimant suffered from an underlying carpal tunnel syndrome which was aggravated by her work experience. The Referee did not find any evidence which reflects claimant's work materially and permanently worsened her underlying condition and, therefore, the Referee concluded that claimant's condition was not compensable. This decision was based on the Court of Appeals' decision in Weller v. Union Carbide Corp., 35 Or App 355, _____ P2d _____ (1978). Therefore, the Referee affirmed the employer's denial.

BOARD ON DE NOVO REVIEW

Subsequent to the Referee's decision in this case and during the pendency of this appeal, the Oregon Court of Appeals' decision in Weller (supra.) has been reviewed and decided by the Oregon Supreme Court. In Weller (supra.) the Supreme Court stated that in order to prevail in a case with facts similar to the case herein an injured worker must prove by a preponderance of the evidence that (1) his work activity and condition (2) caused a worsening of his underlying disease (3) resulting in an increase in his pain (4) to the extent that it produces disability or requires medical services. In Stupfel v. Edward Hines Lumber Company, 288 Or 39, _____ P2d _____ (1979), the Supreme Court stated that if the increase in symptomatology requires medical services and results in disability, either temporary or permanent, the claim for such services for disability is compensable if the restrictions of Weller are satisfied. The Court stated that a permanent increase is not a pre-requisite to compensability.

The Board concurs with the Referee's finding that the medical evidence indicates that claimant, because of her work with this employer suffered an aggravation of her underlying carpal tunnel syndrome. The Board finds the underlying carpal tunnel syndrome has been aggravated to the extent that claimant required medical treatment. Based on the Supreme Court's rationale in Weller and Stupfel (supra.), the Board finds that this claim is compensable.

ORDER

The Referee's order, dated January 26, 1979, is reversed in its entirety.

The employer's denial, dated July 14, 1978, is reversed. This claim is remanded to the employer and its insurance carrier for payment of compensation and other benefits pursuant to law and until the claim is closed pursuant to ORS 656.268.

Claimant's attorney is granted as and for a reasonable attorney's fee for prevailing in overturning the denial of this claim a sum equal to $800.

WCB CASE NO. 78-6247 June 27, 1980

OLIVE H. MORRIS, CLAIMANT
Pozzi, Wilson, Atchison, Kahn
& O'Leary, Claimant's Attys.
Lang, Klein, Wolf, Smith, Griffith
& Hallmark, Employer's Attys.
Request for Review by Claimant

The claimant seeks review by the Board and the employer cross-requests review of the Referee's order which granted claimant compensation for temporary total disability from November 30, 1978 through December 19, 1978 and from April 19, 1979 through May 11, 1979 and an award of compensation for permanent partial disability equal to 75% unscheduled disability.

FACTS

The Board finds the facts as recited in the Referee's Opinion and Order are correct and hereby adopts them. A copy of the Referee's Opinion and Order is attached to this order.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, would modify the order of the Referee.

That portion of the order which awarded temporary total disability from November 30, 1978 through December 19, 1978 is reversed. The Board finds that claimant is not entitled to the additional compensation from November 30, 1978 through December 19, 1978 as the medical evidence does not indicate any worsening of her condition nor does it support a finding that she was disabled during this period of time. The Board agrees that claimant is entitled to compensation for temporary total disability for the time she was an in-patient at the Northwest Pain Center and affirms that portion of the order.

The Board affirms the Referee's award of 75% unscheduled disability for claimant's loss of wage earning capacity.

ORDER

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

That portion of the Referee's order which granted claimant compensation for temporary total disability from November 30, 1978 through December 19, 1978 is reversed.

The remainder of the Referee's order is affirmed.

This matter came on regularly for hearing on October 25, 1979 in Portland, Oregon before Nathan Ail, Referee. Claimant appeared with her attorney, Don Wilson and defendant was represented by Kenney Roberts. The matter was closed the same day.

Issues:

1. Claimant is dissatisfied with her Determination Order of July 20, 1978 which failed to increase prior awards for injury to the low back. She had been previously awarded a total of 50% for unscheduled injury to the low back. (Exhibits 21 and 23).

2. Additional temporary total disability benefits from May 31, 1978 through May 11, 1979.

Findings:

Claimant is 53 years of age with a ninth grade education. Her only work experience prior to injury was as a cook. She sustained a compensable injury to her low back on March 4, 1973 as a result of pulling on a heavy drawer. She returned to work and again reinjured her back several weeks later. She came under the care of Dr. Hauge, Orthopedist, who diagnosed lumbosacral sprain. As a consequence of the injury a laminectomy and discectomy, L5-S1, were performed in March, 1977 by Drs. Hauge and Tenabe, Neurosurgeon. After surgery, claimant experienced loss of sensation about her anus with some incontinence and urinary incontinence. (Exhibits 35, 36, and 37). Dr. Schwartz, Urologist, advised claimant suffered bladder carcinoma but the etiology of her neurogenic bladder was secondary to her earlier back surgeries; i.e., to disc disease with neurologic deficit secondary to pressure either due to the disc or to efforts surgically to correct that situation. (Exhibit 42).

Claimant was examined by Orthopaedic Consultants in May, 1978 who diagnosed:

1. Residual right S-1 nerve root deficit and radiculopathy.

2. Chronic lumbar strain.

They concluded she should not return to her former occupation, but could do light or sedentary work. She was considered stationary. (Exhibit 43).

Claimant was reexamined by Dr. Hauge in November, 1978. In addition to her back problems, he noted a marked weakness of dorsiflexion of the right foot. There was almost total inability to dorsiflex any of the toes. The right ankle jerk was absent. He rated disability as moderately severe. He did not believe she could do more than very light sedentary work in which she could

alternate sitting, standing, or moving about frequently. He doubted she could work a full eight hours even with those limitations. (Exhibit 46).

Claimant was seen for neurological consultation by Dr. Zivin in December, 1978. His impression was:

1. Chronic low back strain with residual pain and radicular impairment.

2. Generalized arteriosclerotic vascular disease with right carotid.

3. Chronic depression.

He opined claimant was medically stationary and her impairment was moderately severe as related to her low back condition. (Exhibit 48).

Claimant was admitted to the Northwest Pain Center in April, 1979. Dr. Seres concluded claimant saw herself as retired and any efforts at job rehabilitation would be unsuccessful. He opined she had significant disability and should avoid heavier forms of work activity. (Exhibit 51, page 12). The psychologist at the center opined claimant has average intellect. (Exhibit 51, page 11).

Claimant testified she would like to return to work if there was something she could do. She does not feel she can do clerking or cooking because it hurts to be on her feet. She said sitting causes back pain on the right side which goes toward the hip and down the buttock. She said her right foot doesn't hurt, but it is numb and she is unable to bend or stoop because of right leg weakness. She vacuums with difficulty and can't walk stairs. Prior to surgery, she worked for awhile as a pharmacy clerk, but left on her Doctor's advise. She still suffers some urinary incontinence while walking and also has loss of bowel sensation but not control. She has not looked for work for the last two years or sought vocational assistance. There have been no offers of rehabilitation services made to her.

Hugh Johnson, a fellow employee, testified that prior to injury, claimant was a hard worker in a busy operation. She was constantly working, dependable, and never requested help. He has noted since her injury she has difficulty getting around, sitting, and has pained expressions.

Opinion:

It appears from the medical evidence that because of her industrial injury, claimant now permanently suffers a chronic low back strain with residual disabling pain, a dropped foot, and a mild bladder disfunction. The medical evidence supports a finding her impairment is moderately severe. It also supports

the proposition claimant is physically able to do light or sedentary work. The evidence indicates claimant had an average range of intellectual functioning. Claimant has not looked for work for the past two years, nor sought vocational assistance.

In order to establish total disability status, the worker must establish she is willing to seek regular gainful employment and has made reasonable efforts to obtain such employment. ORS 656.206 (3). I cannot conclude from the record claimant has made such effort. I do, however, find her award for unscheduled disability was inadequate.

The next issue is entitlement to temporary disability benefits from May 31, 1978 through date of discharge from the Northwest Pain Center on May 11, 1979. Her claim for aggravation was accepted by stipulation on March 18, 1977. On May 30, 1973, Orthopaedic Consultants found she was medically stationary. There is no further evidence of curative treatment or diagnostic care for the industrial injury until November 30, 1978 when Dr. Hauge, found evidence of further nerve involvement and referred her to Dr. Zivin for a neurological examination. This was completed on December 19, 1978 at which time Dr. Zivin found her medically stationary. Subsequently, Dr. Hauge requested re-opening for treatment to reduce drug dependency. It was authorized by the carrier and claimant was seen for assessment by the Northwest Pain Center on April 19, 1979. She was discharged from the Center on May 11, 1979. It appears claimant is entitled to compensation for temporary total disability from November 30, 1973 through December 19, 1978 and from April 19, 1979 through May 11, 1979.

Order:

IT IS NOW, THEREFORE, ORDERED that claimant be awarded 75% unscheduled disability for injury to her low back equal to 240°. This award is in lieu of previous awards granted herein.

IT IS FURTHER ORDERED that the insurer pay claimant additional compensation due for temporary total disability from November 30, 1978 through December 19, 1978 and April 19, 1979 through May 11, 1979.

IT IS FURTHER ORDERED that claimant's agreement with her attorney is approved for the payment of an attorney fee in an amount equal to 25% of the increased compensation awarded herein not, however, to exceed the sum of $2,000.

WCB CASE NO. 79-2028 June 27, 1980

ROBERT SMALL, CLAIMANT
Rask & Hefferin, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

The State Accident Insurance Fund (Fund) seeks Board review of the Referee's order which set aside its January 24, 1979 denial and remanded the claim to it for acceptance and payment of benefits according to law and granted claimant's attorney a fee of $750 for prevailing in overcoming the denial.

FACTS

Claimant, then a 37-year-old maintenance worker with Glendoveer Nursing Home, on February 16, 1978, injured his left shoulder when a piano he was moving fell and lanced on his shoulder.

Dr. James Dinneen first saw claimant on February 28, 1978. Claimant indicated he had injured himself lifting a piano. X-rays revealed evidence of an old distal clavical fracture. Dr. Dinneen diagnosed a minimal sprain of the cervical spine and a minimal sprain of the left "AC joint". He did not feel this injury would cause any permanent impairment.

On July 27, 1978, Dr. Robert Berselli reported that on March 6, 1978 he had initially seen claimant. The x-rays were interpreted as revealing a probable small chip fracture from the distal end of the clavicle.

Dr. Berselli, in January 1979, indicated he felt the small chip fracture from the distal end of the clavicle might possibly be related to the injury claimant reported. However, he could not say, based on the x-rays, whether or not this was a new or old chip fracture. Dr. Berselli felt that if Dr. Dinneen noted the presence of a fracture from the clavicle, in his February 1978 report, then he (Dr. Berselli) felt that it represented an old injury. Dr. Berselli felt x-rays revealed some arthritic changes in the acromioclavicular joint, which he felt were related to an old injury.

The Fund, on January 29, 1979, denied claimant's aggravation claim. This was based on its opinion that when claimant was first treated on February 28, 1978 there was evidence of an old chip fracture and the medical evidence indicated the claimant's acromioclavicular joint changes were a probable result of an old injury.

Claimant testified he had a number of previous injuries. He denied ever injuring his left shoulder before this injury.

The Referee found claimant had proved his claim. Therefore, the Referee set aside the Fund's denial of claimant's aggravation claim and remanded it to the Fund for payment of benefits and awarded claimant's attorney a $750 attorney fee.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, concludes that the Referee's order should be reversed and the Fund's denial of claimant's claim affirmed. Dr. Dinneen, in March 1978, interpreted the x-rays as revealing evidence of an old fracture of the "distal clavicle". Dr. Berselli, in July 1978, interpreted the x-rays as revealing a chip fracture of the distal end of the clavicle. He felt this possibly might be related to claimant's injury to the left shoulder which occurred when the piano fell against him. However, Dr. Berselli stated it was impossible to state whether or not this was a new or an old chip fracture. Dr. Berselli stated that since Dr. Dinneen had noted this fracture in February 1978, he supposed that the finding of a chip fracture represented an old injury. Dr. Berselli also found evidence of some arthritic changes in the acromioclavicular joint. He felt this was more likely due to an old injury rather than a new injury because it took a period of time for these arthritic changes to develop.

The Board finds that the preponderance of the evidence does not establish that claimant's claim should be reopened. The medical evidence indicates claimant had an old fracture of the clavicle. Claimant has failed to prove that his current condition is related to any injury arising out of his employment with Glendoveer Nursing Home. Therefore, the Board reverses the Referee's order in its entirety.

ORDER

The Referee's order, dated December 11, 1979, is reversed.

The State Accident Insurance Fund's denial, dated November 20, 1978, is restored and affirmed.

WCB CASE NO. 79-5886 June 27, 1980

LEE THOMPSON, CLAIMANT
Welch, Bruun & Green, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

The State Accident Insurance Fund (Fund) seeks review by the Board of the Referee's order as amended which awarded claimant compensation equal to 32° for 10% unscheduled disability for headaches. The Fund contends this was in error.

FACTS

The facts as recited by the Referee in his order are correct and the Board adopts them as its own. A copy of the Referee's order is attached to this order and is made a part hereof.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, concludes that claimant is not entitled to any permanent partial disability award for his headaches. On June 25, 1978, Dr. Arthur Evans reported claimant had experienced two seizures and had experienced several over the last year. Claimant denied any prior headaches, vision trouble, paralysis, numbness or ringing in his ears. In August 1978, Dr. Stoner reported claimant was complaining of dizziness and of seizure activity. EMG tests were normal.

In April 1979, Dr. Stoner reported the test results did not conclusively establish claimant's injuries as the source of his dizziness. He felt claimant was medically stationary and it could be expected his condition would improve.

In September 1979, Dr. Zorman reported claimant complained of severe headaches which had started "several weeks ago", were constant and becoming progressively worse. Dr. Newby, in November 1979, diagnosed claimant's condition as post-traumatic headaches of one year duration associated with post-traumatic epilepsy. He felt the headaches were benign and most likely related to the head injury.

Based on all the evidence, the Board does not find claimant entitled to an award of permanent partial disability for his headaches. Claimant has failed to prove he has lost any of his wage earning capacity because of his headaches and dizziness. There is no evidence how these conditions affect claimant's ability to manage a bar or perform other types of employment. Additionally, Dr. Stoner reports that the headaches condition will improve. The evidence is not persuasive that claimant's headaches are permanent. Therefore,

the Board concludes the Referee's order which granted claimant compensation equal to 32° for 10% unscheduled disability for his headaches and awarded claimant's attorney a fee out of this increased compensation must be reversed.

ORDER

The Referee's order, dated February 2, 1980, and as amended on February 7, 1980, is reversed in its entirety.

The Determination Order, dated April 27, 1979, is restored and affirmed.

WCB CASE NO. 79-3866 June 27, 1980

ROBERT E. TOWNSEND, SR., CLAIMANT
Robert L. Burns, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

The State Accident Insurance Fund (Fund) seeks review by the Board of the order of the Referee which granted claimant an award of 35% unscheduled disability.

FACTS

Claimant, 63 years of age, was employed by McCall Oil and Chemical Corporation as a fuel truck driver for almost 20 years. On July 10, 1978 claimant bent down to go under a loading dock to turn on the electricity and hit the top of his head on a brace which knocked him down.

Claimant has not worked nor looked for work since this injury and admits to being retired.

Dr. Cannard, a chiropractor, on July 14, diagnosed lumbar subluxation, thoraco-lumbar strain and sciatic neuralgia.

On August 16, 1978, claimant underwent a lumbar myelogram which revealed a moderate defect at L4-5. Dr. Cruickshank hospitalized claimant and performed a laminectomy and disc excision surgery.

On January 19, 1979, Dr. Cruickshank reported claimant's complaints now were numbness of the left foot and aching through his hips. Claimant was found to be medically stationary with permanent residuals. The doctor did note mild neurological findings.

On June 29, 1979, Comprehensive Rehabilitation Services reported claimant was drawing Social Security and a company pension and was retired.

One month prior to this industrial injury, claimant had attended his retirement party. Claimant testified he had made a deal with his employer to retire at age 62 if and when he sold his ranch.

Claimant has a high school education and six weeks of college and his only work experience has been as a fuel truck driver and a yard foreman at a mill.

Claimant testified he walks three miles in an hour and goes hunting. The employer offered claimant an in-city driving job but claimant didn't think he could drive from Gresham to Portland. Claimant takes no medication.

The Referee found claimant had a significant injury which required surgery which left him with documented neurological findings. The Referee concluded this injury affected claimant's wage earning capacity and granted claimant an award of 35% unscheduled low back disability.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, would modify the Referee's order.

Dr. Cruickshank has reported that claimant does "retain neurological findings" and has suffered residuals from this injury. The claimant has retired, therefore, the affects of the physical residuals on claimant's wage earning capacity are unknown. The Board bases its disability evaluation on the medical evidence relying on Dr. Cruickshank's findings. The Board concludes that claimant would be adequately compensated by an award of 20% unscheduled disability.

ORDER

The order of the Referee, dated January 11, 1980, is modified.

Claimant is hereby granted an award of 64° for 20% unscheduled disability for his low back injury. This award is in lieu of any prior award claimant has received for his July 10, 1978 injury.

The remainder of the Referee's order is affirmed.

WCB CASE NO. 79-6140 June 27, 1980

DONALD VAN EATON, CLAIMANT
Goode, Goode, Decker, Beckham
& Nelson, Claimant's Attys.
Lang, Klein, Wolf, Smith, Griffith
& Hallmark, Employer's Attys.
Request for Review by Employer
Cross-appeal by Claimant

The employer and claimant seek review by the Board of the Referee's order which granted claimant an award of compensation equal to 160° for 50% unscheduled disability and granted claimant's attorney a fee out of the increased compensation. The employer contends this award is excessive. Claimant contends he is permanently and totally disabled.

FACTS

The Board adopts the facts as set forth in the Referee's order, a copy of which is attached to this order and made a part hereof.

BOARD ON DE NOVO REVIEW

Based on these same facts, the Board reaches a different conclusion than that reached by the Referee.

Claimant is now 51 years old, has a 10th grade education and has obtained a GED; he has completed 2-3 terms of an electronics course. Claimant has previously worked as a millwright, a shipboard marine mechanic, a truck driver and a cat skinner. Claimant's learning capacity was rated as average to above average and he has a good work history.

Claimant certified he has constant back pain and has been unable to work. He stated he quit his vocational rehabilitation program because of this pain. Claimant indicated he could perform other activities only if he used pain medication.

The preponderance of the medical evidence indicates claimant has a low back strain without herniated disc. In November 1977, Dr. Fitchett placed the following restrictions on claimant's work activities: no lifting, bending, stooping or prolonged standing.

Since this injury, claimant has not made any effort to return to any type of employment.

Based on all the evidence, the Board finds the Referee's award of compensation is excessive. The medical evidence indicates claimant has not been motivated to return to work or to lessen the disabling affects of his injury. Claimant

has not sought employment of any type and did not fully cooperate in attempts at vocational rehabilitation. The Board finds, based on the evidence in this case, claimant is entitled to an award of compensation equal to 80° for 25% unscheduled disability for his back injury, in lieu of all previous awards.

ORDER

The Referee's order, dated January 30, 1980, is modified.

Claimant is hereby granted an award of compensation equal to 80° for 25% unscheduled disability for this injury. This is in lieu of all prior awards of unscheduled disability.

The remainder of the Referee's order is affirmed.

CLAIM NO. 78-00043 June 30, 1980

RODNEY BAILEY, CLAIMANT
SAIF, Legal Services, Defense Atty.
Stipulation & Order Of Dismissal

The claimant received a Determination Order dated November 9, 1979, which granted 5% unscheduled disability to the low back resulting from the claimant's injury of March 17, 1978. The claim was subsequently reopened and time loss benefits commenced from December 4, 1979 up to receipt of the claimant's second Determination Order of June 16, 1980. The second Determination Order did not award the claimant any additional permanent partial disability. The employer wishes to provide the claimant additional compensation for permanent partial disability and hereby stipulates to an increase of 5% unscheduled disability. The claimant agrees with this increase.

IT IS FURTHER UNDERSTOOD, an overpayment in temporary total disability benefits in the amount of $771.58 exists. His overpayment occurred as a result of payments made up to the time of receipt of the second Determination Order dated June 16, 1980, and after April 30, 1980, the date termination time loss benefits in the second Determination Order.

NOW, THEREFORE, it is hereby stipulated and agreed, by and between the parties hereto, that claimant's unscheduled permanent partial disability as a result of the accident of March 17, 1978, be established at a total of 10% unscheduled disability to the low back, and that this agreement represents an increase of 5% unscheduled permanent partial disability over and above the Determination Order of June 16, 1980. Claimant agrees that he is medically stationary and that this settlement represents all of his physical, psychological and vocational disability flowing from the subject accident, as of the date of this Stipulation.

IT IS FURTHER AGREED, that, in consideration for the payment of the aforementioned increase in unscheduled permanent partial disability, the overpayment of temporary total disability benefits in the amount ot $771.58 shall be deducted from the 5% increase.

IT IS SO STIPULATED:

Based upon the stipulation of the parties hereto, it is hereby ordered that the claimant be awarded an additional 5% unscheduled permanent partial disability for injury to his low back, less $771.58.

WCB CASE NO. 78-7405 July 1, 1980

ROBERT DeGRAFF, CLAIMANT
Olson, Hittle, Gardner & Evans,
Claimant's Attys.
Roger R. Warren, Employer's Atty.
SAIF, Legal Services, Defense Atty.
Order

The State Accident Insurance Fund, on June 3, 1980, moved that claimant be joined as a respondent in this case. Claimant does not object to being joined.

THEREFORE, IT IS ORDERED that clamant is joined as a respondent in this case.

WCB CASE NO. 80-196 July 2, 1980

GARY HAGGARD, CLAIMANT
James Francesconi, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

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 benefits as provided by law and assessed a penalty in the amount of 15% against the temporary total disability compensation due and owing to claimant and $75 attorney fee for the Fund's unreasonable denial and $750 attorney fee.

FACTS

Claimant was employed by Hougham Construction Company as a carpenter's helper and on November 6, 1979 he alleges he injured his low back lifting sheet metal. Claimant and a co-worker took him home for lunch that day. Claimant did not return to work after lunch, and testified the next morning he couldn't get out of bed.

Claimant's live-in girlfriend testified that when claimant came home from lunch that day he had a slight limp and he told her he was injured at work.

The co-worker was subpoenaed and testified at the hearing. When asked if claimant had mentioned any industrial injury, he replied, "not that I know of". He later testified that if claimant had told him he was hurt he would probably have remembered.

On November 7, 1979, claimant was examined by Dr. Lieuallen and gave a history of the injury at work. Claimant also claimed to have injured his finger that same day. The doctor's diagnosis was acute back strain and finger contusion.

On December 27, 1979, the Fund issued its denial.

On January 21, 1980, Dr. Lieuallen opined that he felt certain that claimant's problems were work related.

The Referee found that the only medical evidence supports claimant's contention and remanded the claim to the Fund for acceptance and the payment of benefits. The Referee further found that the denial by the Fund was unreasonable and assessed a penalty and attorney fee.

BOARD ON DE NOVO REVIEW

The order of the Referee is modified.

That portion of the order which awarded claimant penalties and attorney fees for the Fund's unreasonable claim denial is reversed. ORS 656.262(8) provides:

> "If the corporation or direct responsibility employer or its insurer unreasonably delays or unreasonably refuses to pay compensation, or unreasonably delays acceptance or denial of a claim, the corporation or direct responsibility employer shall be liable for an additional amount up to 25 percent of the amounts then due plus any attorney fees which may be assessed under ORS 656.382."

ORDER 656.382(1) provides:

> "If a direct responsibility employer or the State Accident Insurance Fund Corporation refuses to pay compensation . . . or otherwise unreasonably resists the payment of compensation . . . shall pay to the claimant or his attorney a reasonable attorney's fee . . . ".

In this case, the Referee awarded the claimant penalties for the unreasonableness of the denial and an attorney fee for the unreasonable denial. The Board finds that at the time the Fund denied this claim sufficient doubt regarding compensability existed to justify the denial. See Norgard v. Rawlinson's, 30 Or App 999, 1003 569 P2d 49 (1977). The denial was not unreasonable nor was the Fund's actions so irresponsible that the denial constitutes unreasonable delay, unreasonable refusal or unreasonable resistance. [ORS 656.262(8) and ORS 656.382(1)]. These statutes do not provide for penalties and attorney fees based on claim denial per se; there must be proof of unreasonable delay, unreasonable refusal or unreasonable resistance to the payment of compensation or to the processing of the claim. The Board finds in this case the claimant has failed to prove entitlement to penalties and attorney fees.

The Board affirms that portion of the Referee's order which remanded this claim to the Fund for acceptance and ordered payment of all benefits due claimant according to the statute. The Referee found the evidence on compensability preponderates in claimant's favor and we agree.

ORDER

The Referee's order, dated February 28, 1980, is modified.

That portion of the Referee's order which granted claimant a 15% penalty for the Fund's unreasonable denial and granted claimant's attorney $75 for the same is reversed.

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 $200, payable by the Fund.

WCB CASE NO. 78-2215 July 2, 1980

WILLIAM HAWKINS, CLAIMANT
Galton, Popick & Scott, Calimant's Attys.
Samuel Blair, Employer's Atty.
Request for Review by Employer

The employer seeks Board review of the Referee's order which granted claimant permanent total disability. The employer contends this award is excessive.

FACTS

The claimant, now 50 years old, was employed as a painter when he injured his back on September 2, 1976. He was carrying wooden planks to a scaffold when he tripped and fell.

Claimant's medical history indicates he had surgery on his back in 1960 and again in 1971.

On October 15, 1976, Dr. Herbert Spady reported claimant informed him that after the prior surgeries he was able to return to regular work and had experienced little residual pain. Dr. Spady felt that claimant possibly had mild nerve root pressure from scar tissue without neurological changes.

Claimant spends the winter months of each year in Arizona. He was examined by doctors in Arizona in November 1976. They reported that claimant was stationary with no permanent impairment.

A Determination Order, dated March 21, 1977, only awarded time loss from September 2, 1976 through February 17, 1977.

On May 3, 1977, the March 21, 1977 Determination Order was rescinded by a stipulation between the parties.

Claimant returned to Oregon and the claim was reopened for additional medical treatment.

Dr. Mark Melgard reported claimant had considerable pain and permanent impairment from the September 2, 1976 injury.

Dr. Spady opined that claimant's disability would continue for a long period of time and it was unlikely that claimant would return to his previous employment.

Dr. Robert Anderson reported on December 7, 1977 that his physical findings substantiated claimant's complaints of disability.

Dr. Melgard recommended a myelogram so that he could determine if surgery was necessary. Claimant declined the myelogram and Dr. Melgard reported there was nothing further he could offer. He recommended claim closure.

A Determination Order was issued March 14, 1978 and awarded claimant time loss from September 2, 1976 through February 16, 1978 and 32° for 10% unscheduled disability to the back.

Claimant was enrolled at Marylhurst College in a vocational evaluation program. The rehabilitation file was closed "due to severe medical problems". The rehabilitation counselor reported claimant considered himself severely disabled but he was motivated to return to work.

Claimant testified at the hearing that he presently had pain in his lower back and down his right leg. Claimant took medication for pain and said he had difficulty sleeping at night, and had difficulty getting out of bed in the mornings. He occasionally had to lay down during the day. He could not stand for more than fifteen to twenty minutes at a time before his feet gave out.

Claimant called painting contractors in his efforts to find work as recent as one month prior to the hearing without any success. Claimant said he was unable to do regular work required of a painter, such as carrying five gallon cans, moving ladders, climbing up and down ladders, working on scaffolding, and bending. He had not sought employment outside his regular occupation.

Claimant testified that he refused a myelogram which was suggested by his doctors because he thought the doctors were talking about additional exploratory surgery. He apparently thought the myelogram was a surgery.

The Referee, after reviewing the evidence, found that claimant was a credible witness and well motivated towards returning to work. The Referee awarded claimant permanent and total disability.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, reverses the Referee's award of permanent total disability. The medical evidence alone does not establish that claimant is permanently and totally disabled. The evidence indicates that claimant only sought employment with painting contractors, which was inconsistent with his physical limitations. Claimant was enrolled in an evaluation program with Vocational Rehabilitation, but had to withdraw due to his inability to sit or stand more than fifteen minutes at a time. Claimant didn't respond to post-closure follow-up attempts by Vocational Rehabilitation.

The Board concludes the medical evidence alone does not support a finding of permanent total disability. Considering the medical evidence, together with other relevant factors, such as his age (50 years old), third grade education, and work background, the claimant has not established by a preponderance of the evidence that he is precluded from work at a gainful and suitable occupation or an occupation for which he can be trained. Therefore, the Board would reverse the Referee's finding that claimant is permanently and totally disabled.

Based on the evidence, the Board finds claimant is entitled to compensation equal to 192° for 60% unscheduled disability for his back injury. This award is in lieu of and not in addition to all previous awards for unscheduled disability awarded claimant for his September 2, 1976 back injury.

The Board requests the Field Services Division to contact claimant and provide or arrange for such services as it deems appropriate.

ORDER

The Referee's order, dated August 8, 1979, is modified.

Claimant is hereby granted an award of compensation equal to 192° for 60% unscheduled disability for his back injury. This is in lieu of and not in addition to all previous awards of unscheduled disability for claimant's September 2, 1976 injury.

The remainder of the Referee's order is affirmed.

WCB CASE NO. 79-6322 July 2, 1980

ALVIN D. MAGNUSON, CLAIMANT
Velure, Heysell & Pocock, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

The State Accident Insurance Fund (Fund) seeks Board review of that portion of the Referee's order which granted claimant penalties and attorney fees for the Fund's unreasonable failure to process the claim by its failure to follow-up on a settlement stipulation submitted to the Hearings Division.

FACTS

The Board finds the facts recited by the Referee in his order are correct. A copy of the Referee's Opinion and Order is attached and made a part of this order.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, modifies the Referee's order. The claimant and the Fund signed a stipulation in May 1978. The stipulation was sent to the Workers' Compensation Board, Hearings Division, and signed by Referee Danner on May 17, 1978. The record indicates that the Fund did not receive the signed stipulation from the Hearings Division until approximately November 1978. Proof of who was responsible for the delay in the processing of the stipulation between the Hearings Division and the Fund is lacking. There was no evidence in the record that indicated the Fund failed to process and pay compensation benefits once the signed stipulation was received from the Hearings Division. The Referee, after reviewing all the evidence, concluded that the Fund should have made "follow-up" efforts but failed to do so. The Board finds that the Fund had no obligation to pay compensation until the signed order was received.

ORDER

The Referee's orders, dated Janaury 3, 1980 and February 1, 1980, are modified.

The penalties granted to claimant in the amount of 25% of the amount payable under the stipulation and 25% of the amounts payable for time loss (not to exceed $300) are reversed.

The attorney fee granted to claimant's attorney ($300) for services for securing the additional compensation in the form of penalties is reversed.

The attorney fee of 25% of the amount payable or the additional temporary total disability granted to claimant's attorney (not to exceed $750) is affirmed.

The remainder of the Referee's order is affirmed.

WCB CASE NO. 79-828 July 2, 1980

LAWRENCE McCARLEY, CLAIMANT
Pozzi, Wilson, Atchison, Kahn
& O'Leary, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

The State Accident Insurance Fund seeks Board review of the Referee's order which granted claimant 256° for 80% unscheduled disability. The Fund contends this award is excessive.

FACTS

The Board accepts the facts as recited in the Referee's order. The Referee's Opinion and Order is attached and made a part hereof.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, reverses the order of the Referee.

The medical evidence in this case indicates the industrial injury caused chronic lumbosacral strain with coincidental moderately advanced degenerative disc disease. This precludes claimant from returning to occupations which require heavy manual labor. However, claimant has been retrained to a profession within his physical capabilities. Claimant's I.Q. is above average and he has a high school education. The Board concludes that for the residuals from this injury claimant's loss of wage earning capacity was accurately reflected in the Determination Order, which the Board affirms.

ORDER

The order of the Referee, dated August 16, 1979, is reversed.

The Determination Order, dated June 22, 1978, granting 40% unscheduled disability, is hereby affirmed and reinstated.

WCB CASE NO. 78-8745 July 2, 1980

PATRICIA J. TALBOT, CLAIMANT
Merten & Saltveit, Claimant's Attys.
Schwabe, Williamson, Wyatt, Moore & Roberts, Employer's Atty.
Request for Review by Claimant

The claimant seeks review by the Board of that portion of the order of the Referee which granted claimant an additional 15° for a total of 22.5° for 15% loss of the right forearm. Claimant contends that the award is inadequate.

FACTS

Claimant, 41 years of age, was employed by Boise Cascade as a truck driver trainee and on May 6, 1976 was in Tacoma to pick up a load of paper. Claimant was driving the truck when her right arm slipped off of the steering wheel and struck the console. Claimant testified her arm went numb but she completed the shift and then developed pain.

X-rays were taken on May 19, 1976 which showed no evidence of a fracture. Dr. Gill diagnosed severe contusion of the right wrist. On June 11, 1976 Dr. Waldram made the same diagnosis and on July 7 he took claimant off work for two weeks. On July 30, 1976, Dr. Waldram reported that claimant had continuing numbness and an enlarging cyst over the ulnar nerve and surgery was contemplated to alleviate nerve pressure.

EMG studies were attempted by Dr. Stoltzberg on July 30, 1976 but claimant indicated she had "multiple sclerosis" and couldn't tolerate the test because of sensitive skin.

Dr. Waldram reported on August 31 that surgery showed swelling and herniation of the muscles, no ganglion was found and the nerve was released. Dr. Waldram released claimant for her regular work on November 15, 1976. Claimant had mild irritation of the wrist and some weakness. Permanent impairment was rated as from none to minimal. On March 11, 1977, claimant was found to be medically stationary.

Claimant returned to her regular job in March 1977 and on May 2, 1977 Dr. Snodgrass reported that in late March claimant was driving a truck and went to shift a stiff gear and again experienced paresthesia, burning sensations, aching and numbness in the ulnar side of the hand and of the third, fourth and fifth fingers. Upon examination, claimant had good normal grip strength and intrinsic hand muscles. On May 16, 1977, claimant was again released for work.

Dr. Waldram reported on May 17, 1977 that claimant was medically stationary and could perform her truck driving job. She had no limitation of motion, no weakness or atrophy. She did, however, have residual swelling and irritation associated with heavy labor.

Claimant was examined by Dr. Nathan on June 19, 1977 and he felt claimant's symptoms were consistent with carpal tunnel syndrome. He rated claimant's impairment as 5% of the right upper extremity.

The employer terminated claimant in November 1977.

On February 3, 1978, Dr. Mason indicated claimant had had repeat nerve conduction studies which showed a slowing of nerve conduction at the elbow level. He felt in retrospect claimant's original hand problems may be related to developing tardy ulnar palsy.

A Determination Order, dated January 3, 1978, granted claimant an award of 7.5° for 5% loss of the right forearm.

On May 31, 1978, Dr. Zivin examined claimant. The claimant indicated to Dr. Zivin that her condition had been stable for eight months. The doctor felt claimant could not return to truck driving which involved "repeated trauma" and he recommended vocational retraining.

All during 1978 claimant was on Welfare and in January 1979 she went to work as a salesperson for a construction company selling airplane hangers. This job was temporary.

Claimant testified her current problems are trouble writing, driving, she has soreness, aching, fingers are cold and they tingle and she has constant hand numbness. Pressure on the wrist produces sharp pain, and she has difficulty gripping.

The Referee found claimant had objective evidence of loss of function and weakness of opposition and granted her 15% loss of the right forearm. He found also that she was not entitled to further compensation for temporary total disability.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, would reverse the order of the Referee. The Board finds that the medical evidence indicates only two physicians rated loss of function in this case. Dr. Waldram found from "none to minimal impairment" and Dr. Nathan rated claimant's impairment at 5%. These impairment ratings take into account loss of function, weakness, grip strength, loss of sensation and atrophy. The Board feels that the award granted by the Determination Order was accurate.

ORDER

The order of the Referee, dated February 1, 1980, is hereby reversed.

The Determination Order, dated January 3, 1978, is affirmed.

WCB CASE NO. 78-10,033 July 2, 1980

JANE TEMPLE, CLAIMANT
Olson, Hittle, Gardner & Evans,
Claimant's Attys.
Lang, Klein, Wolf, Smith, Griffith
& Hallmark, Employer's Attys.
Request for Reivew by Employer

The employer seeks review by the Board of the Referee's order which granted her an award of 30% unscheduled disability. The employer contends the award is excessive.

FACTS

Claimant was employed by Sunset Manor Nursing Home as a nurse's aide and on January 9, 1977 suffered a compensable low back injury while lifting a patient. Dr. Kirchner diagnosed low back strain.

Claimant was released to return to regular work on March 17, 1977; she worked one day and suffered an exacerbation.

On May 9, 1977, Dr. Anderson reported a diagnosis of cervical and lumbar strain. Claimant wanted to change occupations and the doctor felt this was reasonable. The doctor found no objective evidence of physical impairment but rated it mild due to pain.

Claimant had chiropractic treatment from Dr. Burch who felt claimant could not perform heavy lifting.

In October 1977, claimant was enrolled at the Callahan Center and Dr. Azavedo reported their diagnosis was chronic lumbosacral strain, chronic cervico-dorsal strain, muscle tension headaches and obesity. Claimant's physical impairment was found to be slight with psychological factors somewhat interfering. It was felt claimant could do light to medium work. The vocational team consensus was claimant could not return to her regular occupation and now must avoid repetitive twisting.

Subsequently, claimant was placed in an authorized program of vocational rehabilitation in accounting but after one year's participation claimant quit due to back pain. Her file was closed on September 15, 1978.

On November 3, 1978, Dr. Spady examined claimant and reported that she was 5'6" and weighed 210 pounds, being 90 pounds overweight. He made no diagnosis and recommended no treatment.

A Determination Order, dated December 4, 1978, granted claimant compensation for temporary total disability through September 15, 1978 and an award of 32° for 10% unscheduled low back disability.

On July 10, 1979, Dr. Burch found claimant's condition medically stationary. He was deposed and testified that he concurred with the findings and opinions of the Callahan Center and that claimant needed medical treatment only on a symptomatic basis. He felt claimant's condition had worsened in September 1978 but indicated her symptoms were the same as before and the treatment was the same and palliative in nature.

Claimant testified that she has a high school education and one year of college course work in special education. She currently suffers from upper and lower back pain. She testified she had not really been employed since the injury but does babysit for her sister and also delivers newspapers. Claimant has been actively seeking employment. At the time of the hearing, claimant was on no medication.

The Referee found claimant was not entitled to any additional compensation for temporary total disability. He further found claimant was entitled to a greater award for unscheduled disability. Claimant was now precluded from heavy work and could only perform, based on the medical reports, light to medium work. Claimant was entitled to 30% unscheduled disability to compensate her for her loss of wage earning capacity from this industrial injury.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, would modify the order of the Referee.

The Callahan Center found claimant's impairment slight although she is now limited to light to medium work. Dr. Anderson rated claimant's impairment as mild due to pain with no objective evidence of any physical impairment. The claimant has had no hospitalizations, no surgeries, takes no medication, is young with an average intelligence and a high school education. Therefore, the Board concludes claimant would be compensated for the residuals of this industrial injury by an award of 20%.

ORDER

The order of the Referee, dated December 21, 1979, is modified.

Claimant is hereby granted an award of 64° for 20% unscheduled low back disability. This award is in lieu of all prior awards granted.

The remainder of the Referee's order is affirmed.

WCB CASE NO. 79-2233 July 3, 1980

PANSY E. BORCK, CLAIMANT
Harold W. Adams, Claimant's Atty.
Lang, Klein, Wolf, Smith, Griffith & Hallmark, Employer's Attys.
Request for Review by Employer
Cross-request by Claimant

The employer seeks Board review of that portion of the Referee's order which granted claimant additional compensation for a total of 112° for 35% unscheduled disability. The employer contends the award is excessive. Claimant cross-appeals contending that she is permanently and totally disabled.

FACTS

The Board finds the facts recited in the Referee's Opinion and Order are correct and adopts them. A copy of the Referee's Opinion and Order is attached to this order.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, modifies the Referee's order. The medical evidence indicates that claimant's loss of function was minimal. Claimant was drawing unemployment compensation and did not participate in any vocational rehabilitation. She failed to show a willingness to return to the labor force. The other evidence indicates claimant is 56 years old, with an eighth grade education. Her work experience has been primarily kitchen and nurse's aide work in hospitals and nursing homes.

The Referee found that based on all the evidence claimant was entitled to an award of additional compensation equal to 112° for 35% unscheduled disability for her low back injury.

The Board finds, based on all the evidence, that claimant is entitled to an award of compensation equal to 64° for 20% unscheduled disability for her back injury. This is in lieu of all previous awards for unscheduled disability for this injury.

ORDER

The Referee's order, dated August 16, 1979, is modified.

Claimant is hereby awarded compensation equal to 64° for 20% unscheduled disability for her back injury. This is in lieu of all previous awards for unscheduled disability.

The remainder of the Referee's order is affirmed.

WCB CASE NO. 79-5423 July 3, 1980
WCB CASE NO. 79-9248-E

LEONARD COBB, CLAIMANT
Edwin Nutbrown, Claimant's Atty.
Schwabe, Williamson, Wyatt, Moore & Roberts, 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 Aetna Life & Casualty, 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. D3632 July 3, 1980

KEITH GUBRUD, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On January 28, 1974, claimant sustained a compensable injury to his back. His claim was initially closed and his aggravation rights have expired.

Dr. John Serbu, in February 1975, performed a myelogram which revealed a deformity at the L4-5 level. It was decided to treat claimant with conservative care.

On June 9, 1980, Dr. Serbu reported that claimant had again developed acute low back discomfort with rather marked lumbar scoliosis. He reported there was a mild left sacroiliac radiation. Dr. Serbu opined that claimant again had an acute mechanical low back strain. He indicated there was no good evidence of a truly herniated disc. Dr. Serbu recommended this claim be reopened and prescribed complete bed rest for claimant. He indicated that claimant would eventually receive outpatient physiotherapy at Oakway Spa and would be using pain pills and Tranxene.

The State Accident Insurance Fund, on June 24, 1980, advised the Board it would not oppose an Own Motion Order reopening this claim as of June 9, 1980 for time loss verified by claimant's treating physician.

The Board, after reviewing the evidence in this case, finds that claimant's claim should be reopened as of June 9, 1980 for payment of compensation and other benefits to which he is entitled pursuant to the Oregon Workers' Compensation law and until his claim is closed pursuant to ORS 656.278.

IT IS SO ORDERED.

CLAIM NO. EC 76074 July 3, 1980

JAMES HANSEN, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury to his right leg, right wrist and skull on May 26, 1967 when, while working as a roofer, he fell through a roof. The claim was first closed on May 22, 1970 with an award equal to 29° for unscheduled disability, 44° for the right arm and 40° for the right foot.

Claimant's claim was reopened by a Board's Own Motion Order, dated January 9, 1980, for surgery recommended by Dr. Zimmerman.

On January 18, 1980, a release of the transverse carpal ligament of the right upper extremity was performed by Dr. Zimmerman. Claimant's condition improved satisfactorily and he was able to return to work on February 18, 1980. In Dr. Zimmerman's March 26 report he indicated claimant's hand had improved to its preoperative status.

On April 23, 1980, the State Accident Insurance Fund requested a determination of claimant's current condition. On June 18 the Evaluation Division of the Workers' Compensation Department recommended that claimant be granted compensation for temporary total disability from January 16, 1980 through February 17, 1980. No additional permanent partial disability was indicated.

The Board concurs.

ORDER

Claimant is hereby granted compensation for temporary total disability from January 16, 1980 through February 17, 1980. The record indicates that this award has already been paid out by the carrier.

WCB CASE NO. 79-6058 July 3, 1980

REBECCA JENCO, CLAIMANT
Ringo, Walton, Eves & Gardner,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

The State Accident Insurance Fund (Fund) seeks review by the Board of the order of the Referee which remanded claimant's aggravation claim to it for acceptance and payment of all benefits as required by law.

FACTS

Claimant was and still is employed by the Welfare Division as a welfare assistance worker. On August 16, 1976 she was making a home visit and a dog ran in front of her causing her to trip and fall, striking her left elbow.

The diagnosis was a sprain of the left elbow and x-rays of the left wrist were normal; x-rays of the left elbow showed a vertical fracture.

On June 14, 1977, Dr. Neumann, an orthopedic surgeon, performed a left elbow arthrogram which was normal. In December 1977, EMG's were performed and indicated borderline slowing of nerve and action potential across the carpal tunnel. The diagnosis was early carpal tunnel syndrome. The ulnar nerve showed some abnormality but no finding of denervation.

Claimant had returned to work on October 18,1976.

Dr. Ellison reported on November 9, 1977 a diagnosis was ulnar neuropathy with the site unknown. He recommended EMG and nerve conduction studies.

On May 31, 1978, Dr. Neumann indicated claimant's condition was medically stationary with residual permanent partial disability.

A Determination Order, dated July 5, 1978, granted claimant an award of 5% loss of the left arm. On December 19, 1978, a stipulation was entered into which granted claimant an award of 48° for 15% unscheduled disability in lieu of that awarded by the Determination Order.

On April 9, 1979, Dr. Neumann recommended carpal tunnel release surgery and sought authorization from the Fund.

On June 11, 1979, Dr. Raaf reported that claimant's complaints upon examination were (1) pain of the entire left arm, shoulder, hand and base of fingers; (2) shooting pain of the left thumb, weakness of the left hand, burning sensation in the muscles of the left elbow; and (3) upon extension of the left wrist, burning sensation in the dorsal surface of the wrist. Dr. Raaf felt that clinically claimant did not have an entrapment syndrome of the left arm. The Adsons test for thoracic outlet syndrome was negative. Claimant's hand complaints were not confined to areas innervated by either median or ulnar nerves but were widespread. The doctor found a large functional element as indicated by clinical inconsistencies. Dr. Raaf opined that even if claimant did have carpal tunnel syndrome he found no relationship of that condition to her injury. He felt surgery was in order but since claimant was working she should continue to do so.

On June 21, 1979, a denial of claimant's aggravation claim was issued by the Fund.

EMG and nerve conduction studies were again performed on June 4 and Dr. Kennedy found no evidence of carpal tunnel syndrome nor left arm entrapment. Dr. Raaf felt this supported his opinion.

On October 8, 1979, Dr. Neumann reported that Dr. Knox's interpretation of the EMG studies showed carpal tunnel syndrome and old injury to the ulnar nerve. He found Dr. Knox's finding of a definite delay in the median nerve through the carpal tunnel contrary to the findings of Dr. Raaf.

On November 26, 1979, Dr. Knox reported that he had conducted the EMG and nerve conduction studies on claimant on April 7, 1979 and they were largely within normal limits except for very minimal slowing distally over the left median nerve below the wrist. He did not concur with Dr. Raaf's conclusions. However, he did not know if claimant's condition was related to the injury or not as he did not carry out a complete history and physical examination. Claimant did have very mild and/or early carpal tunnel syndrome.

The Referee found claimant had proved a worsened condition and remanded claimant's aggravation claim to the Fund for acceptance and payment of benefits.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, would modify the order of the Referee.

The Board concurs that claimant has proved a worsened condition and her aggravation claim should be remanded to the Fund. However, the Board finds that claimant's claim should not be reopened until she is hospitalized for the recommended surgery.

ORDER

The order of the Referee, dated January 7, 1980, is hereby modified.

Claimant's claim for aggravation is hereby remanded to the Fund with commencement of compensation for temporary total disability as of the date of hospitalization for the recommended surgery.

Claimant's attorney is hereby granted as a reasonable attorney's fee a sum equal to $200, payable by the Fund.

WCB CASE NO. 79-7493 July 3, 1980

MARY PANGBURN, CLAIMANT
Garland, Karpstein & Verhulst,
Claimant's Attys.
Lang, Klein, Wolf, Smith, Griffith
& Hallmark, Employer's Attys.
Request for Review by Claimant

Claimant seeks Board review of that portion of the Referee's order which granted her an award of 16° for 5% unscheduled disability for her low back injury and affirmed a denial letter, dated September 21, 1979. Claimant contends that the extent of disability was not an issue at the hearing and the Referee erred in making that determination. Claimant also contends that she worked six day weeks and that temporary total disability should have been paid based on a six-day work week. Claimant further contends that penalties and attorney fees should be awarded due to unreasonable closure by the employer.

FACTS

The Board finds the facts recited in the Referee's Opinion and Order are correct and adopts them. A copy of the Referee's Opinion and Order is attached to this order.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, modifies the Referee's order. The issue of extent of disability was not before the Referee at hearing, therefore, it was not proper for him to consider in his order. The award granted to claimant for permanent partial disability equal to 16° for 5% unscheduled low back disability and attorney fees is reversed.

The Board concludes that claimant was correctly compensated for time loss by the Referee's Opinion and Order. The Board does not find any evidence in the record that indicates penalties and attorney fees should be paid for unreasonable closure of this claim. The Board further finds the evidence submitted by claimant as documentation for a six-day work week, as a basis for compensation is inadequate. Therefore, the Board affirms the five-day work week as a basis for computing time loss benefits.

ORDER

The award of 16° for 5% unscheduled disability for claimant's low back injury and attorney fees are reversed. The Referee's order in all other respects is affirmed.

WCB CASE NO. 78-8513 July 3, 1980

ALLEN SIMS, CLAIMANT
Olson, Hittle, Gardner & Evans,
Claimant's Attys.
Lang, Klein, Wolf, Smith, Griffith
& Hallmark, Employer's Atty.
Request for Review by Employer

The employer seeks Board review of the Referee's order that granted claimant an award of additional compensation equal to 64° for 20% unscheduled permanent partial disability based on loss of earning capacity. Claimant had previously been granted an award of compensation for 5% unscheduled disability for his low back. The employer contends this award is excessive.

FACTS

Claimant, 37 years old, sustained a compensable injury to his low back on July 29, 1977 when he twisted the wrong way while placing tie wires on finished bundles of steel. Dr. Schiller diagnosed an acute lumbar intervertebral disc injury.

Dr. Fax reported claimant was placed on bed rest after the injury and then released to return to work on September 12, 1977. Claimant was seen for a closing examination and at that time had only occasional pain. Dr. Fax reported that claimant injured his low back again when a four-by-four piece of wood, used to push the steel, broke causing claimant to jerk forward. Claimant was taken to the hospital and admitted by the emergency room doctor. Claimant subsequently received physical therapy and was fitted to a back brace.

On July 11, 1978, Dr. Fax admitted claimant to the hospital with a diagnosis of acute low back strain superimposed on old chronic strain. Earlier that day while at his dentist claimant had a flare up of low back symptoms and was unable to get out of the dental chair without a great deal of difficulty. Later that day when he had reported to Dr. Fax's office he was barely able to walk and had to leave in a wheel chair. Claimant was admitted to the hospital for traction and on July 18, 1978 an EMG test was performed by Dr. Stolzberg. He reported a normal EMG and the clinical examination showed no evidence of radiculopathy. Dr. Fax's discharge summary stated that no neurological abnormalities were found; no myelogram was done because claimant claims he had an allergy to the intervenous pyelogram dye. Claimant was fitted with a transcutaneous nerve stimulator and released from the hospital on July 20, 1978. Dr. Fax released him for modified work on August 1, 1978.

A Determination Order, dated October 23, 1978, awarded claimant temporary total disability plus 5% unscheduled low back disability.

On March 8, 1979, Dr. Hoda examined claimant. He recommended another EMG and a myelogram "if he [claimant] wants to". Dr. Hoda told claimant that unless he found "something" he would not "continue treatment".

On May 7, 1979, Dr. Hoda reported the EMG was normal. He found nothing objective to indicate that claimant had a serious injury. He found the only substantiation for any diagnosis was claimant's continuing symptoms.

Dr. Hoda reported on May 14, 1979 that claimant had lifted a high pressure washer on his truck. When he jumped off the truck he felt pain in the right side of his back; claimant was unable to straighten up. Dr. Hoda diagnosed a muscle strain.

Approximately one year after Dr. Fax last examined claimant he did a closing examination and reported on July 18, 1979 that claimant continued to get muscle spasms on the right side of his back and intermittent pain down the back of the right leg. Claimant was stationary and the claim should be closed. He rated claimant's disability as mild to moderate and suggested claimant should continue fairly light work.

On October 1, 1979, Dr. Coletti examined the claimant and reported there was a chronic recurrence of symptoms with no evidence of any neurologic dysfunction or preforaminal compression neuropathy. He believed claimant to be permanently disabled and "can't lift over 50 pounds". He recommended no sustained stooping, bending, or lifting, but recommended no further treatment.

The Referee, after reviewing the evidence, found that claimant was better equipped than many workers to earn a living and concluded that claimant was entitled to 25% unscheduled disability.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, would modify the Referee's order. The claimant is now 37 years old and has two years of college. We agree with the Referee in that "with his age, education, experience and motivation, he is better equipped than many workers to earn a living".

The Board finds that the preponderance of the medical evidence does not support an award of 25% unscheduled disability. Claimant received palliative treatment for his subjective complaints. There were no objective findings in the record that substantiated claimant's complaints. There was no myelogram or surgery involved. Dr. Fax rated claimant's disability as mild to moderate. Dr. Coletti reported that there was a chronic recurrence of symptoms and that claimant was "permanently dis-

abled". He recommended no further treatment and that claimant couldn't lift over 50 pounds or do work that required sustained stooping, bending, or lifting.

Therefore, based on all the evidence in this case, the Board finds claimant has not proved by a preponderance of the evidence that he is entitled to 25% unscheduled disability. However, based on the same evidence, the Board finds claimant is entitled to an award of compensation equal to 48° for 15% unscheduled disability for his low back injury.

ORDER

The order of the Referee, dated December 13, 1979, is modified.

Claimant is hereby granted an award equal to 48° for 15% unscheduled disability for his low back injury. 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. 77-5741 July 3, 1980

DALE R. THENNES, CLAIMANT
Allan H. Coons, Claimant's Atty.
Keith D. Skelton, Employer's Atty.
Order of Dismissal

A cross-request for review, having been duly filed with the Workers' Compensation Board in the above entitled matter by the claimant, and said cross-request for review now having been withdrawn,

IT IS THEREFORE ORDERED that the cross-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. C 275380 July 8, 1980

MONICA BISHOP, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order & Determination

On March 25, 1980, claimant requested the Board exercise its own motion jurisdiction and reopen her claim for an injury sustained on October 25, 1970. Claimant's aggravation rights have expired. On April 3, 1980, the Board acknowledged claimant's request for own motion relief and asked Dr. Slocum to furnish it with copies of any pertinent medical reports he might have.

Medical reports were forwarded to the Board which indicated claimant underwent an excision of the patellar fragment of the right knee on February 21, 1980 by Dr. Slocum. On March 24, 1980, Dr. Slocum indicated there was no question that claimant's surgery was the result of her 1970 industrial injury and he recommended that the claim be reopened. On June 9, 1980, Dr. Donald C. Jones reported claimant had mild tenderness over the patellar tendon but she had full range of motion of the knee. He found her condition medically stationary and released her to full time work.

The Board, after thorough consideration of the evidence before it, concludes that claimant has proved a worsening of her condition and her claim should be reopened. Claimant is entitled to temporary total disability compensation from February 21, 1980 through June 9, 1980, less time worked. The Board finds that she has suffered no permanent impairment as a result of her present condition and no award is granted therefor.

IT IS SO ORDERED.

CLAIM NO. C 274740 July 8, 1980

HAROLD W. BREWER, CLAIMANT
Charles Burt, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant sustained a compensable injury on October 7, 1970. Because claimant's aggravation rights have expired, the State Accident Insurance Fund forwarded medical reports to the Board for its consideration of claimant's claim under its own motion jurisdiction. The Fund indicated it opposed reopening the claim because there was no evidence of an objective worsening of claimant's condition since the last award of compensation.

Dr. Robert S. Dow, in his February 18, 1980 report, stated claimant wished to have his claim reopened in order to try a course of treatment with a transcutaneous nerve stimulator. Dr. Dow based his request for reopening on increased abnormal neurological findings and increased pain.

On June 2, 1980, the Orthopaedic Consultants felt claimant was medically stationary and his condition was basically unchanged since the closure in 1974. They felt claimant would benefit from a trial with a transcutaneous nerve stimulator. The award of 100% unscheduled disability for injury to the neck was considered to be appropriate.

The Board, after thorough consideration of the evidence before it, concludes that a trial period with a transcutaneous nerve stimulator could be provided under the provisions of ORS 656.245. There is no evidence that claimant's condition has worsened since the last arrangement or award of compensation and the Board concludes that claimant's request for own motion relief should be denied at this time.

IT IS SO ORDERED.

WCB CASE NO. 78-3017 July 8, 1980

RALPH EMERSON, CLAIMANT
Pozzi, Wilson, Atchison, Kahn
& O'Leary, Claimant's Attys.
Schwabe, Williamson, Wyatt, Moore
& Roberts, Employer's Attys.
Order On Remand

The Board, having now received the Judgment and Mandate of the Court of Appeals, issued June 17, 1980, in the above entitled matter, and in compliance therewith, orders as follows:

The order of the Workers' Compensation Board, dated August 15, 1979, is hereby withdrawn and held for naught, and

The order of the Referee, dated January 4, 1979, is hereby reinstated and the same hereby adopted as the Board order herein.

The petitioner, Ralph Emerson, shall recover from Respondent, costs and disbursements in the Court of Appeals in the amount of $205, and in the further sum of $1,500 as attorney's fees on appeal to said Court, all as ordered and mandated by the Court of Appeals.

In addition, the petitioner, Ralph Emerson, shall recover from Respondent the sum of $300 as attorney's fees on appeal to the Board.

WCB CASE NO. 80-2683 July 8, 1980

ROBERT A. FROST, CLAIMANT
Frank W. Mowry, Claimant's Atty.
Lang, Klein, Wolf, Smith, Griffith
& Hallmark, Employer's Attys.
Own Motion Order

On May 8, 1980, claimant, by and through his attorney, requested the Board exercise its own motion jurisdiction and reopen his claim for an injury sustained on July 18, 1970. Claimant's claim was initially closed on October 27, 1972 and his aggravation rights have expired. Since the date of his injury, claimant has experienced exacerbations of painful symptoms in his right shoulder and arm. Conservative treatment helped considerably until around January 19, 1980 when claimant's symptoms increased and he became temporarily totally disabled. Attached to claimant's request were medical reports in support of his petition.

Dr. Karmy, on January 21, 1980, indicated claimant had been having increased shoulder and arm pain for the past four to six months. He was not sure of the cause of claimant's problem but stated he would be disabled for the next three weeks. On March 5, 1980, Dr. Karmy noted that basically the only thing he had to go on was the history claimant related to him of this 1970 injury. He had no reason to disbelieve claimant, but he did not state unequivocally that claimant's present condition was related to the industrial injury. He planned only symptomatic treatment and hoped claimant would be able to return to work eventually.

On June 4, 1980, the Board asked the carrier to advise the Board of its position with respect to claimant's petition within 20 days.

On June 23, 1980, the carrier, by and through its attorney, advised the Board it opposed the reopening of claimant's claim. Because claimant did not seek medical treatment from 1972 until April 1977, it felt any attempt to relate claimant's current condition to the 1970 injury would be merely guess work.

On March 24, 1980, claimant requested a hearing on the issue of his entitlement to treatment under ORS 656.245 for his right arm and shoulder condition. The Board, after thorough consideration of the evidence before it, concludes that it would be in the best interest of the parties involved if the own motion request was consolidated with WCB Case No. 80-2683 for a hearing. The issue to be determined is whether claimant's current condition is related to his 1970 industrial injury and, if so, whether the matter can be handled under the provisions of ORS 656.245 or should be reopened for further time loss benefits. The Referee shall cause a transcript of the hearing to be prepared and forwarded to the Board together with his recommendation concerning the own motion request. He shall also enter an appealable Opinion and Order with respect to claimant's request for hearing of March 24, 1980. It should be noted that claimant has requested the matter be set in Portland.

WCB CASE NO. 78-7347 July 8, 1980

DARRELL GREEN, CLAIMANT
Jerry E. Gastineau, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

The State Accident Insurance Fund (Fund) seeks Board review of the Referee's order which remanded the claim to the Fund for acceptance and awarded claimant's attorney a fee.

FACTS

The Board finds the facts recited in the Referee's Opinion and Order are correct and adopts them. A copy of the Referee's Opinion and Order is attached to this order.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, reverses the Referee's order. The medical evidence in the record indicates claimant had a prior neck and back injury in 1975 when he was working as a logger in California. There is no medical evidence in the record that indicates a new injury occurred on August 4, 1978. Claimant testified that he was never pain-free from his 1975 injury. Dr. Ludwig (D.C.), claimant's only treating physician, reported claimant had an inherent weakness in the dorsal area and it was easily aggravated. His symptoms were the same or similar to that from the 1975 injury.

Claimant testified that he got stiff after working all day on August 4, 1978 but did not have a "specific incident" that day which caused the onset of symptoms. The claimant has failed to prove by a preponderance of the evidence that a new injury occurred on August 4, 1978.

Although the law does not require a "specific incident" the evidence must show that the condition(s) of employment either originally caused or produced a worsening of an existing condition so as to require medical services or produce disability. The Board finds the weight of the evidence in this case establishes the claimant's condition is not the result of his work activity with the employer herein. We find it is more likely than not the claimant on and after August 4, 1978 experienced a manifestation of symptoms of a pre-existant condition.

The Board reverses the Referee's order and affirms the Fund's denial.

ORDER

The Referee's order, dated September 4, 1979, is reversed in its entirety.

The State Accident Insurance Fund's denial, dated August 29, 1978, is affirmed.

CLAIM NO. C 139608 July 8, 1980

CHARLES T. SCHROEDER, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury to his pelvis and left elbow on August 7, 1968. The claim was initially closed on March 6, 1969 and claimant's aggravation rights have expired.

On November 6, 1979, 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. Based on this report, the Board, in its November 27, 1979 Own Motion Order, reopened claimant's claim as of the date he entered Providence Medical Center for the recommended surgery.

On November 15, 1979, the recommended surgery was performed by Dr. Fitch. Claimant returned to work on January 7, 1980. On May 27, 1980, Dr. Fitch indicated claimant's condition was stationary and no further medical treatment was indicated.

On June 3, 1980, the State Accident Insurance Fund requested a determination of claimant's current condition. On June 18, 1980 the Evaluation Division of the Workers' Compensation Department recommended claimant be granted additional compensation for temporary total disability from November 14, 1979 through January 6, 1980 and for February 4, 1980, the date claimant had a doctor's appointment.

The Board concurs in this recommendation.

ORDER

Claimant is hereby granted compensation for temporary total disability from November 14, 1979 through January 6, 1980 and for February 4, 1980, one day only, less time worked. The record indicates claimant has already received this award from the carrier.

CLAIM NO. YC 371697 July 8, 1980

MARVIN L. TODD, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On May 15, 1980, claimant, by and through his attorney, requested the Board to exercise its own motion jurisdiction and reopen his claim for a May 16, 1972 industrial injury. Claimant's aggravation rights have expired. On May 19, 1980, the Board advised claimant's attorney that supporting documentation would be necessary before it could act on claimant's request.

On May 23, 1980, two medical reports were forwarded to the Board. On April 7, 1980, Dr. Gary Goby indicated claimant was hospitalized on March 27 because of left leg swelling, pain and generalized thrombophlebitis. Claimant has a history of venous and arterial disease and the State Accident Insurance Fund (Fund) has paid medical expenses related to his venous disease as it related to an industrial injury in 1972. On May 12, 1980, Dr. Goby reported that claimant's industrial injury was one of four contributing factors to his present condition and he could not be unequivocal in the matter of causal relationship.

On May 27, 1980, the Board advised the Fund of claimant's request for own motion relief and asked it to advise the Board of its position within 20 days.

On June 3, 1980, the Fund informed the Board that it opposed reopening claimant's claim because it felt claimant's current problem was not the result of the 1972 industrial injury.

On June 13, 1980, claimant's attorney recommended that the case be referred to the Hearings Division for the purpose of collecting evidence.

The Board, after thorough consideration of this matter, concludes that there is reasonable doubt as to the causal relationship of claimant's condition to his 1972 industrial injury. The Board finds that it would be in the best interests of both parties to refer the matter to its Hearings Division for a hearing on the issue of whether claimant's current condition is directly related to claimant's May 16, 1972 industrial injury. The Referee shall cause a transcript of the proceedings to be prepared and forwarded to the Board along with his recommendation with respect to this case.

CLAIM NO. 3W-10-0845 July 9, 1980

KEITH BARNETT, CLAIMANT
Lang, Klein, Wolf, Smith, Griffith
& Hallmark, Employer's Attys.
Own Motion Order

On February 19, 1980, claimant requested that the Board exercise its own motion jurisdiction and reopen his claim for an injury sustained 1970. Attached to his request was a medical report from Dr. R.D. Cook which indicated claimant's condition had worsened. Dr. Cook, after consultation with two other doctors, felt surgery would not be of benefit to claimant.

The carrier, on June 18, 1980, advised the Board that it felt it would not be appropriate for the Board to exercise its own motion jurisdiction in this matter. Based on Dr. Cook's report, the carrier felt that the only issue was the extent of claimant's disability; additional surgery or medical treatment were not recommended. Claimant's claim had already gone through a hearing and the Court of Appeals on the issue of extent of disability. Attached to the carrier's letter was a report from the Orthopaedic Consultants, dated May 16, 1980. They felt claimant's condition was stationary and recommended no further treatment. They felt his low back impairment due to the industrial injury was within the severe category.

The Board, after thorough consideration of the record before it, concludes that it would be in the best interest of the parties involved if the matter were referred to the Hearings Division to be set for a hearing. The Referee shall determine whether claimant's condition has worsened since the last award or arrangement of compensation and, if so, whether his claim should be reopened for the payment of temporary total disability compensation. At the conclusion of the hearing, the Referee shall cause a transcript of the proceeding to be forwarded to the Board together with his recommendation in this case.

CLAIM NO. C 385436 July 9, 1980

MARIE E. JORDAN, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On November 20, 1979, claimant requested the claim for her August 2, 1972 back injury be reopened under the Board's own motion jurisdiction. Claimant's aggravation rights had expired.

In December 1979, Dr. Richard Matteri reported claimant had had "progressive disability referable to her back". He felt claimant could not perform even light work, but could conceivably if retrained, perform sedentary work.

Dr. Matteri, in July 1977, reported claimant, after her 1972 injury, had undergone a laminectomy and fusion. Claimant had suffered a myocardial infarction after this surgery. He felt claimant was limited in her employment opportunities because of her age and physical condition. He felt claimant could not be involved in any job requiring stooping, lifting, or bending or that required prolonged sitting or standing. In August 1979, Dr. Matteri placed claimant in a Raney flexion jacket. He indicated claimant had chronic instability of her lumobsacral spine.

The Orthopaedic Consultants, in June 1980, opined, after examining claimant, her condition was still stationary and recommended no further treatment. They did not feel claimant's condition had worsened. It was noted claimant had "advancing evidence of diabetes and/or arteriosclerotic disease". It was doubted whether claimant could return to gainful employment, but not because of her low back condition "per se".

The State Accident Insurance Fund, on June 27, 1980, based on this report, advised the Board it opposed an Own Motion Order reopening this claim since there was no indication as to a worsening of claimant's condition since the last arrangement of compensation.

The Board, after reviewing this file, finds no evidence claimant's condition has worsened since her last arrangement or award of compensation. Therefore, the Board denies claimant's request for own motion relief.

IT IS SO ORDERED.

WCB CASE NO. 79-2782 July 9, 1980

STANLEY PARISH, CLAIMANT
Bischoff, Murray & Strooband,
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. 79-8369 July 9, 1980

ROSE E. PEDERSON, CLAIMANT
Welch, Bruun & Green, Claimant's Attys.
Schwabe, Williamson, Wyatt, Moore
& Roberts, Employer's Attys.
Request for Review by Claimant
Cross-appeal by Employer

The claimant appeals that portion of the Referee's order which affirmed the employer's denial of a claim for neck injury and the Referee's finding that the matter of attorney's fees was moot.

The employer cross-appeals that portion of the Referee's order which awarded the claimant 32° for 10% unscheduled disability for her low back injury.

FACTS

The Board finds the facts recited by the Referee's Opinion and Order are correct and adopts them. A copy of the Referee's Opinion and Order is attached to this order.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, modifies the Referee's order. We affirm that portion of the Referee's order which upheld the employer's denial of compensability of the claimant's neck condition. The preponderance of the medical evidence indicates claimant's compensable injury consists of a possible muscle strain which caused pain in the back and

the legs. Concurrent with her back injury, claimant was also suffering from a "flu syndrome" and was examined by several doctors. Dr. Cotterell reported claimant had pain in both sides of her back and headaches causing her eye to ache. Dr. Bower reported claimant was complaining of pains in the back and the legs. Dr. Berkeley was the only physician that attributed claimant's neck pain to cervical spondylopathy and related it to her employment. The Referee was not persuaded that the neck condition is compensable, nor are we. Since the Referee approved the employer's denial and we have affirmed that finding we agree with the Referee that any consideration of penalties and attorney's fees is rendered moot. The Board reverses the Referee's award of 10% unscheduled disability for the loss of wage earning capacity and restores the last Determination Order. The Board finds the preponderance of the evidence in this case does not establish claimant has suffered a loss of wage earning capacity greater than that awarded to her by the Determination Order. Claimant has returned to her previous form of employment and is able to function well in it with minimal difficulties. The preponderance of the medical evidence indicates claimant has no permanent disability. The Orthopaedic Consultants opined that claimant had recovered without any permanent disability. Dr. Berkeley concurred with the Orthopaedic Consultants and we find their opinion is consistent with the other medical evidence and the claimant's work status.

ORDER

The Referee's order, dated December 13, 1979, is modified.

That portion of the Referee's order which granted claimant an award equal to 32° for 10% unscheduled disability for her back injury and granted claimant's attorney a fee out of the increased compensation is reversed and the Determination Order, dated October 26, 1979, is reinstated.

The employer's denial, dated September 18, 1978, is affirmed.

Penalties and attorney's fees are not appropriate and none are awarded.

WCB CASE NO. 79-9068 July 9, 1980

HERBERT SATHER, CLAIMANT
Pozzi, Wilson, Atchison, Kahn
& O'Leary, Claimant's Attys.
Schwabe, Williamson, Wyatt, Moore
& Roberts, Employer's Attys.
Order of Dismissal

A request for review and cross-request for review, having been duly filed with the Workers' Compensation Board in the above entitled matter by the claimant and the employer, respectively, and said request for review and cross-request for review now having been withdrawn,

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

CLAIM NO. C 69382 July 10, 1980

ROBERT G. HAINES, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On April 20, 1967, claimant sustained a compensable injury to his left leg. His claim was initially closed by a Determination Order, dated September 18, 1968, which granted claimant an award of temporary total disability compensation and compensation equal to 20% loss of use of his left leg. Claimant's aggravation rights have expired.

This claim was subsequently reopened, closed and then appealed. Claimant has been granted a total award of compensation equal to 70% loss of use of the left leg and compensation equal to 75% unscheduled disability of his low back.

On May 22, 1980, claimant was hospitalized for pain in his left lower extremity by Dr. Samuel Scheinberg. Dr. Scheinberg reported that claimant had undergone an open reduction, osteotomey, and plate fixation of his left tibia in 1972. Dr. Scheinberg indicated that claimant's complaint was that the plate was painful and that there were several prominent areas that represented the screws which were causing him considerable discomfort. On May 23, 1980, Dr. Scheinberg removed the plate and screws from claimant's left tibia.

The State Accident Insurance Fund, on June 26, 1980, advised the Board that it would not oppose an Own Motion Order reopening this claim for surgery that was performed on May 23, 1980.

The Board, after reviewing the evidence in this file, concludes that this claim should be remanded to the State Accident Insurance Fund for acceptance and payment of compensation and other benefits to which claimant is entitled under Oregon Workers' Compensation law effective May 22, 1980, the date he was hospitalized by Dr. Scheinberg for the additional surgery, and until closed pursuant to ORS 656.278.

IT IS SO ORDERED.

CLAIM NO. C 214818 July 10, 1980

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

On November 1, 1969, claimant sustained a compensable injury to her right shoulder. This claim was originally closed by a Determination Order, dated March 19, 1971, which granted claimant an award of temporary total disability compensation and an award of compensation equal to 38° for partial loss of the right arm plus 19° for permanent loss of wage earning capacity. Claimant's aggravation rights have expired.

Dr. T. L. Miller reported, on March 19, 1979, claimant's right shoulder periodically dislocated. He indicated these dislocations were related to her 1969 injury and her disability was probably aggravated due to these episodes. Claimant advised the Board that she had been seen by Dr. Gerald Lisac who had recommended surgery on the right shoulder to correct this condition.

In its order, dated October 9, 1979, the Board remanded this claim to the State Accident Insurance Fund for payment of compensation as provided by law commencing on the date claimant was hospitalized for the recommended surgery and until closed pursuant to ORS 656.278.

On March 6, 1980, Dr. Gerald Lisac performed an anterior repair of the right shoulder dislocation. Prior to this surgery, claimant was hospitalized on March 4, 1980 by Dr. Lisac.

In May 1980, Dr. Lisac reported that he had examined claimant on April 22 and she was having no problems. He reported that there was a small discoloration from a subcutaneous stitch in the central portion of the wound. He reported that claimant was scheduled for an appointment on May 6, 1980, however, she cancelled that appointment and did not reschedule an additional appointment.

On May 27, 1980, the State Accident Insurance Fund advised the claimant that if she was having difficulty with her injury she should be examined by her doctor so that he could submit a report. In its letter, it indicated that if claimant did not reply within two weeks from the date of that letter, it would assume that she had recovered to the point where her physical condition was the same as it was before she was injured. It advised her that it would take steps to close her claim.

On June 5, 1980, the State Accident Insurance Fund requested a determination of claimant's disability. The Evaluation Division of the Workers' Compensation Department, on June 27, 1980, recommended claim closure and that claimant be granted additional temporary total disability compensation from March 4, 1980 through May 6, 1980, but no additional permanent partial disability award beyond that previously granted.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted an award of additional temporary total disability compensation from March 4, 1980 through May 6, 1980, less time worked.

CLAIM NO. B53-148609 July 10, 1980

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

On May 7, 1972, claimant suffered a compensable injury to his back. This claim was initially closed on August 2, 1974 by a Determination Order. Claimant's aggravation rights have expired. Part of claimant's treatment for this injury consisted of a laminectomy.

In March 1980, Dr. Stanley Young reported claimant had begun to have a recurrence of left hip and leg pain five weeks previously after performing a fairly heavy job of moving heavy timbers.

On April 24, 1980, Dr. Robert Bathurst reported claimant had been doing well after his original surgery, although he had had an acute exacerbation of his condition in 1976. Claimant had undergone a myelogram on April 22, 1980 which was interpreted as normal. Claimant was hospitalized from April 17 to April 25, 1980 for treatment of severe back pain.

Dr. Young, in June 1980, reported claimant's hospitalization in April 1980 was for the recurrence of low back pain, radiating into the left hip and left leg without any specific injury or trauma, but from performing fairly heavy work in the mill after his job was changed. He felt this current episode was similar to the one which had occurred in 1976. Dr. Young felt both were related to claimant's "status postlumbar laminectomy". It was his feeling claimant did not suffer a new injury per se, but had a continuation of the previous process and exacerbation of it.

The Board, after reviewing all the evidence before it, concludes that the April 1980 incident is related to claimant's original injury and the residuals from it. Therefore,

the Board, under its own motion jurisdiction, orders this claim reopened effective April 17, 1980 for payment of compensation and other benefits provided for by law and until closed pursuant to ORS 656.278.

IT IS SO ORDERED.

WCB CASE NO. 79-5828 July 10, 1980

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

The State Accident Insurance Fund (Fund) seeks review by the Board of the order of the Referee which granted claimant 48° for 25% loss of the right arm.

FACTS

Claimant, then 29 years of age, was employed as a waitress for Vinara Inn and on August 10, 1977 filed a claim for an injury suffered on July 25, 1977 when she bumped her right arm on a walk in door. On the claim form the employer reported the next morning (July 26, 1977) claimant fell in the bath tub with all her weight on her right arm and claimant told them that "finished it off".

Dr. Monson diagnosed contusion of the right elbow. On September 23, 1977, Dr. Monson indicated that it was impossible to tell how much of the injury and complaints were due to the injury at work or to the slipping in the tub. Claimant subsequently developed a radial-humeral bursitis and also periostitis of the medial epichondyle. On October 11, 1977, Dr. Monson released claimant for her regular work.

On January 20, 1978, Dr. Monson reported that the epicondylitis of the claimant's right elbow persists but she was slowly progressively getting better. Claimant was working and getting along but with some pain and discomfort.

On July 6, 1978, Dr. Young, after examination, reported that he concurred with the diagnosis of chronic right tennis elbow or lateral epicondylitis. They discussed treatment alternatives including surgery, and claimant indicated she would like to avoid that if at all possible.

A chart note of December 11, 1978 indicates claimant was only mildly symptomatic and had no significant disability and required no further treatment.

A Determination Order, dated January 22, 1979, granted claimant compensation for temporary total disability, less time worked.

On January 22, 1979, Dr. Young reported that simple twisting of claimant's arm on some simple activity would re-exacerbate her symptoms and now her pain has increased. Because of this, Dr. Young now recommended surgery.

On February 13, 1979, Dr. Young performed a Bosworth lateral release of the right elbow. On March 26, 1979, Dr. Young released claimant to her regular work.

On May 3, 1979, Dr. Young reported claimant was back at work doing well. She indicated she was completely relieved of pain she had prior to surgery but still had occasional tenderness if the elbow was stressed. Dr. Young felt claimant was fully recovered with no disability.

A Determination Order, dated May 29, 1979, granted claimant additional compensation for temporary total disability only.

Dr. Young, in a chart note dated July 13, 1979, reported claimant's elbow was considerably worse. Claimant had attempted work as a cocktail waitress plus putting up jam and the chart note indicates that this was too much activity for her.

The Referee found that claimant's right arm condition adversely affects her ability to return to her regular work as she has difficulty lifting and carrying heavy items and also with any activity which requires pushing and pulling motions. He concluded claimant had scheduled disability and granted her 25% loss of the right arm.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, would reverse the order of the Referee.

The Board finds that the medical evidence does not support a finding that claimant has any loss of function to her right arm. Dr. Young found her fully recovered with no disability.

ORDER

The order of the Referee, dated December 19, 1979, is reversed.

The Determination Order, dated May 29, 1979, is hereby affirmed in its entirety.

CLAIM NO. D53-114115 July 10, 1980

RAYMOND A. RICHARDSON, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On October 12, 1966, claimant sustained a compensable injury to his right lower extremity. This injury was diagnosed as a displaced fracture of the right ankle with abrasions and contusions to the foot and lower leg and a fracture of the proximal phalanx, right fifth toe. The fractured ankle was surgically repaired. The claim was initially closed by an order, dated November 13, 1968, which granted claimant an award of temporary total disability compensation and compensation equal to 20% permanent partial disability of the right foot. Claimant's aggravation rights have expired.

In May 1980, claimant advised Wausau Insurance Companies, his employer's workers' compensation carrier at the time of his injury, that in March or early April he began having difficulty with his right foot. He reported that his first toe "festered up and broke open" and that his foot swelled. He indicated that he was hospitalized and given medication for this condition. Claimant advised them that he had injured his foot in 1974 when he dropped a piece of metal on his toe and that the toe subsequently was amputated. He indicated that he had had continuing problems with swelling in his foot for the past several years.

Claimant also has diabetes mellitus. In June 1975, because of the diabetes mellitus, and development of a plantar ulcer on the right great toe, that toe was amputated.

Dr. F. H. Sim, in June 1976, reported that claimant complained of persistent swelling and discomfort and in his right foot and ankle.

In April 1980, Dr. Eldon Erickson reported that he had seen claimant in March 1980 and that claimant had a cellulitis of the right second toe. He indicated that claimant had had diabetes 21 years and that the infection was serious for a man in claimant's condition. Claimant advised Dr. Erickson that he had injured his toe in October 1966 and the toenail and toenail bed had never been the same since. Dr. Erickson reported that the infection started in the toenail bed. Based on claimant's history, he felt that claimant's current problem was a continuation of the original injury.

On June 26, 1980, Wausau Insurance Companies advised the Board that it opposed an Own Motion Order reopening this claim. It was their contention that the problem with the second toe which had been treated recently should not be considered as a continuation of, or related to, the original injury of October 12, 1966.

The Board, after reviewing the evidence submitted to it in this case, finds the facts do not support the reopening of claimant's claim under the Board's own motion jurisdiction at this time. The evidence does not indicate that the condition involving the second toe of the claimant's right foot is related to his original injury. Therefore, the Board denies claimant's request for own motion relief at this time.

IT IS SO ORDERED.

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 to her back on May 25, 1972. The claim was initially closed on October 17, 1972. 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. On March 31, 1980 the Board, based on the totality of the evidence before it, denied claimant's request for own motion relief.

Just prior to the issuance of the Board's order, claimant's attorney forwarded two additional medical reports to the Board to be considered with the other evidence. On March 4, 1980, Dr. Berselli reported that he was uncertain whether claimant's 1972 industrial injury caused her current condition of spondylolisthesis. He recommended that she undergo surgery for this problem. On March 18, 1980, Dr. Berselli advised claimant's attorney that the 1972 injury was definitely a material contributing factor to her current symptoms.

On April 3, 1980, the Board asked the carrier to advise the Board of its position with respect to the new medical evidence which it did not have at the time of its March 31, 1980 Own Motion Order. On April 8, Mr. Klein, the carrier's attorney, requested that any decision be delayed until claimant could be examined by the Orthopaedic Consultants the following month. Because of the conflict between the two reports of Dr. Berselli, the Board agreed with Mr. Klein's proposal.

On June 20, 1980, Mr. Klein forwarded to the Board the Orthopaedic Consultants' report, dated May 21, 1980. They felt there had been no objective worsening of claimant's underlying back condition since her claim was last closed in September 1977. They felt a lumbosacral fusion might help, however, it would help if she would lose weight first to see if that would improve her condition. Based on this report, Mr. Klein recommended that the Board deny claimant's request for own motion relief.

The Board, after thorough consideration of all the evidence before it, concludes that claimant has failed to prove that her condition has worsened since the last arrangement or award of compensation. Claimant's request, at this time, should be denied.

IT IS SO ORDERED.

CLAIM NO. RC 257187 July 10, 1980

MAX H. WIMMER, CLAIMANT
Allan B. deSchweiritz, Claimant's Atty.
Stephen D. Brown, Attorney for SAIF
Joint Own Motion Petition

The parties, claimant personally and by his attorney, Allan D. deSchweintz, and the State Accident Insurance Fund by its attorney, Stephen D. Brown, represent to the Workers' Compensation Board and petition as follows:

1. Claimant was awarded five percent unscheduled disability, for right shoulder disability, by determination order on August 24, 1970.

2. Claimant's claim for left shoulder injury, PD 68472, was re-opened by the State Accident Insurance Fund and time loss paid in that claim pursuant to statute. At the same time claimant received active medical treatment for his right shoulder condition, and was unable to work due to a worsening of his right shoulder condition.

3. Claimant is medically stationary and is entitled to no further temporary total disability in claim RC 257187.

4. Claimant has additional residual unscheduled right shoulder disability to the extent of ten percent in addition to that which was granted by the aforementioned determination order.

5. Claimant's attorney was instrumental in obtaining this additional compensation, having appeared at hearing before Referee Mark Braverman on June 18, 1980, in claim PD 257187.

ORDER

Before the Workers' Compensation Board, in exercise of its own motion jurisdiction, hereby

ORDERS that claimant be awarded an additional ten percent unscheduled right shoulder disability, for a total award of fifteen percent disability.

IT IS FURTHER ORDERED that claimant's attorney shall be awarded a reasonable attorney's fee of 25 percent of the increased compensation awarded by this stipulation, to be paid out of and not in addition to compensation.

JANET HICKS WOLF, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

The State Accident Insurance Fund (Fund) seeks Board review of the Referee's order which granted claimant an award of compensation equal to 80° for 25% unscheduled disability for her back injury. The Fund contends this award is excessive.

FACTS

Claimant had a prior injury to her low back on June 28, 1974, moving furniture for her then employer, Richter & Associates, Inc. This injury was diagnosed as a lumbar strain. Dr. Chen Tsai, in December 1974, diagnosed a herniation of the nucleus pulposus at the L4-5 level with bilateral nerve root compression. A Determination Order, dated March 13, 1975, granted claimant an award of temporary total disability compensation and compensation equal to 32° for 10% unscheduled disability for her back injury.

A Stipulation, dated November 26, 1975, granted claimant an additional award of 45° unscheduled disability for her back injury.

The injury before us occurred on July 16, 1976, while claimant was employed as a cashier for Bi-Mart and she tried to stop a shopping cart top heavy with a case of motor oil from tipping over and experienced severe low back pain. This injury at first was diagnosed as an "Acute bilateral SI sprain". Claimant received conservative treatment for this injury. On July 28, 1976, claimant was hospitalized for traction and Dr. Tsai diagnosed left L5 radicular irritation due to herniated nucleus pulposus L4-5 aggravated by the July 16, 1976 injury.

On September 24, 1976, this claim was denied by the Fund. After a hearing, this claim was found to be compensable as a new injury and was remanded to the Fund. The Board affirmed this order.

Claimant was again hospitalized for conservative care on February 18, 1977.

In May 1977, Dr. Thomas Martens reported claimant had had continuing back pain after her 1974 injury. He reported claimant had undergone an EMG and nerve conduction velocity examination in January 1977 and no nerve damage was found,

but nerve root irritation was found. Claimant complained of dull aching in her low back and occasional aching in both of her legs. This was increased by leaning over, vacuuming, sweeping, mopping and running. Dr. Martens diagnosed a chronic and recurrent strain of the lumbosacral spine, with no neurological deficit present. He found no objective reason why claimant could not return to her work at Bi-Mart. Dr. Martens indicated he felt the July 1976 incident was only a mild strain.

Dr. Eusterman disagreed with Dr. Martens. He did not feel claimant could return to her regular work and felt claimant was not medically stationary. Dr. Martens, on June 9, 1977, reported he felt claimant's condition was medically stationary.

Dr. A. J. Masock, in July 1977, reported he did not feel claimant would be able to return to work as a checker. Dr. Masock felt the checker work required rotation and flexion of the trunk, coupled with lifting variable weights and could result in another "acute exacerbation". He felt claimant should be retrained in a more sedentary occupation.

In August 1977, claimant was referred for vocational rehabilitation. Claimant was enrolled in a floral design school. Claimant completed this program in November 1977 and was offered a job. However, claimant indicated she did not feel she was ready to go to work full time and her doctor had not released her for work.

On January 30, 1978, a Determination Order awarded claimant temporary total disability compensation for her July 16, 1976 injury.

On January 31, 1978, Dr. Matteri reported claimant must avoid a lot of heavy lifting, stooping or bending.

In February 1978, Dr. Cornog reported claimant complained of low back pain with radiation into the lower extremities bilaterally. No objective evidence of any neuropathy was found. His diagnosis was based on claimant's complaints. He indicated claimant was employable if she limited her bending, stooping, lifting and avoided prolonged standing. It was his opinion claimant did not have any permanent impairment as a result of the July 1976 injury.

In March 1978, Dr. Eusterman indicated he had released claimant for part time work to try floral design.

In March 1979, Dr. Eusterman reported claimant continued to have intermittent right sacral pain, especially with prolonged sitting or standing or driving.

Claimant testiifed she does not use pain medication. She said she tried to work as a floral designer, but had to quit because of the standing required. While working at this job, claimant said she was unable to perform her housework.

Claimant also worked as a census taker and performed general office work.

The Referee found, based on the loss of wage earning capacity claimant suffered due to the July 1976 injury, she was entitled to an award of compensation equal to 80° for 25% unscheduled disability for her low back injury. The Referee found claimant was not entitled to any additional temporary total disability and the Fund was not entitled to recover any of the overpayment.

BOARD ON DE NOVO REVIEW

The medical evidence in this case indicates claimant had some residual disability and limitation from her 1974 injury. The medical evidence as related to the 1976 injury indicates claimant has some impairment because of that injury. The medical evidence and the testimony together do not support the award granted by the Referee. Claimant, now 24 years old, has a high school education and has been retrained as a floral designer. For her 1974 injury, she has received a total award equal to 77° for that injury. Claimant has performed various office-type work, worked as a waitress and as a checker. Dr. Masock does not believe claimant, after the 1976 injury, could return to work as a checker. The Board finds the evidence supports an award of compensation equal to 32° for 10% unscheduled disability for the July 16, 1976 injury and would so modify the Referee's order.

The Board affirms the remainder of the Referee's order.

ORDER

The Referee's order, dated October 18, 1979, is modified.

Claimant is hereby granted an award of compensation equal to 32° for 10% unscheduled disability for her July 16, 1976 low back injury. This 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. 78-2140 | July 10, 1980

ROLAND ZITZEWITZ, CLAIMANT
SAIF, Legal Services, Defense Atty.
Disputed Claim Settlement-Aggravation

Roland Zitzewitz, claimant, contends that he sustained a compensable aggravation of a prior low back injury on or about December, 1979 or January, 1980;

The employer, Transcon Lines, and its insurer, Transport Indemnity Compeny, contend that the claimant did not sustain an aggravation of his condition because there was no medically verified worsening of his condition and, even if his condition had worsened, it was not due to the original injury but rather was due to new, non-industrial activities and traumas;

By letter dated July 10, 1980, the employer/insurer have denied benefits to the claimant and advised him of his rights to contest the denial of his aggravation claim; and

The parties hereto desire to settle this dispute and dismiss this claim on a disputed claim basis, in lieu of any further proceedings or formal hearings.

Now, therefore, it is hereby stipulated to and agreed by and between the parties hereto that, in consideration of payment of $4,500, the employer/insurer's denial shall be affirmed.

It is understood by the parties, and agreed, that said payment is in full and final settlement of all benefits owed or all claims which claimant has or may have against the employer for injuries or diseases claimed or their results, relating to tha alleged aggravation of December, 1979 or January, 1980, and all benefits under the Workers' Compensation Law or otherwise. This settlement is of a doubtful and disputed claim and is not an admission of liability on the part of the employer, who denies that the claimant has suffered a compensable aggravation or worsening of his prior condition, and that this settlement is of any and all claims whether specifically mentioned herein or not, under the Workers' Compensation Law or otherwise, and that claimant agrees that an Order may issue approving this settlement.

IT IS SO STIPULATED:

Based upon the stipulation of the parties hereto, and being fully advised in the premises, the Disputed Claim Settlement is hereby approved and the employer/insurer is ordered to pay claimant the sum of $4,500. The employer's denial, by way of letter dated July 10, 1980, is affirmed.

WCB CASE NO. 78-4946 July 11, 1980

J.D. CARTER, CLAIMANT
Malagon & Yates, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

On June 22, 1978, the Board, in an Own Motion Determination, granted claimant an award of additional temporary total disability compensation and an additional award of permanent partial disability compensation. Claimant requested a hearing contending that his claim should have been closed pursuant to the provisions of ORS 656.268 instead of ORS 656.278. The Board referred this request to the Hearings Division to determine if the claim had been properly closed.

A stipulation was entered into by the parties and this issue was submitted along with written evidence and argument of the parties to a Referee. In an order, dated June 23, 1980, the Referee referred this claim back to the Board with the recommendation that the Own Motion Determination, entered on June 22, 1978, was proper.

The Board, after reviewing this case, concurs with the Referee that this claim was correctly and properly closed by the Own Motion Determination, dated June 22, 1978. Therefore, the Board affirms that order.

IT IS SO ORDERED.

WCB CASE NO. 78-4256 July 11, 1980
WCB CASE NO. 78-5020

RONALD E. GANNON, CLAIMANT
Malagon & Yates, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

The State Accident Insurance Fund (Fund) seeks Board review of the Referee's order which remanded claimant's claim for the April 6, 1978 injury to his low back for acceptance as a new injury and ordered payment of all benefits under the Oregon Workers' Compensation Act. The Fund contends claimant's current condition is not a new injury.

FACTS

The Board finds the facts recited by the Referee in his Opinion and Order are accurate and should be adopted as its own. A copy of that order is attached hereto and, by this reference, made a part hereof.

BOARD ON DE NOVO REVIEW

The claimant filed two requests for hearing. The first request, dated June 7, 1978, relates to a claimed new injury of April 6, 1978, designated WCB Case No. 78-4256. The second request, dated June 28, 1978, relates to an aggravation of a July 13, 1976 injury, designated WCB Case No. 78-5020. At the hearing, the Fund contended the claimant's "current back problem" was related to an off-the-job injury and was neither the result of any new on-the-job injury nor aggravation of the prior on-the-job injury.

The Referee found the claimant had proved a new compensable on-the-job injury had occurred April 6, 1978. The Board agrees and affirms the Referee.

We believe, for purposes of clarity, the Referee should have made a finding regarding the aggravation issue. (WCB Case No. 78-5020). We realize the Referee's finding on compensability of the April 6, 1978 injury may have rendered the issue raised in WCB Case No. 78-5020 moot; nonetheless, the Board amends the Referee's finding by approving the Fund's denial of aggravation of the July 13, 1976 injury (WCB Case No. 78-5020).

ORDER

The Referee's order, dated December 11, 1979, is affirmed.

The denial issued by the State Accident Insurance Fund of claimant's aggravation claim 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.

CLAIM NO. EC 280757 July 11, 1980

DONALD C. HECK, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant suffered a compensable injury to his low back on December 10, 1970. Claimant's claim was initially closed on June 14, 1974 and his aggravation rights have expired. Claimant has undergone several surgeries and has been granted awards totalling 35% unscheduled disability for injury to his low back.

On December 27, 1979, a Board's Own Motion Order reopened claimant's claim effective October 19, 1979 for a myelogram performed by Dr. John Thompson on that date. Subsequent to this surgery, claimant had attended the Northwest Pain Clinic. Dr. Thompson released claimant to work as of May 27, 1980 with a restriction on the amount of walking claimant should do. A report from the Field Services Division indicated claimant returned to work on May 16, 1980.

On June 6, 1980, the State Accident Insurance Fund requested a determination of claimant's current disability. The Evaluation Division of the Workers' Compensation Department recommended that claimant be granted compensation for temporary total disability from October 19, 1979, per the Board's Own Motion Order, through May 19, 1980, less time worked.

The Board concurs in this recommendation.

ORDER

Claimant is hereby granted compensation for temporary total disability from October 19, 1979 through May 19, 1980, less time worked. This award is in addition to any previous awards claimant has been granted for his 1970 industrial injury.

WCB CASE NO. 79-8430 July 11, 1980

JOHN M. JOHNSON, CLAIMANT
Lang, Klein, Wolf, Smith, Griffith & Hallmark, Claimant's Attys.
Tooze, Kerr, Marshall & Shenker, Employer's Attys.
Request for Review by Claimant

Claimant seeks Board review of the Referee's order which denied claimant's request for additional temporary total disability compensation and further medical care and affirmed the September 24, 1979 Determination Order which awarded claimant temporary total disability from September 16, 1978 through July 5, 1979. Claimant contends his claim was prematurely closed or in the alternative he is entitled to an award of unscheduled permanent partial disability.

FACTS

The Board finds that the facts as recited by the Referee in his Opinion and Order are accurate and should be adopted as its own. A copy of the Referee's order is attached to this order and made a part hereof.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, affirms the Referee's order. Claimant has underlying conditions of osteoarthritis and degenerative disc disease of his cervical spine. These conditions were found not to be causally related to his work activities. The cervical strain was found to be compensable.

The evidence indicates that the claim for cervical strain was not prematurely closed. Dr. Jones, on July 31, 1979, indicated claimant was able to work.

The Board finds the evidence does not establish that claimant has suffered any loss of wage earning capacity because of the cervical strain. The evidence indicates the reasons claimant is unable to return to any of his previous jobs is the underlying conditions of osteoarthritis and degenerative disc disease and not due to the residuals from his industrial injury. Therefore, the Board affirms the Referee's order.

ORDER

The Referee's order, dated November 26, 1979, is affirmed.

WCB CASE NO. 78-6010 July 11, 1980

ELRIE PUMPELLY, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Claimant seeks Board review of that portion of the Referee's order which affirmed the State Accident Insurance Fund's (Fund) denial of claimant's aggravation claim.

FACTS

Claimant, then 26 years old, sustained a compensable injury to her right hand consisting of pain and swelling on June 23, 1973 following the use of an electrical hand sander for the prior four days.

Dr. John Corson, an orthopedic surgeon, reported on June 28, 1973, a diagnosis of acute calcific deposit of the metacarpophalangeal joint of the right middle finger. Claimant received an injection of analgesic and began conservative treatment. Dr. Corson reported claimant was medically stationary and recommended no heavy usage of power equipment with her hand.

Claimant returned to Dr. Corson on October 29, 1973 complaining of pain and numbness in the right hand. He suspected carpal tunnel syndrome and referred claimant to Dr. John Melson.

Dr. Melson reported on November 5, 1973 that an EMG and a nerve conduction velocity study were within normal limits.

A Determination Order, dated December 28, 1973, awarded time loss benefits and no permanent disability.

Dr. Corson reported claimant was seen by him on July 24, 1974 complaining of lack of grip strength, stiffness in the hand and numbness in the thumb and index finger. No treatment was done and her condition was considered stationary.

Claimant appealed the Determination Order and a hearing was held on January 29, 1975. The Referee referred claimant for additional medical evaluation subsequent to the hearing because of the nature and extent of her complaints. The Referee indicated that Dr. James Dunn II, a neurologist, noted a borderline slowing of the right ulnar nerve outlet with diagnosis of a probable thoracic outlet problem. Dr. James Luce, a neurosurgeon, reported claimant's work-up had not been completed. Claimant refused to continue with the evaluation and requested the Referee to enter his Opinion and Order. The Referee awarded claimant 45° equal to 30% loss of the right hand.

Dr. J. A. Blandino, a chiropractor, reported on November 14, 1977 that claimant began chiropractic manipulation. He diagnosed cervical strain syndrome with brachial plexus neuralgia.

On July 19, 1978, the State Accident Insurance Fund denied claimant's aggravation claim.

In August 1978, claimant began treatment with Dr. William Cash, a chiropractor. He diagnosed traumatogenic right cervical or shoulder neuropathy with secondary transient monoplegia of the right hand.

Dr. Thomas Martens, an orthopedic surgeon, examined claimant in December 1978 and May 1979. He diagnosed: (1) possible chronic carpal tunnel syndrome, right, and (2) a chronic strain, cervical thoracic spine. On August 1, 1979, Dr. Martens opined that claimant's chronic strain of the cervicothoracic spine was related to the industrial injury of June 27, 1973.

On October 23, 1979, Dr. Corson reported he had not seen claimant since July 24, 1974. His records indicated that claimant never complained of any problem in the cervical or thoracic area of the spine. He opined that symptoms of a strain syndrome should appear within a day or so of the time the strain was sustained.

Dr. Hildreth reported on October 26, 1979 that he did not question claimant regarding cervical symptoms.

Dr. Melson reported on November 26, 1979 that he would expect complaints of the strain in the cervical thoracic areas to appear within one to three days after the injury.

On December 4, 1979, Dr. Martens concurred with Dr. Melson, however, noticed that claimant had excruciating pain in her right hand that might have made claimant unaware of pain in other areas.

Dr. Cash reported on January 2, 1980 that the original diagnosis of carpal tunnel syndrome was either premature or totally incorrect because at the time claimant had some aberrations of the upper arm. He opined that claimant " . . . probably now has, as a result of her original industrial injury, a transient neuropathy of the left [sic] hand with associated cicatrix of the nerve root sleeves of C6 through T2 which are consistent and certainly well within the realm of reasonable medical probability".

Claimant testified that her present condition of pain and numbness in her right shoulder, arm, hand and fingers had persisted since the injury of June 1973. She said that her headaches, neck stiffness and muscle spasms in her shoulder started approximately four to five years ago.

Claimant worked four days at Craftsman Cabinets and never returned to work after the June 23, 1973 injury. She did waitress and cocktail work in 1973. She worked as a county clerk for one year (1974-1975), then returned to waitress work until February 1979, when she quit and went on Welfare.

The Referee found the issue of compensability of cervical condition was res judicata. The Referee affirmed the Fund's denial of aggravation and awarded medical care pursuant to ORS 656.245. The Referee further granted claimant's attorney a fee of $250.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, modifies the Referee's order. The Board finds that claimant has never filed a claim for a cervical strain from her original injury. Therefore, the Board reverses that portion of the Referee's order that awarded claimant entitlement to medical services under the provisions of ORS 656.245 and the subsequent award of attorney fees in the amount of $250.

Dr. Martens, Blandino and Cash opined that claimant's neck, shoulder and arm conditions were related to the June 23, 1973 injury, but they did not examine claimant until four to five years after the injury. Dr. Corson, who originally treated claimant, reported claimant never complained of any problems in the cervical or thoracic area of the spine. He indicated that a strain syndrome would manifest within a day or so of the time it was sustained.

The Board affirms that portion of the Referee's order which affirmed the carrier's July 19, 1978 denial of claimant's aggravation claim.

ORDER

The Referee's order, dated January 31, 1980, is modified.

Claimant's entitlement to medical services under the provisions of ORS 656.245 and the award of attorney fees in the amount of $250 awarded by the Referee is reversed.

The balance of the Referee's order is affirmed.

WCB CASE NO. 78-1252 July 11, 1980

JAMES D. VAN CLEAVE, CLAIMANT
Pozzi, Wilson, Atchison, Kahn
& O'Leary, Claimant's Attys.
Merten & Saltveit, Employer's Attys.
Order On Remand

The above entitled matter having been appealed to the Court of Appeals from an Order of the Workers' Compensation Board, dated June 19, 1979,

And the Court of Appeals by Judgment and Mandate having remanded the Order of the Board for further proceeding pursuant to the Court's decision and opinion rendered April 21, 1980,

Now, therefore, in compliance with said Mandate and Order and the opinion of the Court, the Board hereby remands this case to Referee Fink to determine whether the 1976 injury caused Kienbock's disease, merely made it symptomatic or aggravated a pre-existing condition.

CLAIM NO. C 416838 July 14, 1980

LYLE AMMON, CLAIMANT
Michael B. Dye, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury on December 20, 1972 when he developed an abdominal hernia while helping to lift a large cant. The claim was first closed by a Determination Order, dated March 16, 1973, and claimant's aggravation rights have expired.

On May 9, 1980, the Board, by its Own Motion Order, reopened claimant's claim based on a report from Dr. R. W. McIntyre which indicated claimant had a large epigastric hernia which was related to his industrial injury. Surgery was performed by Dr. McIntyre on February 4, 1980.

On May 27, 1980, Dr. McIntyre reported that claimant was doing well and the surgical repair was completely satisfactory. He indicated claimant returned to work on March 11, 1980.

On May 30, 1980, the State Accident Insurance Fund requested a determination of claimant's current disability. On July 2, 1980, the Evaluation Division of the Workers' Compensation Department recommended claimant be granted temporary total disability compensation from February 3, 1980, the date he was hospitalized for surgery, through March 10, 1980.

The Board concurs.

ORDER

Claimant is hereby granted compensation for temporary total disability from February 3, 1980 through March 10, 1980. The record indicates that most or all of this amount has been paid to claimant.

CLAIM NO. C 393375 July 14, 1980

JOHN E. ARDIEL, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order & Determination

On September 8, 1972, claimant sustained a compensable injury to his back. His claim was closed and his aggravation rights have expired.

After the original closure, claimant continued to experience low back pain periodically. On December 22, 1979, Dr. John Harris reported that claimant had had a recurrence of his low back pain on December 10, 1979, without any new injury. Because the back pain persisted and radiated into the legs, claimant was hospitalized by Dr. Harris on December 22, 1979 for conservative treatment and further evaluation.

On March 6, 1980, Dr. Harris reported that claimant continued to have low back pain. He reported that claimant had been given a Raney brace which claimant reported provided considerable relief when he worked. Dr. Harris advised claimant that he had no further treatment to offer him and that he felt claimant's condition should be considered medically stationary after he completed his physical therapy in one more week. On March 18, 1980, Dr. Harris reported that claimant advised him that he had returned to work on March 17, 1980 and that claimant was continuing to take muscle relaxants only at bedtime. Dr. Harris advised he had no further treatment to offer claimant at that time.

On June 19, 1980, the Orthopaedic Consultants opined that claimant's condition was stationary. Claimant continued to have to use Norflex as necessary and would use the Raney brace on a "prn" basis. The Orthopaedic Consultants felt that claimant's current symptoms were directly related to his September 8, 1972 injury.

The State Accident Insurance Fund (Fund), on July 8, 1980, advised the Board of these facts. The Fund indicated it would not oppose an Own Motion Order reopening this claim for time loss from December 22, 1979 through March 17, 1980, less time worked. It also requested that a Determination Order be entered closing this claim since claimant's condition was again medically stationary.

The Board, after thoroughly reviewing all the evidence submitted to it, finds the claim should be reopened for the payment of temporary total disability compensation and other benefits for the period from December 22, 1979 through March

17, 1980, less time worked. The Board finds that the claimant's condition is again medically stationary and that the claim can be closed with the above award of additional temporary total disability compensation.

IT IS SO ORDERED.

WCB CASE NO. 79-2842 July 14, 1980

RONALD D. BLACKWELL, CLAIMANT
Malagon & Yates, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Claimant seeks Board review of the Referee's order which affirmed the State Accident Insurance Fund's (Fund's) denial of his claim and did not assess penalties and an attorney fee for the Fund's failure to provide him with a copy of Dr. Wilson's June 12, 1979 report. Claimant contends the Fund's denial was incorrect, unreasonable and should be set aside. Further, claimant contends the Fund should be assessed a penalty and an attorney fee for its failure to supply Dr. Wilson's report.

FACTS

The Board finds that the facts as recited by the Referee in his Opinion and Order are accurate and should be adopted. A copy of the Referee's order is attached hereto and made a part hereof.

BOARD ON DE NOVO REVIEW

The Board agrees with the Referee's finding that the denial of this claim by the Fund was proper and affirms the Referee. The Board finds, for the reasons stated by the Referee, that the claimant failed to establish by a preponderance of the evidence that his work situation was the cause of his emotional problems as diagnosed by Drs. Holland and Wilson.

However, the Board finds claimant is entitled to a penalty and an attorney fee for the Fund's refusal to furnish him the June 12, 1979 report of Dr. Wilson. The case relied upon by the Referee, Morgan v. Stimson Lumber Co., 38 Or App 579, 590 P2d 292 (1978), was reversed by the Supreme Court [288 Or 595, _____ P2d _____ (1980)]. The Supreme Court held that the Board's rule OAR 436-83-460 was valid. Therefore, based on the Fund's failure to furnish claimant a copy of Dr. Wilson's report as he requested, the Board assesses a penalty of $150 and an attorney fee of $150 to be paid by the Fund for its withholding of Dr. Wilson's report.

ORDER

The Referee's order, dated January 10, 1980, is modified.

Claimant is hereby granted the sum of $150 as a penalty and claimant's attorney is awarded a sum of $150, both payable by the State Accident Insurance Fund for its failure to provide the June 12, 1979 report of Dr. Wilson as requested by claimant.

The remainder of the Referee's order is affirmed.

Claimant's attorney is granted as a reasonable attorney's fee a sum equal to $75, payable by the carrier.

WCB CASE NO. 79-4148 July 14, 1980

TED ARNOLD DIGGS, CLAIMANT
Harold Adams, Claimant's Atty.
Lang, Klein, Wolf, Smith, Griffith
& Hallmark, Employer's Attys.
Request for Review by Claimant

Claimant seeks Board review of the Referee's order which: (1) found claimant was not entitled to additional temporary total disability compensation; (2) affirmed CNA's denial of responsibility for aggravation claim and/or additional temporary total disability compensation; (3) affirmed the State Accident Insurance Fund's (Fund) denial of a claim for an injury; (4) remanded the claim to Gould, Inc. and CNA for submission to the Evaluation Division for the purpose of re-determining claimant's permanent partial disability based upon additional medical evidence; and (5) granted claimant's attorney a fee out of any additional permanent partial disability award as a result of subsequent action by the Evaluation Division. Claimant contends he is entitled to additional temporary total disability compensation and penalties and attorney's fees for the carrier's failure to submit his claim to the Evaluation Division.

FACTS

The Board finds that the facts as recited in the Referee's Opinion and Order are accurate and should be adopted. A copy of the Referee's order is attached hereto and made a part of this order.

BOARD ON DE NOVO REVIEW

The Board does not find claimant is entitled to any additional temporary total disability compensation. The evidence establishes that this claim was not prematurely closed. Likewise, the evidence does not establish claimant's condition has worsened since his last award or arrangement of compensation. Further, the evidence does not establish claimant sustained a new injury. Claimant did not appeal the Determination Order of January 12, 1979 on the issue of the extent of disability. Therefore, the Board concurs with the Referee's affirming of the denials of CNA and the Fund.

The Board does not agree with the Referee's remanding the claim to Gould, Inc. and CNA for submission to the Evaluation Division for a redetermination of claimant's permanent partial disability based upon the medical and other evidence presented in the record. The evidence does not establish the original claim closure was premature. The evidence also does not establish that claimant's condition aggravated and/or he is entitled to additional temporary total disability compensation. The Referee and the Board approved CNA's denial of claimant's aggravation claim and/or entitlement to additional temporary total disability compensation. There is no basis upon which to resubmit that claim to the Evaluation Division. Therefore, the Board reverses that portion of the Referee's order which remanded claimant's claim to Gould, Inc. and CNA for submission to the Evaluation Division for a redetermination of claimant's disability and awarded claimant's attorney a fee out of any permanent partial disability awarded claimant as a result of subsequent action by the Evaluation Division.

The Board finds no basis on which to assess penalties and other sanctions as requested by claimant based on the record in this case.

ORDER

The Referee's order, dated December 17, 1979, is modified.

That portion of the Referee's order that remanded claimant's claim to Gould, Inc. and CNA for submission to the Evaluation Division for redetermination of claimant's permanent disability and granted claimant's attorney a fee equal to 25% of any permanent disability awarded claimant as a result of subsequent action by the Evaluation Division is reversed.

The remainder of the Referee's order is affirmed.

WCB CASE NO. 78-5409 July 14, 1980

BILL MAVIS, CLAIMANT
Marvin S. Nepom, Claimant's Atty.
SAIF, Legal Serivces, Defense Atty.
Order On Remand

The above entitled matter was appealed to the Court of Appeals from an order of the Workers' Compensation Board, dated August 17, 1979. The Court of Appeals by Judgment and Mandate reversed the order of the Board and remanded the case for further proceedings pursuant to the Court's decision and opinion rendered April 28, 1980.

The Board awarded claimant temporary total disability compensation for about three months and awarded claimant a 25% penalty because of unreasonable denial of this claim. The Court found the issue of a penalty had not been raised and was waived by claimant. Also the Court held that the Referee should have heard and considered evidence on the temporary total disability issue. The Court indicated it was necessary to determine the duration of claimant's temporary disability pursuant to ORS 656.210 and that the State Accident Insurance Fund was entitled to present evidence on this question. Secondly, the Court stated it was necessary to determine the exact amount of money claimant's noncomplying employer paid him directly after his injury because his employer is entitled to have such payments offset against claimant's time loss compensation. Thirdly, the Court stated it was necessary to determine the exact amount of money, if any, that the State Accident Insurance Fund paid to claimant in addition to the direct payments from his employer. The Court stated: "This simple formula has not yet been applied in this case; on remand it should be". The Court reversed and remanded this case to the Board.

Now, therefore, in compliance with said Judgment and Mandate and order and the opinion of the Court, the Board sets aside that portion of its order of August 17, 1979 which awarded claimant temporary total disability compensation for about three months and awarded claimant a 25% penalty because of the unreasonable denial of this claim and that portion of the order dealing with temporary total disability compensation is remanded to the Hearings Division. A hearing shall be held and the "formula" set forth by the Court of Appeals shall be applied to determine claimant's entitlement to temporary total disability compensation.

WCB CASE NO. 79-1267 July 14, 1980

STEVEN A. MILLS, CLAIMANT
Pozzi, Wilson, Atchison, Kahn
& O'Leary, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Claimant seeks Board review of the Referee's order which affirmed the Determination Order, dated January 31, 1979, as corrected on March 2, 1979, which awarded claimant temporary total disability compensation and compensation equal to 4.2° for 70% loss of the right little finger. Claimant contends he is entitled to a disability based on the loss of use of the right hand rather than simply loss of use of the right little finger.

FACTS

The Board finds that the facts as recited by the Referee in his Opinion and Order are accurate and should be adopted. The Order of the Referee is attached hereto and, by this reference, made a part hereof.

BOARD ON DE NOVO REVIEW

Claimant argues that his injury to his right little finger has extended into the palm of his hand. Claimant testified his right hand is weaker as a result of the injury and that he develops cramps after using the hand. He stated he has lost much of the grip in his right hand, which is verified by the grip strength tests performed by Dr. McVay. Claimant is right-handed. According to claimant, he has lost the ability to grip tools as tightly as he used to and can no longer hold a tool for any length of time without experiencing cramps in his right hand.

Dr. McVay, on August 7, 1978, performed a revision amputation of the stump of claimant's right little finger. This operation extended into the palm of claimant's right hand. The profundis tendon was removed in this surgery.

Dr. Button, in December 1978, reported claimant had: (1) cold intolerance and (2) cramping and fatigue of the hand when gripping tools for more than a few minutes. Dr. Button felt claimant's complaints of weakness, cramping with grip and cold intolerance were "well accepted sequela of injuires of this nature".

The Board agrees with claimant that he is entitled to an award of permanent disability for his right hand. The original injury was to the right little finger. However, the last surgical treatment for this injury required surgery in the palm of the right hand. Claimant's testimony, as

supported by Dr. Button, is that he has lost strength in his dominant right hand, it fatigues easily, cramps with gripping activities and is intolerant of cold. The preponderance of the evidence establishes that claimant has lost some function of his right hand. Therefore, the Board awards claimant compensation equal to 15° for 10% scheduled disability for loss of function of his right hand.

ORDER

The Referee's order, dated December 20, 1979, is modified.

Claimant is hereby granted an award of additional compensation equal to 15° for 10% scheduled disability for loss of function of his right hand.

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. 80-4328 July 14, 1980

RICHARD A. PERRY, CLAIMANT
Galton, Popick & Scott, Claimant's Attys.
Lang, Klein, Wolf, Smith, Griffith & Hallmark, Employer's Attys.
Own Motion Order

On June 12, 1980, claimant, by and through his attorney, requested the Board to exercise its own motion jurisdiction and reopen his claim for an injury sustained on September 24, 1974. This claim was originally closed on December 16, 1974 and claimant's aggravation rights have expired.

Subsequently, claimant filed a claim for an injury allegedly sustained on February 25, 1980. This claim is presently before the Hearings Division as WCB Case No. 80-4238.

Attached to claimant's own motion petition were several medical documents. On April 9, 1980, Dr. A. Torres indicated that claimant's current condition was probably an exacerbation of a chronic low back condition related to low back strains four and five years earlier. Based on this report, claimant requested that the Board reopen his September 1974 claim or, in the alternative, refer the matter for a consolidated hearing with WCB Case No. 80-4238.

On June 30, 1980, the carrier, by and through its attorney, advised the Board that it felt claimant's current condition was due to his previous injury and was not a new injury. It recommended that the Board reopen claimant's claim for the 1974 industrial injury. On July 3, 1980, claimant's attorney responded to the carrier's letter indicating that it was claimant's position his current condition was due either or both to his 1974 injury or his new injury.

The Board, after thoroughly considering the evidence before it, concludes that it would be in the best interest of all the parties concerned if the own motion request was consolidated with the case presently before the Hearings Division for a hearing. The Referee is instructed to take evidence and determine whether claimant's current condition is causally related to his 1974 injury or the alleged 1980 injury or both. At the close of the hearing, the Referee shall cause a transcript of the proceedings to be prepared and forwarded to the Board together with his recommendation concerning the disposal of the 1974 claim. The Referee shall also prepare an appealable order with respect to the 1980 alleged injury and the carrier's denial thereof.

CLAIM NO. DC 43823 July 14, 1980

JAMES R. SAMPSON, CLAIMANT
SAIF, Legal Services, Defense Atty.
Amended Own Motion Order

On May 30, 1980, the Board entered its Own Motion Order reopening claimant's claim for his November 29, 1972 industrial injury as of the date of the order. On June 20, 1980 the Board received a recent report from Dr. Groth indicating claimant had been disabled since February 12, 1980 and had been unable to work since that day. The Board concludes that its order should be amended, allowing claimant compensation for temporary total disability from February 12, 1980 and until closed pursuant to ORS 656.278.

IT IS SO ORDERED.

WCB CASE NO. 79-3637 July 14, 1980

FREDA K. SHEFFIELD, CLAIMANT
Brown, Burt & Swanson, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

The State Accident Insurance Fund (Fund)seeks Board review of the Referee's order which set aside its denial of claimant's chronic back condition and paresthesias of the fingers of the left hand. The Fund contends their denial should be approved and the March 16, 1979 Determination Order affirmed.

FACTS

Claimant, at the time a 45-year-old supervisor in the Crime Prevention Unit of the Salem Police Department, sustained a compensable injury on September 20, 1978 when she was involved in an automobile accident. Dr. H. Searing, on September 27, 1978, diagnosed: (1) contusion of the left shoulder, (2) contusion of the left temple, (3) small laceration of the upper right jaw, and (4) neck spasms with some limitation of movement.

Claimant was released for modified work on October 4, 1978 by Dr. Searing. On November 29, 1978, Dr. Searing reported she had improved range of motion with pain in the left shoulder because of her work.

Dr. Robert Anderson, on January 22, 1979, reported claimant sustained injuries about the left shoulder, the right upper arm and shoulder and about the head in the September 1978 automobile accident. He indicated claimant returned to full duty in early November 1978. He felt she had recovered well and was medically stationary at that time. All references to cervical strain and back surgery were pre-existing and not related to, or aggravated by, the September accident. He found total loss of function to the neck and left shoulder due to the injury was zero. On February 23, 1979, Dr. Searing concurred with Dr. Anderson's report.

On March 16, 1979, a Determination Order granted claimant compensation for temporary total disability from September 20, 1978 through October 3, 1978 and temporary partial disability from October 4, 1978 through October 31, 1978.

On March 30, 1979, Dr. R. D. Brust found claimant was suffering from chronic back trouble, left shoulder strain, cervical neck strain and an element of subjective paresthesias in the medial three fingers of the left hand. Dr. George Harwood, medical consultant for the Fund, did not find the paresthesias condition nor the back strain related to the September 1978 accidnet.

On April 17, 1979, the Fund issued a partial denial contending claimant's chronic back problems and paresthesias of the median nerve were not related to the September 20, 1978 accident.

Dr. Searing, on August 17, 1979, indicated that claimant had a laminectomy in 1965 and had experienced back problems periodically since then. He was unable to relate her present problems to the industrial accident although a relationship could possibly exist. In all medical probability, he did feel the paresthesias condition was related to the automobile accident of 1978.

On October 26, 1979, Dr. Searing indicated that claimant was laid off by the police department in June 1979 and has not been able to be gainfully employed since then. He requested her claim be reopened. In his deposition, Dr. Searing indicated that he had changed his mind about the relationship of claimant's back problems to the automobile accident. He didn't feel it aggravated claimant's disc disease, but rather the symptoms from the disc disease. He indicated that normally if the back problems were related to the accident it would have been evident shortly after the accident, which was not true in this case. Claimant did not complain of paresthesias until March 1979, six months after the automobile accident. Based on this, Dr. Searing was asked, "Would that lead you to believe that the relationship between the automobile accident and the paresthesis [sic] she is experiencing is tenuous?" His reply was, "I'd have to admit that it isn't a positive proof".

The Referee concluded claimant's paresthesias condition was "at least" a temporary worsening of her underlying disc disease and the medical evidence together with claimant's credible testimony strongly supported the compensability of that condition. The partial denial of the Fund was set aside and the matter referred to the Fund for acceptance of the paresthesthesias condition with the payment of temporary total disability benefits to continue until claimant was found to be medically stationary. Claimant's attorney was granted a fee of $800.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, concludes that the Referee's order should be reversed. The Board finds that Dr. Searings' reports are equivocal. At one point he is in complete agreement with Dr. Anderson and then later changes his mind about the relationship of claimant's present symptoms to the automobile accident. Dr. Anderson was very definite in his opinion that claimant's back condition was pre-existing and not related to the accident. The paresthesias condition was not mentioned by Dr. Anderson; in fact, it was not discussed until six months after the accident by Dr. Brust who found subjective complaints only.

Dr. Anderson found claimant sustained no permanent disability as a result of the September 20, 1978 automobile accident. Claimant returned to light work within two weeks and full time work within a little over a month. She worked full time until she was laid off in June 1979. Based upon claimant's own testimony, she is looking for jobs similar to the one she held with the police department. The Board concludes there is no loss of earning capacity due to the September 20, 1978 injury.

Based on all the evidence before it, the Board concludes the Fund's partial denial should be affirmed and the March 16, 1979 Determination Order should also be affirmed.

ORDER

The order of the Referee, dated January 21, 1980, is reversed.

The March 16, 1979 Determination Order is affirmed.

The April 17, 1979 partial denial issued by the Fund is reinstated and affirmed.

CLAIM NO. C604-9967 July 14, 1980

DELORES A. SKIDMORE, CLAIMANT
Galton, Popick & Scott, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury to her back on September 28, 1969. The claim was initially closed on August 3, 1972 and claimant's aggravation rights have expired. Claimant has been granted several awards for a total equal to 240° for 75% unscheduled disability for injury to her low back.

On February 21, 1980, the Board entered its Own Motion Order reopening claimant's claim as of January 7, 1980, based on Dr. Thomas Boyden's report indicating claimant had been hospitalized on that date for increased pain. In his report of January 17, 1980, Dr. Boyden indicated claimant's condition has worsened subjectively since September 1979 and, in his opinion, claimant was permanently and totally disabled from gainful employment. He related her condition to the September 28, 1969 industrial injury.

On January 23, 1980, Dr. George Robins indicated that the hospitalization did improve claimant's symptoms somewhat, but this would not be permanent. He felt she was permanently and totally disabled as a result of her 1969 injury.

On May 30, 1980, the Orthopaedic Consultants examined claimant and found her condition was medically stationary and further treatment would not be of any benefit. They felt claimant could not return to any "reasonably continuous gainful employment". They felt the award of 75% was consistent with her present physical status.

On June 16, 1980, the carrier requested a determination of claimant's current disability. The Evaluation Division of the Workers' Compensation Board recommended that claimant be granted additional compensation for temporary total disability from January 7, 1980 through May 30, 1980 with no additional award for permanent partial disability.

The Board, after thoroughly considering the evidence before it, concurs with the recommendation concerning the award for temporary total disability. However, the Board concludes, based on the reports of Dr. Boyden, Dr. Robins and the Orthopaedic Consultants, that claimant is permanently and totally disabled from any gainful employment and should be compensated for this disability.

ORDER

Claimant is hereby granted compensation for temporary total disability from January 7, 1980 through May 30, 1980. Claimant is also granted compensation for permanent total disability resulting from her September 28, 1969 industrial injury, effective May 31, 1980.

Claimant's attorney has already been granted a reasonable attorney's fee for the increased award of temporary total disability. 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. 78-4706 July 14, 1980

KATHRYN M. SMITH, CLAIMANT
Pozzi, Wilson, Atchison, Kahn
& O'Leary, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Claimant seeks Board review of the Referee's order which affirmed the State Accident Insurance Fund's (Fund) denial of her claim for a phlebitis condition.

FACTS

In 1973, claimant began working with this employer as an assemblyline worker. Claimant began training for a supervisor position in June 1977 and in September 1977 started performing her job as a supervisor. This job required her to be on her feet eight hours a day to supervise other employees who were packing cookies. Claimant alleges that this standing caused a phlebitis condition.

In February 1977, claimant underwent pelvic surgery. She indicated that she missed approximately eight to ten weeks of work and returned to work on or about April 15, 1977 and did not experience any problems.

Claimant testified that on approximately February 7 or 8, 1978 she noticed what appeared to her to be more than normal tiredness in her legs from standing. She stated she did not have any prior difficulties with her legs. She went to work on February 8, 1978 and her leg continued to swell. Her supervisor advised her to go to a doctor to see what was causing this problem. She stated that she went home and contacted Dr. J. Lambrecht.

On February 8, 1978, Dr. Lambrecht reported that claimant was admitted to the hospital with a diagnosis of thrombophlebitis. She was discharged on February 13, 1978 with the diagnosis of superficial phlebitis in the left lower leg. Claimant began anticoagulation therapy and continued with this treatment after her discharge from the hospital. Dr. Lambrecht released claimant for regular work on March 6, 1978 with instructions that she elevate her feet during her breaks. In March 1978, Dr. Lambrecht reported that he had no way of ascertaining if claimant's being on her feet all day while working was a specific cause of her phlebitis, but working at her job may have prolonged or aggravated the condition.

Dr. Joe Much, medical consultant for the Fund, in April 1978, opined that claimant's phlebitis condition was not related to her work.

In May 1978, claimant was referred to Dr. F. Hakkinen by Dr. Lambrecht for a consultation. Dr. Hakkinen felt claimant had a probable thrombophlebitis of the deep veins, left pelvis, with very mild involvement of the deep calf and greater saphenous system on the left side, with noticeable calf swelling and positive Roman's sign. He also suspected a very tiny pulmonary emboli. Dr. Hakkinen felt it was crucial that claimant had undergone pelvic surgery 15 months prior and indicated that occasionally this causes phlebitis. He noted that claimant's surgery was on the left side and that her left lower extremity was the one involved in this case. He recommended that claimant continue to use Heparinization and also Coumadin.

On May 30, 1978, the Fund denied claimant's claim. The denial was based on the opinion that there was insufficient evidence to substantiate a causal relationship between claimant's work activity as described and her condition diagnosed as superficial phlebitis.

Dr. Lambrecht, in June 1978, reported that he advised claimant to avoid being on her feet for any prolonged period of time. It was his feeling that continuing in her work as a supervisor would be detrimental to claimant's health and that she should seek a job more suited to her capacities, along the lines of secretarial work or some job where she did not have to be on her feet for prolonged periods of time and was able to lay down or sit down and elevate the lower extremity in order to facilitate venous drainage. In an undated report, Dr. Lambrecht reported that claimant's thrombophlebitis condition was caused or aggravated by venous stasis in the lower extremities. He indicated that this could occur when an individual has been standing for prolonged periods of time. He felt that the nature of claimant's job contributed to her developing the thrombophlebitis either as a causative factor or as an aggravating one.

In March 1979, Dr. Harold Vick, a gynecologist, reported that claimant wondered if her pelvic surgery caused her phlebitis and so Dr. Vick requested the reports from Dr. Augters who did the surgery. Dr. Vick then opined that there was no reason to believe that this surgery should have, in any way, precipitated a thrombophlebitis condition in her left leg.

Claimant testified that after her first thrombophlebitis episode she remained at home and remained in bed. After approximately two weeks, claimant was allowed to get up and start walking, but was advised to continue to wear her support hose on both legs. She stated that she returned to work as a supervisor on March 15, 1978 and that the only time she could elevate her legs at work was when she was on

break. She stated that she continued to work until May 24, 1978 when she again experienced pain and swelling in her legs. She reported that she eventually left work because she experienced chest pain and her left leg became painful. She testified that she did not do any prolonged standing except on her job. She did perform her regular housework and stood while doing such. In her supervisory job, claimant indicated she had to constantly walk or stand and that she continually bumped her legs on cookie tables, cookie belts and sometimes on flats of cookies.

The Referee found the medical evidence did not indicate that claimant's employment was the probable cause of the phlebitis condition. The Referee found that the evidence failed to establish that the employment caused a material and permanent worsening of her condition which was necessary to establish compensability, citing Weller v. Union Carbide, 35 Or App 355, _____ P2d _____ (1978), and Henry v. SAIF, 39 Or App 795, _____ P2d _____ (1979). Therefore, the Referee affirmed the Fund's denial.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, reverses the Referee's order. Claimant did not have any previous leg problems or thrombophlebitis problems prior to the incident occurring on either February 7 or 8, 1978. The weight of the evidence indicates that there is no relationship between claimant's February 1977 surgery and the development of the thrombophlebitis condition. Dr. Vick opined that there was no reason to believe that this surgery should have in any way precipitated the thrombophlebitis in claimant's left leg. Dr. Lambrecht opined that claimant's thrombophlebitis condition was related to her work with this employer. The evidence indicates that her employment requirement that she remain on her feet for prolonged periods of time has resulted in her developing this condition. There is no evidence that claimant, off her job, engaged in such prolonged standing. The Board finds that the evidence establishes that claimant did not have a pre-existing condition. Dr. Lambrecht opined that claimant's work requirements contributed to her developing the thrombophlebitis either as a causative factor or as an aggravated one. The Board finds that claimant has established by a preponderance of the evidence that her thrombophlebitis condition is related to her work. Therefore, the Board reverses the Referee's order and remands this claim to the State Accident Insurance Fund for acceptance and payment of compensation and other benefits to which claimant is entitled and until the claim is closed pursuant to ORS 656.268.

ORDER

The Referee's order, dated September 13, 1979, is reversed.

This claim is remanded to the State Accident Insurance Fund for acceptance and payment of compensation and other benefits pursuant to Oregon's Workers' Compensation Law and until closed pursuant to ORS 656.268.

Claimant's attorney is granted a fee of $1,050 for his efforts in this case.

WCB CASE NO. 78-7607 July 14, 1980

DONALD TINNER, CLAIMANT
Schwabe, Williamson, Wyatt, Moore & Roberts, Employer's Attys.
Order of Dismissal

A request for review was received by the Board on May 15, 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 carrier within 30 days after the date of the Referee's order as required by ORS 656.295(2).

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. 79-5255 July 15, 1980

MILTON B. DAVIS, JR., CLAIMANT
Donald S. Richardson, Claimant's Atty.
David O. Horne, Employer's Atty.
Own Motion Order

On January 4, 1979, claimant requested the Board exercise its own motion jurisdiction and reopen his claim for an injury sustained on August 8, 1967. After thoroughly considering the evidence before it, the Board felt it would be in the best interests of all the parties if the case was remanded to the Hearings Division to be heard by a Referee on the issue of whether claimant's current condition was related to the August 1967 industrial injury and represented a worsening thereof.

A hearing was held on May 28, 1980 before Referee Leahy. After considering all the evidence, Referee Leahy concluded that claimant's condition is not related to the August 1967 injury and recommended that the Board affirm the carrier's May 4, 1979 denial of reopening.

The Board, after reviewing this case, agrees totally with the Referee and would affirm and adopt his recommendation, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The denial issued by the carrier on May 4, 1979 is affirmed.

CLAIM NO. C 452937 July 15, 1980

RUSSELL J. DEMIANEU, CLAIMANT
Leeroy O. Ehlers, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On June 1, 1973, claimant sustained a compensable injury to his back. His claim was closed and his aggravation rights have expired.

In January 1980, Dr. Donald Smith reported that claimant had been experiencing back pain and leg pain which had become rather severe in the past few months. Claimant reported no new injuries. Dr. Smith reported claimant was grossly overweight, weighing approximately 60 to 70 pounds more than he should. Claimant also had an ulcer condition which was bothering him. Dr. Smith advised claimant that since his job required a great deal of driving and that appeared to aggravate his back, he should stop it. In February 1980, Dr. Smith reported claimant continued to have back pain, however, he had improved since he had stopped his job which required a great deal of driving. Dr. Smith indicated x-rays revealed some narrowing of the lumbosacral disc, but not the degenerative changes he had expected to see. He felt there was no indication that any further surgery was needed and felt that claimant would have to either be trained or find work where he could avoid lifting or bending, or long periods of sitting, such as driving. He felt claimant should be evaluated by the Orthopaedic Consultants.

On June 18, 1980, the Orthopaedic Consultants reported that claimant's condition was stationary from a neurological and orthopedic standpoint. They saw no reason to reopen the claim at that time. It was felt that claimant would benefit from a vigorous home exercise program and weight reduction. It was their opinion that claimant would be able to return to an occupation in the light to medium work category. They did not feel that there was any change in claimant's overall impairment and that his previous award of 30% unscheduled disability was still considered adequate.

The State Accident Insurance Fund Corporation, on July 7, 1980, forwarded to the Board this information and other information from the claim file. It indicated it opposed an own motion order reopening this claim based on the current report from the Orthopaedic Consultants.

After reviewing the evidence submitted to it, the Board finds it is not sufficient to warrant a reopening of claimant's claim at this time under its own motion jurisdiction. Therefore, the Board would deny claimant's request for the reopening of this claim under its own motion jurisdiction.

IT IS SO ORDERED.

WCB CASE NO. 79-9535 July 16, 1980

JAMES R. ALDRICH, JR., 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 Corporation, and said request for review now having been withdrawn,

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

WCB CASE NO. 76-4935 July 16, 1980

EDWARD H. GIBSON, CLAIMANT
Galton, Popick & Scott, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Order On Remand

The Board, on March 29, 1978, in its Order on Review, found this claim compensable, assessed a penalty on the temporary total disability compensation due claimant for approximately three months, awarded claimant's attorney two fees for his services before the Referee and the Board. The Court of Appeals reversed that portion of the Board's order finding the claim compensable, but affirmed the award of penalties and attorney fees. The Supreme Court affirmed the Court of Appeals.

The Board, having now received the Judgment and Mandate of the Supreme Court, issued January 9, 1980, in this case, and in compliance therewith, orders as follows:

That portion of the Board's order which reversed the State Accident Insurance Fund Corporation's denial of this claim is reversed. The State Accident Insurance Fund Corporation's denial is reinstated and affirmed. The remainder of the Board's order is affirmed.

WCB CASE NO. 79-287 July 16, 1980

ARTHUR MORRIS, CLAIMANT
Cash R. Perrine, Claimant's Atty.
Roger Warren, 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.

Based on the above, the motion of the claimant to supplement the record is now moot.

WCB CASE NO. 79-6500 July 16, 1980

RICHARD L. NOLIND, 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. 79-5390 July 16, 1980

EDWARD F. OSTROLENCKI, CLAIMANT
Welch, Bruun & Green, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Claimant seeks Board review of the Referee's order which affirmed the State Accident Insurance Fund's (Fund) denial of his claim for thrombophlebitis.

FACTS

The Board concludes that the Referee accurately recited the facts in his Opinion and Order and it hereby adopts those facts as its own. A copy of the Referee's order is attached hereto and thereby made a part of this order.

BOARD ON DE NOVO REVIEW

The Board finds that the preponderance of the medical evidence establishes that claimant's thrombophlebitis condition, although not causally related to claimant's industrial injury, is causally related to the treatment he received for that injury. The medical evidence indicates on March 17, 1978 claimant's right leg was larger than his left. Dr. Brooke felt this difference was well within the limits of "measuration error" and of little significance. Dr. Acker disagreed. Dr. Acker, in January 1979, felt the results of the medical tests were consistent with a previous iliofemoral thrombophlebitis and assumed that claimant had had an element of phlebitis in 1978 while being treated for his low back

injury. Dr. Lati also felt the size difference between claimant's right and left legs was measurable. He felt claimant's thrombophlebitis was precipitated by the bed rest prescribed for claimant for his back injury. Dr. Acker agreed that the phlebitis was not related to claimant's original injury, but did develop during claimant's convalescence and treatment for his low back injury. He felt it was an indirect result of claimant's injury.

After his back injury claimant was placed in traction and bed rest was prescribed. Dr. Acker indicated that if claimant had prolonged periods of bed rest or any periods of traction that could lead to either the development of the phlebitis or increasing severity of the phlebitis which may have already been present.

The Board concludes based on the preponderance of the evidence in this case, claimant's claim for the thrombophlebitis condition is compensable. Therefore, the Board reverses the Referee's order and the Fund's denial of this condition and remands it to the Fund for acceptance and payment of compensation and other benefits provided for by law until closed pursuant to ORS 656.268.

ORDER

The Referee's order, dated January 28, 1980, is reversed.

The State Accident Insurance Fund Corporation's denial is set aside and this claim is remanded to it for acceptance and payment of compensation and other benefits provided for by law until closed pursuant to ORS 656.268.

Claimant's attorney is hereby granted as a reasonable attorney's fee a sum equal to $1,000 for his services both at the Hearing level and at Board review level.

WCB CASE NO. 79-6300 July 17, 1980

LARRY R. PAYN, CLAIMANT
Olson, Hittle, Gardner & Evans,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On October 30, 1979, the Board referred this case to the Hearings Division to be consolidated with WCB Case No. 79-6300 to have a Referee take evidence to determine if claimant's aggravation rights had expired and, if so, if own motion relief should be granted or, if not, issue an order on the extent of disability.

The Board agrees with the conclusion reached by the Refere in her Own Motion Recommendation and affirms and adopts said recommendation as its own, a copy of which is attached hereto and, by this reference, made a part hereof.

ORDER

Claimant's claim is hereby remanded to the State Accident Insurance Fund Corporation for acceptance and the payment of compensation to which claimant is entitled commencing the date claimant entered the hospital for his July 27, 1979 surgery and 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. 79-4257 July 17, 1980

DAVID F. WOOTEN, CLAIMANT
Robert R. Dickey, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

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 benefits as provided by law.

FACTS

Claimant was employed as a cook for the Jubilee Club and alleges he suffered a low back injury on April 14, 1979. Claimant testified that he came to work at noon, did his preparatory work and around 4:30 p.m. took potatoes out of a 100-pound sack, put them in a pot of water and placed them on the stove. The pot weighed approximately 30-40 pounds. The rush hour started around 5:00 to 5:30 p.m. and claimant cooked the meals and still had no problems. Claimant testified at 7:30 p.m. he took a coffee break, sat down and relaxed with one leg on a chair. After the break he started to arise and felt back pain.

Claimant testified he had no prior back problems. However, there was introduced into evidence a hospital record from a December 1976 admission showing a diagnosis of low back strain. The hospital report of April 17, 1979 indicates claimant twisted his back "while sitting". The history claimant gave Dr. Gilsdorf was consistent with the claimant's testimony regarding onset of back pain. Dr. Gilsdorf reported a history of lifting a heavy bucket of potatoes and thereafter a rush period after which claimant took a break and when he arose from a chair he experienced an acute onset of lumbar pain. Dr. Gilsdorf's diagnosis was spondylolisthesis, mechanical derangement of the lumbosacral spine, "aggravated by work activities". He hospitalized claimant for traction.

On May 14, 1979, Dr. Gilsdorf reported claimant could possibly return to light work in late May. On May 21, the doctor released claimant for modified work with no heavy lifting or repetitive bending or stooping. Claimant told the doctor that his current employment did not involve repetitive or heavy lifting, maximum lifting was 25 to 30 pounds which was done rarely.

On June 12, 1979, the Fund's medical consultant, Dr. Much, opined that nothing in the history would indicate a relationship between claimant's job and the condition diagnosed by Dr. Gilsdorf and no specific causative incident had been cited.

On June 15, 1979, the Fund denied the claim.

On July 2, 1979, Dr. Gilsdorf reported that he thought the Fund's denial was incorrect. Although claimant had pre-existing spondylolisthesis and lumbosacral instability, the doctor felt that on April 14, 1979 claimant had an onset of acute symptoms. In his opinion, the symptoms were the result of an aggravation of his pre-existing condition as a direct result of his work activity.

The Referee deferred to the opinion of Dr. Gilsdorf and remanded the claim of the Fund for acceptance.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, would reverse the order of the Referee.

The Board concludes the claimant has failed to prove his case, based on the fact the evidence indicates the alleged causative factor was the lifting of the pot of potatoes. Yet, the claimant testified to no symptoms nor anything unusual connected with that lifting incident or any other work activity prior to the 7:30 p.m. rest break. In fact, during the approximate three hours between the lifting incident and the break he went about his regular duties absent pain or any discomfort. Therefore, we believe the temporal relationship alone makes the connection between the potato pot lifting incident and the subsequent onset of "acute lumbar pain" speculative at best. The claimant has failed to prove that the onset of symptoms arose out of and in the course of his employment.

ORDER

The order of the Referee, dated February 21, 1980, is reversed.

The denial by the Fund, dated June 15, 1979, is affirmed.

WCB CASE NO. 78-4946 July 21, 1980

J.D. CARTER, CLAIMANT
Malagon & Yates, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Order of Dismissal

This claim was closed by the Board's Own Motion Determination pursuant to ORS 656.278. Claimant contended it should have been closed pursuant to ORS 656.268. Therefore, the Board referred this case to the Hearings Division on claimant's contention and a hearing was held. The Referee referred this claim back to the Board with the recommendation that the Own Motion Determination, entered on June 22, 1978, closing the claim pursuant to ORS 656.278 was proper.

The Board, on July 11, 1980, after reviewing all the evidence before the Referee, concurred with the Referee that this claim had been correctly closed by the Own Motion Determination, dated June 27, 1978, and affirmed that order.

On June 30, 1980, claimant, by and through his attorney, requested Board review of the Referee's order.

The Board finds that claimant's request is not appropriate. The recommendation made by the Referee is not an appealable order. The Board reviewed all the evidence submitted to the Referee prior to this issuance of its June 11, 1980 order. Therefore, the Board dismisses claimant's request for review in this case.

IT IS SO ORDERED.

WCB CASE NO. 79-8267 July 21, 1980

JOSEPH DAVIDSON, 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. 78-3722 July 21, 1980

HERBERT NUTTALL, CLAIMANT
Richard O. Nesting, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF
Cross-appeal by Claimant

The State Accident Insurance Fund (Fund) seeks Board review of that portion of the Referee's order which: (1) granted claimant additional temporary total disability from February 6, 1979 through July 1, 1979; (2) found the treatment offered by Dr. Holman from February 6, 1976 forward to be compensable; and (3) awarded a penalty and attorney fee on these two issues. It contends the Referee erred in doing so.

Claimant seeks Board review of the Referee's order contending the Referee should have granted an additional penalty and should have granted claimant additional permanent partial disability.

FACTS

The Board concludes that the Referee's Opinion and Order accurately recites the facts in this case and adopts then as its own. A copy of the Referee's order is attached to this order and, by this reference, made a part hereof.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, concurs with the Referee's conclusions regarding claimant's entitlement to compensation for additional temporary total disability, payment of Dr. Holman's treatment and the assessed penalty and attorney fee.

The Fund, at the hearing, denied responsibility for claimant's neck, upper back and shoulder conditions which constitute a de facto denial. The denial they issued in this case was on the grounds of an intervening injury. The Board finds this de facto denial is proper.

Claimant's low back injury occurred on August 22, 1977 and he had no neck, upper back or shoulder complaints until he saw Dr. Gibbon in August 1978. Dr. Noall, who originally treated claimant for his injury, heard complaints of upper back problems for the first time in September 1978. The record before us contains no medical proof of causation that claimant's complaints to these body areas are related, in any way, to his original industrial injury. Therefore, the Board concludes these conditions are unrelated.

ORDER

The Referee's order, dated October 2, 1979, is modified.

The State Accident Insurance Fund's de facto denial of responsibility for claimant's neck, upper back and shoulder conditions is approved.

The remainder of the Referee's order is affirmed.

GARY LEE SPEAR, CLAIMANT
Jerry E. Gastineau, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

The State Accident Insurance Fund (Fund) seeks Board review of the Referee's order which remanded this claim to it for acceptance and payment of compensation as provided by law and awarded claimant's attorney a fee of $800. The Fund contends the Referee erred: (1) in ruling it was estopped from asserting the defense of nonliability based on the case of Frasure v. Agripac, Inc., 41 Or App 007, ___ P2d ___ (1979); (2) in striking its request for a hearing filed after issuance of the Opinion and Order; and (3) in awarding claimant's attorney an $800 fee.

FACTS

Claimant, a 38-year-old truck driver, alleges he sustained injuries on February 14, 1979 in a motor vehicle accident while driving a truck for Lang Gangnes Corporation. The claim was accepted by the Fund.

On June 7, 1979, Dr. John Apostol reported to the Fund he had examined claimant on February 12, 1979 because of claimant's complaints of burning and pressure in each eye. Claimant stated he saw stars, had had double vision for two months, and felt his condition was getting worse. Claimant had been treated from 1974 through 1976 for glaucoma. Dr. Apostol felt claimant had chronic simple glaucoma. He advised claimant not to drive.

On June 25, 1979, the Fund denied responsibility for this claim. It contended claimant's driving the day of his injury constituted a violation of his doctor's orders and the employer's instructions. It felt due to his unreasonable and prohibited conduct, the employer should not be held responsible.

The Referee found the Frasure case stands for the principle that a carrier is estopped to deny liability after the statutory time to deny a claim has run, regardless of whether claimant or the carrier requests a hearing. The Referee concluded the Frasure rationale was applicable and granted claimant's motion to strike the denial.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, finds that the Frasure (supra.) case does not stand for the principle applied by the Referee in this case. In the Frasure case the claimant was initially injured while working for an employer which was insured by Chubb Pacific Indemnity Group (Chubb). That claim was closed on June 5, 1974 with an award of permanent partial disability for his back and right leg. Claimant went to work for a different employer on September 13, 1975 and experienced back pain. Claimant's physicians felt he had suffered an aggravation rather than a new injury and reported it to Chubb, which paid claimant temporary total disability compensation and medical benefits. Seventeen months later, claimant's physicians changed their diagnosis and felt claimant had suffered a new injury. Claimant filed a claim for a new injury which was denied on the basis the claim was not timely filed and claimant had sustained an aggravation. The Court of Appeals held that by voluntarily accepting and processing claimant's claim and paying aggravation benefits to claimant for 17 months, Chubb was estopped to assert the defense of nonliability for the unreasonable consequences of that action which resulted in that case.

This case is distinguishable from the Frasure case. In Frasure the issues were aggravation versus new injury and timely filing of the new injury claim. Claimant, in that case, had relied on Chubb's acceptance of his aggravation claim for 17 months, well past the time he could have filed a new injury claim. The Court found claimant's reliance on Chubb's acceptance over a 17-month period of time was detrimental to the claimant and Chubb was estopped from asserting its denial.

In this case, no evidence was taken on claimant's contentions that his reliance on the Fund's acceptance of his claim was to his detriment. Claimant was paid temporary total disability compensation from the date of his accident to the date of the Fund's denial. The Board finds the Frasure case rationale is not applicable to this case. Therefore, the Board reverses the Referee's order in its entirety and remands it to Referee Baker to conduct a hearing to determine whether or not this claim is compensable.

IT IS SO ORDERED.

WCB CASE NO. 78-8745 July 21, 1980

PATRICIA J. TALBOT, CLAIMANT
Merten & Saltveit, Claimant's Attys.
Schwabe, Williamson, Wyatt, Moore
& Roberts, Employer's Attys.
Order

The claimant, by and through her attorney, on July 11, 1980, requested the Board reconsider its July 2, 1980 Order on Review in this case. Claimant contended the Board had no authority to lower the award of compensation ordered by the Referee when claimant had appealed the Referee's order and there was no cross-appeal by the employer-carrier.

The Board's review of cases is de novo. The Board may reverse or modify the order of the Referee or make such disposition of the case as it determines to be appropriate. ORS 656.295(6). The Court has held the Board can reach issues not cross-appealed and can make a determination based on the evidence in the record. Neely v. SAIF, 43 Or App 319, _____ P2d _____ (1979). The Board, in this case, without a cross-appeal by the employer-carrier, reduced the award granted by the Referee. The Board has the authority to do so. Therefore, the Board denies claimant's motion for reconsideration.

IT IS SO ORDERED.

WCB CASE NO. 79-4065 July 21, 1980

RICHARD WEHR, CLAIMANT
Roll, Roll & Westmoreland,
Claimant's Attys.
Schwabe, Williamson, Wyatt, Moore
& Roberts, Employer's Attys.
Order of Dismissal

On July 10, 1980, Referee Harold Daron issued an order requiring the Defendant to produce four witnesses for cross-examination at the hearing in this case. The Defendant, on July 14, 1980, requested Board review of this order contending it was a final order and that the Referee erred in ordering it to produce the witnesses at the hearing for cross-examination.

The Board does not find Referee Daron's order to be a final order. It is an interim order and does not determine the rights of the parties in this case so that no further question would arise before the Referee. Further action is required by the Referee in this case. Therefore, the Board dismisses the Defendant's request for review.

IT IS SO ORDERED.

CLAIM NO. 4 23 4 M 187 July 22, 1980

MURLIN D. WISE, CLAIMANT
Gale K. Powell, Claimant's Atty.
Brian L. Pocock, Employer's Atty.
Stipulation to Settle Disputed Claim

IT IS HEREBY AGREED AND STIPULATED, the claimant acting by and through his attorney, Gale K. Powell, and Boise Cascade acting by and through its attorney, Brian L. Pocock, as follows:

1. THAT on or about April 27, 1974, claimant sustained a compensable injury while employed by Boise Cascade Corporation and there after filed a claim which was accepted and processed by Boise Cascade.

2. THAT the First Final Determination Order in regard to claimant's claim issued on August 2, 1974, awarding the claimant time loss but no permenent disability. The claim was again reopened and closed by Determination Order dated June 18, 1976, which awarded the claimant additional time loss together with 20% unscheduled low back disability equal to 64 degrees. The claimant requested a hearing form that Determination Order and by stipulation dated March 29, 1977, claimant was awarded an additional 12.20% unscheduled low back disability equal to 39 degrees for a total disability award of 32.20% unscheduled disability equal to 103 degrees.

3. THAT on December 11, 1979, claimant's Aggravation rights having expired, the claimant requested the Board to exercise its Own Motion jurisdiction and reopen his claim. Following this request the Board issued its Own Motion Order dated January 21, 1980, a copy of which is attached to this stipulation.

4. THAT there is a bona fide dispute between the parties whether claimant's request for Own Motion relief should be granted and whether claimant's medical condition for which he has received medical care and treatment and has sustained lost time from work is still causally related to his industrial injury of April 27, 1974.

5. THAT the parties wish to settle the above-entitled dispute by a payment from Boise Cascade to claimant and his attorney of the sum of $7,250.00.

6. THAT the claimant fully understands that payment of this sum does not constitute an admisstion by Boise Cascade that his condition in 1979 and thereafter was or is causally related to his industrial injury of April 27, 1974. Claimant also understands that Boise Cascade will not be responsible for any time loss, medical expense or permanent disability related to claimant's condition for which he has sought Board's Own Motion relief.

7. THAT the parties are agreed that claimant's attorney, Gale Powell, is entitled to the sum of $750.00 payable out of the agreed sum as a reasonable attorney fee for services rendered to the claimant.

8. THAT the claimant agrees that his request that the Board exercise its Own Motion jurisdiction may be dismissed with prejudice.

IT IS SO ORDERED.

Based upon the above stipulation of the parties, the undersigned finds that there is a bona fide dispute between the parties. Pursuant to ORS 656.289(4) the foregoing stipulated settlement is therefore approved and the request that the Board exercise its Own Motion jurisdiction is hereby dismissed with prejudice.

WCB CASE NO. 78-2624 July 23, 1980

MARJORIE BROUGHER, CLAIMANT
Doblie, Bischoff & Murray, Claimant's Attys.
Cavanaugh & Pearce, Employer's Attys.
Request for Review by Employer

The employer seeks Board review of the Referee's order which granted claimant an award of compensation for permanent total disability and granted claimant's attorney a fee out of the increased compensation. The employer contends that claimant's condition is not medically stationary, that the evidence does not support the award granted by the Referee and no evidence that claimant is precluded from continued employment.

FACTS

On September 12, 1977, claimant, a 42-year-old employee of Martin Brothers, suffered a partial loss of the thumb and the second and third digits of the right hand in a saw accident. Dr. Price Gripekoven treated claimant and performed three different surgical procedures on these digits.

Dr. Gripekoven had reported, in December 1977, that claimant's condition was medically stationary. He opined that claimant had lost 82% of her hand as a result of this injury. He felt that her ability to return to work would have to be limited because of the severe disability of her right dominant hand.

The claim was closed by a Determination Order, dated March 14, 1978, which awarded claimant temporary total disability compensation and compensation equal to 97.5° for 65% loss of her right hand.

On May 31, 1978, claimant was referred for vocational assistance. Claimant, at first, was entered into a work tolerance program to explore her tolerance for waitress work. She was also sent through a second work experience as a hotel clerk.

Dr. Michael Fleming, a psychologist, in June 1978, reported that claimant had a ninth grade education. She advised Dr. Fleming she had worked as a waitress for approximately 23 years, worked as a service station cashier for approximately one year and worked disassembling auto transmissions for eight months and had been employed for approximately one month by Martin Brothers at the time of her injury. Claimant indicated she was unable to return to her waitress work because she had developed a condition on the soles of her feet. He indicated that claimant's test results indicated she was well below average in all of her abilities and that she would have difficulty in any new training situation. Dr. Fleming felt claimant's current emotional status was "fairly serious". He described claimant as being generally agitated, fearful, and somewhat compulsive. He felt she was experiencing an endogeneous depression. Claimant, in his opinion, was placing a great deal of emphasis on her somatic complaints, and felt extremely limited in all areas of her life as a result of her injury. He felt that claimant had a great deal of difficulty accepting her limitations and was also experiencing considerable anxiety about her vocational future. Dr. Fleming felt the prognosis for restoration and rehabilitation was fair at best. In his opinion, claimant had very limited basic abilities and did not have any strong aptitudes. He felt that claimant would need considerable vocational guidance and assistance in her efforts to return to full time gainful employment. He felt that she would also need further psychological assistance for her emotional problems.

In September 1978, Dr. Gripekoven reported that claimant was extremely depressed and quite emotional about the deformity of her hand. She continued to complain of extreme pain in the hand which he could not explain based on his physical examinations which remained unchanged. He indicated that claimant had developed a rather significant emotional problem associated with disfiguring injury to her hand, which he felt was understandable. He continued to feel claimant's condition was medically stationary.

In November 1978, Dr. Robert Davis and Mr. Frank Colistro of the Sylvan Psychological and Counseling Services, opined that claimant's disfigurement had precipitated an anxiety neurosis. They indicated claimant's condition was not stationary inasmuch as she was responding to treatment and demonstrating improvement. However, at that time, they felt claimant's condition was seriously debilitating and that recovery was not seen as imminent.

A Second Determination Order, dated February 1, 1979, awarded claimant additional temporary total disability.

In July 1979, Dr. Gripekoven referred claimant to Dr. Joan Kelley for psychological consultation. He reported that claimant had become increasingly depressed and was showing increasing mental despondency concerning her disability. He also related this to her hand injury.

A vocational consultant for the Field Services Division, in August 1979, reported that claimant had been placed, in May 1979, as a desk clerk in a motel. She was fired approximately three weeks after she assumed this job because she could not handle the bookkeeping requirements of that job. The vocational rehabilitation counselor felt that claimant was "placeable", but would need intensified help in returning to employment.

In August 1979, Dr. Davis and Mr. Colistro reported that claimant's condition was not stable and had, in fact, regressed in several ways. They indicated her level of depression and despondency had risen markedly, as had her tendency to see the world in general as hostile and unsupportive. They indicated that claimant's drive and tenacity had also been eroded by repeated failures to find satisfactory employment and that she was becoming more passive and disparing. These serious problems were seen as taking the form of chronic difficulties and the prognosis for significant improvement was guarded at that time. It was their feeling claimant had been an independent and emotionally stable woman prior to her injury, but now was left with deep-seated emotional as well as physical scars. She had a poor self-image, a sense of alienation, despondency which had a serious negative impact on her present and future employability. They felt significant progress was not seen as forthcoming.

It would be adviseable, in their opinion, for claimant to become involved in a regularly scheduled psychotherapy program to assist her in her coping with these problems and hopefully leading to eventual stability and independence.

Dr. Gripekoven, on August 21, 1979, reported that claimant's condition was still stationary and there had been no significant change in her condition. He felt that claimant had significant emotional problems because of the disfiguring mutilation of her hand, which required psychological counseling. He noted the discomfort in claimant's right upper extremity appeared to be improving with the passage of time and was related to the loss of function of her hand. Dr. Gripekoven anticipated that claimant's condition would continue to improve.

Dr. Joan Kelley, a clinical psychologist, on August 24, 1979, reported claimant was bitter, resentful, desperate and hostile because of the disfigurement and pain the amputation the three digits had caused. Claimant indicated she had constant pain in the right hand which occasionally radiated up the arm. Claimant felt the pain restricted the use of her hand and combined with what she saw as a repulsive disfigurement made it difficult for her to become re-employed. Dr. Kelley reported these circumstances, further combined with significant anxiety and depression accompanied by suicidal ruminations. Dr. Kelley felt the prognosis for resumption of productive living was guarded and that claimant would need continued efforts of vocational retraining and therapeutic support.

At the hearing, claimant testified that she still has pain and stiffness in her thumb and pain at the site of the amputation and has limited use of the right hand. She states she can use a pencil by holding it between her two remaining fingers. She indicated she could not return to waitress work because of her foot trouble. She stated that she tried various other jobs which she did not like. Claimant had been retrained through vocational rehabilitation program of on-the-job training as a telephone operator and a desk clerk in a motel. Claimant indicated she attempted to work in this occupation but could not perform the bookkeeping work required and was fired.

The Referee found that claimant's incapacity prevented her from regularly performing work at a gainful and suitable occupation. The Referee concluded that claimant was permanently and totally disabled.

BOARD ON DE NOVO REVIEW

The medical evidence indicates that claimant's psychological condition is not stationary at this time. Drs. Davis and Kelley both indicate that claimant needs additional psychotherapy. Therefore, the Board would reverse the Referee's award of permanent total disability and remand this claim to the carrier to be reopened and commence payment of temporary total disability effective the date of the Referee's order and for intensive psychotherapy and intensive job placements and other vocational assistance. The carrier is entitled to credit payments of permanent total disability against the award of temporary total disability compensation.

ORDER

The Referee's order, dated September 18, 1979, is reversed in its entirety.

The claim is hereby remanded to the carrier for reopening and the commencement of payment of temporary total disability compensation, intensive psychotherapy and intensive job placement and vocational assistance effective the date of the Referee's order, September 18, 1979 and until closed pursuant to ORS 656.268. The carrier is entitled to credit payments it had made under the Referee's order against the temporary total disability compensation awarded by this order.

CLAIM NO. SC 288027 July 23, 1980

BESSIE BUSH, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order On Reconsideration

On June 23, 1980, the Board ordered this claim reopened effective June 3, 1980, the date of the Referee's order under its own motion jurisdiction. Claimant, by and through her attorney, on July 12, 1980, asked the Board to reconsider its order contending this claim should have been opened either as of November 1978 or as of February 5, 1979. Claimant's attorney also requested an attorney fee in addition to and not out of the additional compensation granted claimant.

The Board, after reconsidering its order and the evidence in this case, modifies its order. In 1974, Dr. Slocum felt claimant was permanently and totally disabled. In November 1978, claimant's knee gave out and she fell. She sought medical treatment from Dr. Slocum in February 1979. On February 5, 1979, he stated claimant most likely suffered from a resolving peroneal neuropathy which would recover spontaneously.

The Board finds this claim should be reopened effective February 5, 1979 for payment of compensation and other benefits claimant is entitled to pursuant to law and until closed pursuant to ORS 656.278.

The Board does not find claimant's attorney is entitled to more of a fee than it previously granted. The Board rules provide only for an attorney fee out of compensation. OAR 438-47-020(2).

ORDER

The Board's Own Motion Order, dated June 23, 1980, is hereby modified.

Claimant's compensation for temporary total disability should commence as of February 5, 1979 rather than June 3, 1980 as stated in the original order. The remainder of the Board's order is affirmed.

WCB CASE NO. 79-1978 July 23, 1980

BROADWAY CAB COMPANY, CLAIMANT
Spears, Lubersky, Campbell & Bledsoe,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Order On Review

Broadway Cab Company (Broadway) seeks Board review of that portion of the Referee's order which found the owner-drivers of Broadway Deluxe Cab Company were employees of Broadway from February 1, 1979 to October 2, 1979. Broadway contends the owner-drivers are independent contractors.

FACTS

The Board finds that the facts as recited in the Referee's Opinion and Order are accurate and affirms them. A copy of the Referee's order is attached to this order and, by this reference, made a part hereof.

BOARD ON DE NOVO REVIEW

The Board questions whether it has legal authority to review this case. However, assuming (but not agreeing) that it does, the Board reverses the Referee's finding that the owner-drivers are employees of Broadway.

The evidence indicates the owner-drivers provide their own cabs. Broadway does not exercise control over the owner-drivers as to schedules, the number of hours worked or the manner in which the work is performed. Broadway provides certain services for the use of the owner-drivers on a voluntary basis for a fee. The owner-drivers have available to them services offered by Broadway (on a voluntary basis) and the advantage gained through Broadway's policy of certain administrative functions such as the purchase of vehicle insurance. The Board does not find that the relationship between Broadway and the owner-drivers meets the legal criteria necessary to establish an employer-employee relationship.

The Board finds, based on all the evidence, the owner-drivers are not subject employees of Broadway. Therefore, the Board reverses that portion of the Referee's order which so found, but affirms the remainder of the order.

ORDER

The Referee's order, dated February 12, 1980, is modified.

That portion of the Referee's order which found the owner-drivers of Broadway Deluxe Cab Company were employees of Broadway Cab Company from February 1, 1979 to October 2, 1979 is reversed.

The remainder of the Referee's order is affirmed.

WCB CASE NO. 79-7091 July 23, 1980

WILLIAM A. DYER, CLAIMANT
Alan B. Holmes, Claimant's Atty.
SAIF, Legal Serivces, 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 Corporation, and said request for review now having been withdrawn,

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

WCB CASE NO. 80-1289 July 23, 1980

GEORGE HAYES, CLAIMANT
Gary Allen, 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 requst 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.

BLYTHE S. HIRST, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

On July 22, 1951, claimant was struck in the left eye by a piece of steel. The claim was accepted and initially closed by an order, dated October 28, 1954, which awarded claimant compensation equal to 4.3° loss of vision in the left eye. Claimant's aggravation rights have expired.

In 1974, Dr. Henton reported claimant's vision in the left eye had deteriorated. Dr. L. Christensen, in August 1977, reported claimant had developed a traumatic cataract in his left eye. On October 27, 1977, Dr. Christensen performed a phaco-emulsification and lens implant in claimant's left eye. After this surgery, claimant was released for work on November 28, 1977.

In January 1978, Dr. Christensen reported he had found increased pressure in the left eye. Visual acuity was corrected to 20/40.

On June 13, 1979, claimant was hospitalized for a discission of the pupillary membrane of his left eye the following day. Claimant was discharged from the hospital on June 15, 1979. Dr. Christensen reported claimant's vision was corrected to 20/30. Claimant returned to work on June 16, 1979.

On December 21, 1979, the State Accident Insurance Fund requested a determination of claimant's disability. On July 14, 1980, the Evaluation Division of the Workers' Compensation Department recommended claimant be granted an award of compensation equal to 50% loss of vision of the left eye in lieu of all previous awards and additional temporary total disability compensation from October 26, 1977 through November 27, 1977 and from June 13, 1979 through June 15, 1979.

The Board concurs in this recommendation.

ORDER

Claimant is hereby granted compensation for temporary total disability from October 26, 1977 through November 27, 1977 and from June 13, 1979 through June 15, 1979, less time worked.

Claimant is also granted an award of compensation equal to 50% loss of vision of the left eye in lieu of all previous awards granted for this disability.

CLAIM NO. HB 139488 July 23, 1980

LAWRENCE WILFRED WELLS, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury on May 4, 1965 to his left knee. The claim was closed and his aggravation rights have expired. In June 1975, claimant underwent a proximal tibial osteotomy and the claim was again closed in October 1976 with an award of compensation equal to 50% loss of the left leg.

An Own Motion Order, dated January 29, 1979, reopened the claim effective September 28, 1978. Claimant underwent additional surgery. An Own Motion Determination of February 21, 1980 awarded claimant additional temporary total disability compensation and ordered the State Accident Insurance Fund obtain additional information on claimant's disability and submit it to the Evaluation Division for its consideration.

This was done and on July 14, 1980, the Evaluation Division recommended claimant receive no additional permanent partial disability after comparing his current disability with his disability in October 1976.

The Board concurs with this recommendation.

ORDER

Claimant is entitled to no additional permanent partial disability for his injury sustained on May 4, 1965.

WCB CASE NO. 79-6976 July 23, 1980

TRACEY J. WHITEMAN, CLAIMANT
Allen & Vick, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Claimant seeks Board review of the Referee's order which affirmed the State Accident Insurance Fund Corporation's (Fund) denial of responsibility for her neck and back complaints.

FACTS

The Board finds that the Referee accurately set out the facts of this case in his Opinion and Order. The Referee's order is attached hereto and, by this reference, made a part hereof.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, affirms the Referee's order. The preponderance of the evidence, both medical and lay testimony, does not establish that claimant's back and neck problems are related to her employment. While it is true claimant's problems arose while she was employed by the employer, no nexus has been established between her work and this condition. Claimant has failed to prove her claim. Therefore, the Board affirms the Referee's order.

ORDER

The order of the Referee, dated February 28, 1980, is affirmed.

CLAIM NO. 941 C 24 62 26 July 23, 1980

EUGENE WILLIAMS, CLAIMANT
Doblie & Francesconi, Claimant's Attys.
Schwabe, Williamson, Wyatt, Moore & Roberts, Employer's Attys.
Own Motion Order

On May 8, 1980, claimant, by and through his attorney, petitioned the Board to exercise its own motion jurisdiction and reopen his August 6, 1973 claim for a heart attack while employed by Green Thumb. Claimant suffered a second acute myocardial infarction on October 31, 1979 while employed by a second employer. Both employers denied responsibility for the second heart attack.

On January 25, 1980, Dr. Herbert Griswold opined claimant's second heart attack was related to the first heart attack.

Claimant requested a hearing on both of the employers' denials. However, on May 8, 1980, he withdrew both requests and filed his petition for own motion relief.

Dr. Wayne Rogers, in June 1980, opined claimant's second heart attack was not related to the first. He felt claimant's second heart attack was due to the further progression of the atherosclerotic narrowing of claimant's arteries.

On July 14, 1980, Green Thumb, by and through its carrier's attorney, indicated it felt the Board should not exercise its own motion jurisdiction in this case.

The Board finds it would be in the best interests of all the parties if this case were remanded to the Hearings Division. A hearing shall be scheduled and the Referee shall decide whether or not claimant's second myocardial infarction is related to the first myocardial infarction and represents a worsening of that condition. Upon the conclusion of the hearing, the Referee shall forward a transcript of the proceedings together with other exhibits to the Board.

IT IS SO ORDERED.

WCB CASE NO. 78-8610 July 24, 1980
WCB CASE NO. 78-9204
WCB CASE NO. 78-10,323

KAREN L. BAILEY, CLAIMANT
Don G. Swink, Claimant's Atty.
Schwabe, Willaimson, Wyatt, Moore & Roberts, Employer's Atty.
Request for Review by Employer

Tri-Met/Fred S. James & Company seek Board review of that portion of the Referee's order which reversed their denial of claimant's left shoulder claim and remanded the claim to them for acceptance and payment of compensation and awarded claimant's attorney a $600 attorney fee. They contend that claimant's left shoulder condition was a compensable consequence of her right shoulder condition and/or that the left shoulder condition was compensable against the State Accident Insurance Fund (Fund) as a separate injury.

FACTS

Claimant, a 38-year-old bus driver with Tri-Met, alleges that on March 24, 1977 she developed a painful right shoulder because of her bus driving. At this time, the Fund provided Workers' Compensation coverage for the employer. The claim was accepted. Dr. J. Norris diagnosed this condition as right bicep tendinitis. Claimant was released for regular work on July 25, 1977 by Dr. Harris. He indicated that it was unknown if claimant would suffer any permanent impairment as a result of this injury. The release for work at this time was on a trial basis.

Claimant returned to work on July 27 and she testified she shortly experienced the same symptoms in her left shoulder.

On August 5, 1977, Dr. Theodore Pasquesi reported that claimant gave him a history of gradually developing pain in the region of her right shoulder. She indicated she had to stop working on March 24, 1977 because of this pain. He noted that claimant had pain in the left shoulder occasionally as well as in the right shoulder. Dr. Pasquesi diagnosed claimant's condition as a supraspinatus tendinitis or bursitis with some acromioclavicular arthritis and slight scapulothoracic bursitis of the right shoulder. He felt claimant's problems were probably an occupational disease and expected her symptoms to continue although he felt it was reasonable she could remain on her prior job.

Claimant testified the pain in both shoulders worsened and she was forced to quit driving on December 1, 1977.

Dr. Harris, in his December 1977 report, indicated she had continuing pain in the right shoulder area. EMG studies performed were normal but nerve conduction studies showed a very mild increase in median nerve sensory latency bilaterally. He took claimant off work.

Tri-Met had been provided workers' compensation coverage by the Fund until January 1, 1978 when it became self-insured, through Fred S. James & Company.

The claim was initially closed by a Determination Order, dated January 6, 1978, which awarded claimant temporary total disability. This order was set aside by another Determination Order, dated January 20, 1978, based on an additional medical report from Dr. Harris.

Dr. Harris, on February 22, 1978, reported that he released claimant for regular work as of February 27, 1978 and found her condition medically stationary as of February 22, 1978. He felt that claimant would have no permanent impairment as a result of this injury.

The claim was again closed on April 11, 1978 by a Determination Order which awarded claimant temporary total disability from March 25, 1977 through July 24, 1977, less time worked, and further from December 1, 1977 through February 26, 1978, less time worked.

Dr. Harris, on August 15, 1978, reported that claimant had complaints in both the left and right shoulders. He felt that claimant's condition had worsened somewhat since her claim had been closed and that she was now complaining of pain in both shoulders. He felt that it was questionable how much longer claimant would be able to continue to drive buses and that if her symptoms persisted she would probably have to change occupations.

On September 6, 1978, Dr. Harris reported that claimant had ceased working as a bus driver, due to persistent pain in both shoulders. He felt that claimant would be required to change occupations and could perform work which did not require working over her head, occasional lifting with more than 35 pounds or repetitive lifting for more than 10 pounds.

On September 14, 1978, the Fund denied claimant's claim for her left shoulder condition. This is based on the fact that the original claim was made on the right shoulder condition only and that there had been no aggravation of that condition. It was suggested that claimant file a claim with Fred S.James & Company for benefits and medical payments for treatment of the left shoulder.

On September 27, 1978, Dr. Harris reported that he felt that responsibility for claimant's condition could be divided between the Fund and Fred S. James & Company. He opined that claimant's condition was medically stationary and recommended vocational rehabilitation.

On October 5, 1978, claimant filed a claim for her left shoulder condition with the Fred S. James & Company. On November 17, 1978, Fred S. James & Company denied responsibility for claimant's left shoulder condition. It was their position that the left shoulder condition was the result of the right shoulder injury which had been accepted by the Fund. It contended that because claimant protected the right shoulder due to the March 1977 injury, she overused the left shoulder, resulting in her current problems.

A Second Determination Order, dated November 29, 1978, awarded claimant additional temporary total disability compensation and compensation equal to 48° for 15% unscheduled disability for her right shoulder injury.

On January 2, 1979, claimant was released for part-time work. She was released for full-time work as of January 23, 1979 by Dr. Harris.

On January 31, 1979, a .307 order was issued designating the Fund as the paying agent.

Dr. Pasquesi, in April 1979, reported claimant continued to complain of pain in the region of the anterior aspect of the right shoulder, the top of the shoulder and the back of the shoulder. She indicated this varied from day to day. This pain was increased with motion such as turning the wheel of the bus, raising her arm above shoulder level, grasping, reaching and pulling. The diagnosis was persistent tendinitis of the region of the right shoulder. He felt that claimant's condition would continue and she would eventually probably have to stop driving a bus. Claimant was medically stationary and her impairment, on the basis of chronic moderate pain, was equal to 10% of the upper extremity.

A Determination Order, dated May 25, 1979, awarded claimant additional temporary total disability compensation and compensation equal to 32° for 10% unscheduled disability for her right shoulder injury. The period of the temporary total disability compensation was corrected by another Determination Order of the same date.

Claimant testified that she felt that because of her right shoulder injury she used her left arm more while driving the bus. She felt this produced the condition in the left shoulder. She stated the left shoulder problems began in July 1977 and that she reported this to Dr. Harris, who apparently made no notes of it.

The Referee concluded claimant was probably correct in her belief that the need to use the left arm more while driving the bus to favor her right shoulder produced the condition in the left shoulder. It was noted that neither the Fund or Fred S. James & Company denied that claim for the left shoulder was compensable. The Referee felt that the issue before him on whether the left shoulder problem resulted as a compensable consequence of the original right shoulder injury or condition was the responsibility of Fred S. James & Company under "the last injurious exposure" rule. The Referee found, after applying the "last injurious exposure rule" that the left shoulder condition was the responsibility of Fred S. James & Company. Therefore, the Referee reversed that denial and remanded the claim to it for acceptance and payment of compensation.

BOARD ON DE NOVO REVIEW

Claimant testified that her left shoulder began to be painful in July 1977. She indicated she felt that she developed trouble in the left shoulder because she compensated for her right shoulder injury. She said that when she left work in December 1977 it was because of the condition of both her left and right shoulder. Dr. Pasquesi reported in August 1977 that claimant reported she had occasional trouble with her left shoulder as well as trouble with her right shoulder. The Board, after reviewing all the evidence, concludes that the left shoulder problem results as a compensable consequence of claimant's original right shoulder injury. Therefore, the Board would reverse the Referee's order and order the claim be remanded to the Fund for acceptance and payment of compensation and ordered that the Fund reimburse Fred S. James & Company for any payments made pursuant to the Referee's order.

ORDER

That portion of the Referee's order which set aside the denial of Fred S. James & Company, remanded the claim to Tri-Met and affirmed the denial of the State Accident Insurance Fund is reversed.

The denial of Fred S. James & Company issued November 17, 1978 is reinstated and affirmed.

The denial of the State Accident Insurance Fund, issued September 14, 1978, is reversed. The claim is remanded to it for acceptance and the payment of compensation and other benefits pursuant to law and until closed pursuant to ORS 656.268.

It is further ordered that the Fund reimburse Fred S. James & Company for all sums that it expended on this claim pursuant to the Referee's order.

The $600 attorney fee ordered by the Referee to be paid by Fred S. James & Company on behalf of Tri-Met shall be paid by the State Accident Insurance Fund.

The remainder of the Referee's order is affirmed.

WCB CASE NO. A 779323 July 24, 1980

C.E. BREWSTER, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant sustained a compensable injury to his right arm on February 5, 1960. The claim was accepted and first closed by an order, dated May 25, 1965, and his aggravation rights have expired.

On January 3, 1980, Dr. Richard Hopkins indicated that claimant had been stacking empty pallets about two weeks previous and has had pain in his right arm ever since. The doctor's impression was that of a neuritis of the transplanted ulnar nerve. Claimant was treated with medication at first but his arm continued to have pain and a transcutaneous stimulator was tried. It gave him almost complete relief from pain and he was getting along very well. On May 29, 1980, Dr. Hopkins indicated that claimant had a recurrence of his ulnar neuritis about three weeks previous to that after lifting some watermelons. The pain was so acute that he had been off work since then, with relief from the stimulator only if he didn't use it too much. In June, Dr. Hopkins reported that claimant's condition had not improved at all.

On July 11, 1980, the State Accident Insurance Fund Corporation advised the Board that it would not oppose an Own Motion Order reopening claimant's claim for time loss which started in early May 1980 as a result of the watermelon lifting incident.

The Board, after thorough consideration of the evidence, concludes that claimant's claim should be reopened as of the date he became temporarily disabled as a result of lifting watermelons in early May 1980 and until closed pursuant to the provisions of ORS 656.278.

IT IS SO ORDERED.

WCB CASE NO. 78-6855 July 24, 1980

MARIA FRANCO, CLAIMANT
January Roeschlaub, Claimant's Atty.
Noreen K. Saltveit, Employer's Atty.
Request for Review by Claimant
Cross-appeal by Employer

Claimant and the employer seeks Board review of that portion of the Referee's order which granted her an award of compensation equal to 96° for 30% unscheduled disability for her back injury in lieu of all previous awards. Claimant contends the award of unscheduled disability does not adequately compensate her for her loss of wage earning capacity she suffered as a result of this injury. The employer-carrier contends the Referee's award for permanent partial disability is excessive.

FACTS

On August 17, 1977, claimant, a 47-year-old food processor inspector with General Foods Corporation, suffered an injury to her back and neck when she slipped and fell on a wet floor. She sought treatment from Dr. Roger Popp, a chiropractor, who diagnosed her injury as an acute cervical thoracic lumbar sprain/strain.

Dr. Jerry Becker, in November 1977, examined claimant and noted that she was unable to speak English. Through an interpreter she denied any prior history of neck, waist, low back or leg pain. Dr. Becker felt claimant did have a problem with her neck and possibly low back, but found no neurological deficits. He felt that claimant did have moderately severe functional overlay.

Dr. James Mason, in December 1977, examined claimant at the Disability Prevention Center. Claimant, through an interpreter, complained of pain in the low back, neck, intermittent right arm and right leg pain, numbness in the low back and right leg which was intermittent, intermittent cramps in the right leg, intermittent cramps and numbness in the right arm and headaches. Claimant indicated that she was unable to do anything. She indicated that sitting longer than 10 to 15 minutes aggravated her pain as well as standing longer than 20 minutes. Claimant reported she had no formal education. She stated she had worked in a cannery as an inspector for approximately three years, had previously operated a sewing machine, and worked in a tree nursery. Dr. Mason diagnosed a strain of the cervical dorsal and lumbosacral spine, which resulted in claimant having an undetermined degree of residual disability, which he rated as probably not over mild, if any, organically. He found no evidence of nerve root compression involving the cervical or lumbosacral spine. Dr. Mason did find marked emotional overlay. He indicated that claimant presented a clinical picture of complete, right body hysterical neurosis and that the neurosis totally prevented objective evaluation of her physical status. Dr. Oda Kent, a psychologist and vocational team chairman, reported that it was the consensus of the vocational team claimant did possess a vocational handicap due to her physical limitations and that she should not return to work in an occupation in which she had previous experience and/or training due to the possibility of an exacerbation of her physical symptoms. Claimant was referred to the Vocational Rehabilitation Division for assistance. Dr. Mason, in January 1978, indicated that as long as claimant's emotional condition remained as it was at that time, claimant would be "apparently" limited to sedentary work. Dr. Kent reported that claimant had not attended any formal school, but that she could read and write Spanish on a limited basis. Dr. Kent felt claimant was quite depressed. It was felt that once claimant's emotional problems were resolved she would be a good candidate for rehabilitation.

Claimant was referred to the Vocational Rehabilitation Division for assistance in January 1978. Claimant was found ineligible for their services on March 20, 1978 because it was felt her handicap was too severe.

In April 1978, Dr. Becker reported that he was not claimant's treating physician and had only seen her once. After reviewing the reports from the Callahan Center he indicated it did not appear that there was significant change in claimant's condition and that one could assume that claimant's condition was medically stationary.

The claim was initially closed by a Determination Order, dated August 17, 1978, which awarded claimant temporary total disability compensation and compensation equal to 32° for 10% unscheduled disability for her back injury. Subsequently, additional evidence was received by the Evaluation Division and a Second Determination Order was issued on September 18, 1978 which affirmed the prior order.

On August 31, 1978, this employer indicated that a job was available for claimant as a belt inspector. Dr. Becker, in December 1978, indicated that this job description was within claimant's capability, although she might experience some discomfort in performing it. He felt this would be an excellent vocational choice for claimant.

In September 1978, claimant was referred to the Motivation Rehabilitation Consultants for assistance in determining an appropriate vocational goal. The rehabilitation consultant, after interviewing claimant, felt that her complaints of continued pain and discomfort were not as great as she made them out to be. It was felt that claimant had a strong emotional and functional overlay and that she should be employed in the area in which she resided. It was felt she would benefit from on-the-job training with a Spanish speaking instructor or supervisor and that she could not function in any type of formal training or schooling.

Dr. Becker, in October 1978, reported that claimant, through an interpreter, complained of continuing pain in her neck, low back, and described her neck pain as being constant and spreading the whole posterior of the neck. She indicated she had some radiation from the shoulder into the arm area. Dr. Becker felt that claimant had a cervical lumbosacral pain of a questionable degree, which was not severe, with no localizing findings suggestive of a herniated intervetebral disc disease. He felt that claimant had severe functional overlay with apparent conversion hysteria and moderately severe obesity. He recommended that claimant lose some weight and return to work.

In January 1979, the rehabilitation consultant reported that claimant, in her opinion, was capable of performing the job offered by the employer. It was felt that claimant needed no additional training to make her employable. The belt inspector job was the lightest form of employment that this employer had for claimant.

In February 1979, the employer advised its carrier claimant was not working at that time. They indicated that they would contact claimant when there was something available in her line of seniority that was within her capabilities and limitations.

In April 1979, Dr. Dudley Bright reported he felt claimant appeared to have degenerative osteoarthritis of the cervical spine and spurring and sclerosis at multiple levels of the lumbosacral spine. He felt that claimant's problems were mainly related to arthritis and not to her accident of August 1977. He felt it was possible that the accident aggravated her arthritis, but at that time the disability was related to the degenerative arthritis of the cervical and lumbosacral spine. He did not find any reason why claimant could not return to her previous job and that the claim could be closed. He found she had no residual damage or permanent deformity secondary to her work-connected injury.

Dr. Bright was deposed. In his deposition he stated that claimant's injury prevented her from returning to her previous forms of employment. He felt she was unable to do work which required sitting, standing, or walking for any length of time. He limited her sitting ability to approximately 30 to 40 minutes. He felt she could lift only 10 to 15 pounds. He opined that claimant's injury aggravated the osteoarthritis condition and may have also "precipitated the pain chronicity the patient now has". He felt it was difficult to say what type of employment claimant could perform.

Claimant testified she could not stand for long periods of time. She indicated she is unable to perform much of her housework and had to be assisted by her children. She indicated she is unable to lift anything from the floor and is able only to lift light objects from a table. She stated that her back gives her trouble constantly and she currently uses a considerable amount of medication for her back condition. According to claimant, she would like to go back to cannery work if she was able to do so. She stated that she has inquired about a nursery job, but feels that her limitations in her back prevent her from performing this job.

The Referee found that, considering all the evidence, claimant had lost approximately 30% wage earning capacity and, therefore, granted her an award of compensation equal to that amount. The Referee found the carrier's delay in the payment of temporary total disability was unreasonable. The Determination Order had awarded temporary total disability from August 18, 1977 through August 8, 1978. Claimant's attorney, on August 17, 1978, had advised the carrier that claimant had been disabled since May 24, 1978 and was still disabled. The carrier, on November 10, 1978, paid claimant the temporary total disability for the period from May 25, 1978 through August 8, 1978. The Referee found the manner of payment in this case required that he assess a penalty and attorney fee. Therefore, he awarded a penalty of 25% of the amount of temporary total disability and a $300 attorney fee for the failure to pay the temporary total disability properly.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, concurs with the Referee's findings and conclusions in this case. The evidence indicates that as a result of her August 1977 injury claimant has suffered a loss of wage earning capacity commensurate with that award granted by the Referee. Likewise, the Board finds that the carrier did not properly pay time loss as required by law. Therefore, the Referee's award of penalties and attorney's fees in this case was also correct. In conclusion, the Board would affirm the Referee's order. The Board, likewise, would suggest that the Field Services Division contact claimant and assist her in her re-employment efforts.

ORDER

The order of the Referee, dated January 25, 1980, is affirmed.

CLAIM NO. HC 156512 July 24, 1980

ROBERT CARL LAUBER, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant sustained a compensible injury to his left leg on November 16, 1968 which resulted in a amputation below the knee. The claim was subsequently closed and claimant's aggravation rights have expired.

On May 16, 1980, the Workers' Compensation Board reopened claimant's claim by an Own Motion Order based on Dr. Robert McKillop's April 15, 1980 report. Dr. McKillop indicated claimant had developed a loose fitting prosthesis which resulted in sores on his stump. He recommended that claimant "leave the prosthesis off and stay off his feet", and felt that he would be ready for casting and fitting of a new prosthesis in two weeks. On May 13, 1980, Dr. Leland Cross, a physiatrist, indicated that claimant's skin lesions had healed and the prosthetic device fit well. In Dr. McKillop's absence, Dr. Cross released claimant to work as of May 14, 1980.

On July 7, 1980, the State Accident Insurance Fund Corporation (Fund) requested a determination of claimant's current disability.

The evaluation division of the Workers' Compensation Department, recommended to the Board that claimant be granted time loss comencing April 15, 1980 and until May 13, 1980 the date he was released for work.

The Board concures in this recommendation.

ORDER

Claimant is hereby granted compensation for temporary total disability from April 15, 1980 through May 13, 1980 less time worked. The record indicates that claimant has already been paid this temporary total disability.

WCB CASE NO. 77-7834 July 24, 1980

GARY LEACH, CLAIMANT
Allan H. Coons, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

candidate for surgery. Dr. Norman Hickman, a psychologist, reported that claimant was evidencing a generally high level of psychological distress. He felt claimant was displaying a moderately severe psychoneurotic reaction with anxiety, depression and pre-occupation with his few physical and emotional complaints. He felt there was certain evidence of a basic personality trait disturbance with emotional immaturity and instability. Dr. Hickman felt the principle feature in claimant's adjustment pattern was his paranoid thinking. He felt there was only a mildly moderate relationship between claimant's present psychopathology and his accident through the aggravation of a pre-existing condition. He did not feel that that portion of psychopathology which was related to his accident would be permanent if claimant could be vocationally re-established in some occupation.

In March 1973, Dr. Roy Hanford reported he found no neurological deficit. He felt claimant needed to obtain a lighter occupation other than working in the woods.

Dr. Weinman, in May 1973, reported that he did not feel there were any psychiatric abnormalities that interferred with the objective physical findings in his examination. He rated the loss of function of the back as mild. He felt the claimant's condition was stable and that he should not have a spinal fusion. However, he noted that claimant could not return to his former job. Dr. Hanford, in June 1973, also found claimant's condition stationary and rated his impairment as mild.

The claim was initially closed by a Determination Order, dated July 10, 1973, which awarded claimant a period of temporary total disability compensation and compensation equal to 32° for 10% unscheduled disability for his back injury.

In October 1973, after being hospitalized for complaints of severe back pains, Dr. Stanley Young reported he found no objective or x-ray abnormalities to justify claimant's claim of severe pain. He strongly suspected relatively marked drug dependency or drug addiction on the part of claimant. He felt the claimant would be a "catastrophically poor risk for any surgical attempt at resolution of his symptoms as I feel that his main problem at this time is psychological".

The claimant seeks Board review of the Referee's order which granted him an award of compensation equal to 96° for 30% unscheduled disability for his back injury and granted claimant's attorney a fee out of this increased compensation. Claimant contends that he is permanently and totally disabled.

FACTS

On September 26, 1972, claimant, a 21-year-old chaser with Tilley Logging, was caught between a shovel and a log and squeezed injuring his back and stomach. Dr. Darrell Weinman diagnosed fractures of the transverse process of L2,3,4 and 5 on the left side. X-rays revealed claimant had a spondylosis on the left side at the L5-S1 level.

In January 1973, claimant was referred to the Disability Prevention Center for evaluation. Dr. James Mason, medical examiner, reported that claimant had developed some psychological difficulty while in the service. Claimant stated that he was shell-shocked in combat. It was noted that Dr. Weinman had reported that claimant had difficulty understanding instructions either because he had a limited I.Q. or had some problem with the use of drugs. Dr. Mason diagnosed healed fractures of the left transverse process of the L2,3,4, and 5 by history and with questionable residuals and a low back strain. He felt the residuals from this injury were probably minimal to mild. Dr. Mason did not feel, based on claimant's psychological status, that he was a

Dr. Floy Jack Moore, a psychiatrist, in November 1973, reported claimant was showing symptoms of a schizophrenic reaction-paranoid type. He felt that claimant had these psychiatric-emotional problems for some time prior to his injury. However, he felt that prior to his injury claimant had been able to function apparently at a reasonable level and after the injury he was unable to so function. Dr. Moore was of the opinion that the injury and whatever special meaning it had to claimant, likely precipitated or accelerated his psychiatric difficulties.

In May 1974, Dr. Donald Schroeder reported that he felt claimant had ligitimate complaints of back pain secondary to his spondylolisthesis. He felt that claimant's condition had progressively deteriorated during the last year and felt that claimant had become medication dependent. He felt surgical intervention was indicated.

Dr. Charles Brown, in July 1974, reported that he did not feel claimant was suffering from any thought disorder. He concluded that claimant was more than likely suffering from an organic disease which was causing his pain. He agreed with Dr. Schroeder that claimant was a candidate for surgery. Dr. Brown felt that less emphasis should be placed on claimant's emotional difficulties and that he receive a correction of his orthopedic problem and then after that felt claimant might benefit from further psychiatric treatment.

In September 1974, Dr. Mario Campagna reported that he had diagnosed multiple lumbar fractures, post-traumatic aggravation of spondylolisthesis and severe psychopathology. He discussed these problems with the claimant and claimant agreed to be hospitalized for psychiatric evaluation.

While claimant was hospitalized he was evaluated by Dr. J. M. Kilgore. Dr. Kilgore diagnosed a neurosis with hypochondriacal and hysterical features and a strong possibility that the pain claimant complained of was based on these features. He also diagnosed an anti-social personality and the claimant was attempting to dictate treatment in order to get surgery. He felt claimant was possibly addicted to Codeine. Also, in September 1974, a myelogram was performed which was interpreted as being normal.

In October 1974, it was noted that claimant was abusing his medication. Therefore, it was suggested that closer attention be paid to claimant's use of prescription medication.

A Second Determination Order, dated February 19, 1975, awarded claimant additional temporary total disability compensation pursuant to an Opinion and Order of a Referee.

On November 6, 1975, Dr. W. L. Streitz performed a posterior lateral fusion with graft from right posterior iliac crest from L4 to sacrum. Dr. Streitz reported claimant was medically stationary as of March 26, 1976. However, in May 1976, he indicated that claimant was not medically stationary and was still recovering from his fusion. In September 1976, Dr. Streitz stopped treating claimant because claimant allegedly had obtained some drugs from his office.

Dr. Campagna, in November 1976, found no objective evidence of any organic disease of the central nervous system. He noted that claimant was in a post-fusion status. Dr. Campagna felt claimant should be seen at the Disability Prevention Center for psychiatric and psychological counseling. Dr. N. J. Wilson concurred with this recommendation. Dr. Campagna, in March 1977, reported claimant's condition was still stationary.

Claimant was incarcerated in the Oregon State Penitentiary for a drug-related offense. In February 1977, Dr. Jerry Becker reported that claimant was still complaining of low back pain. In June 1977, Dr. John White reported that he felt claimant suffered from hysteria, status-post-lumbosacral fusion, and found that claimant had a normal neurological status. Dr. White felt that claimant's problem was psychiatric rather than physical. He noted he would be opposed to any surgical procedures in the lumbar area. In August 1977, Dr. Becker had indicated that claimant was suffering from a pseudoarthrosis at the L4-5 level.

A Third Determination Order, dated November 30, 1977, awarded claimant additional temporary total disability.

Dr. Hugh Gardner, a psychiatrist, in May 1978, reported that his diagnosis indicated a personality disorder with many passive, aggressive and anti-social features. He advised claimant that no surgery would relieve his discomfort. Dr. Gardner noted that claimant would probably continue to shop for a physician to gain his own ends in terms of surgical approach and medication. He felt surgical intervention, in fact, was contraindicated as was analgesic therapy. Dr. Gardner opined that the personality disorder that the claimant was then experiencing antidated his industrial accident and had been well documented as early as the age of 15.

In January 1979, claimant was referred to the Northwest Pain Clinic. The initial diagnosis consisted of hysterical conversion reaction, compensation neurosis with significant secondary gains in areas of relief from work responsibilities, home activities and responsibilities, character disorder, low frustration tolerance, low self-esteem, impulsive disorder, chronic marital and family problems, economic security resting on continued disability complaints, chronic mechanical low back pain and status post-fusion. Dr. Seres noted that claimant's basic interest seemed to be obtaining a regular supply of narcotics. He also noted that claimant was interested in having further surgery performed. Dr. Seres did not feel that any further surgery would be of benefit to claimant.

Dr. Leonard Yospe, a psychologist with the Pain Center, felt that claimant's manner of relating was extremely manipulative and was quite consistent with a diagnosis of a character disorder. Dr. Yospe felt that claimant had many characterological features which could be best subsumed under the diagnosis of sociopathic personality. He did not feel that claimant would benefit from treatment at the Pain Center. Claimant, in fact, did not complete the initial evaluation that was performed at the Center.

Again, in January 1979, claimant was hospitalized with complaints of low back pain and anxiety. Dr. S. Aflatooni diagnosed a drug dependence and depressive neurosis with anxiety features.

Dr. Brown, in March 1979, agreed with Dr. Gardner that claimant had no psychological sequela to his injury. He indicated he did not feel claimant was suffering from a depressive neurosis.

Dr. Richard Matteri, also in March 1979, reported he was unable to definitely establish any pseudoarthrosis. He also could not find any positive neurological findings. He felt that claimant's chances of obtaining any relief from additional surgery were next to zero.

In the record are various reports from the Veteran's Administration regarding claimant's treatment by them. They indicate that as early as 1970 claimant was receiving some treatment for his psychiatric problems.

Dr. Brown was deposed and in his deposition he stated that he felt claimant manipulated his own disability in order to relieve himself from tension which was generated by the kind of responses that claimant had prior to his injuries such as trouble with the law and fights. Dr. Matteri was also deposed. He opined that claimant was permanently disabled based on his overall evaluation of claimant. He felt that claimant's use of the crutches was rather bizarre. Dr. Matteri was not able to state that claimant had any greater than normal impairment due to his fusion, because he was unable to accurately measure it. However, he did not feel that from an orthopedic standpoint the disability was permanent and total.

Dr. Gardner testified at the hearing. It was his opinion that most of claimant's indications of his problems were voluntary and that claimant is undoubtedly faking his pain and the amount of disability he had in order to obtain drugs and increase his disability.

At the hearing, claimant testified that he can do very little, if anything. It was noted that he moved very slowly during the hearing itself. Claimant, at the hearing, was on crutches and testified that he uses a back brace. Claimant indicated that he felt he was unquestionably permanently and totally disabled.

The Referee commented that he felt the claimant had rationalized himself into a position where he, in his own mind, was permanently and totally disabled. The Referee felt that claimant was apparently using his injury voluntarily in order to obtain drugs. The Referee found that regarding claimant's psychiatric condition that no further treatment was necessary for this condition or the portion of the condition which was attributed to the industrial injury. The Referee concluded that based on the evidence, the psychiatric condition which existed at the time of the hearing was not part of the industrial injury. Based on all the evidence, the Referee found that claimant was not permanently and totally disabled. The Referee felt that claimant was able to function with his disability, that he was voluntarily aggravating his condition in order to obtain compensation. The Referee, based on all the evidence concluded that claimant's disability was greater than the 10% awarded by the Evaluation Division, but did not exceed 30%. Therefore, the Referee granted claimant an award of compensation equal to 96° for 30% unscheduled disability in lieu of all previous awards for permanent partial disability and granted claimant's attorney a fee out of this increased compensation.

BOARD ON DE NOVO REVIEW

The Board, after reviewing this voluminous file, concurs with the Referee's assessment of this case. The Board, as did the Referee, finds that claimant is not permanently and totally disabled. The majority of claimant's psychiatric problems pre-dated his industrial injury. The Board does not find that these conditions when coupled with claimant's injury make him permanently and totally disabled. It is apparent from the exhibits that claimant has voluntarily withdrawn from the labor market. It is also apparent from the evidence that claimant is voluntarily using this injury as an excuse to obtain more medication and to avoid many of his responsibilities. However, claimant has undergone a fusion of his back and would need a different form or type of employment than that which he has previously been doing. Therefore, the Board finds that claimant has suffered a loss of wage earning capacity due to this injury. The Board feels the Referee correctly decided claimant's loss of wage earning capacity and correctly awarded claimant the compensation he did. Therefore, the Board would affirm the Referee's order.

ORDER

The Referee's order, dated October 9, 1979, is affirmed.

CLAIM NO. YC 475573 July 24, 1980

THOMAS LONG, CLAIMANT
Richard Kropp, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On June 12, 1980, claimant, by and through his attorney requested the Board to reopen his claim for back injury he sustained on July 6, 1973. Claimant indicated that he had undergone several back surgeries and after a 1976 spinal fusion developed spinal meningitis. In March or April 1980, he developed loss of sphincter control and was having a great deal of trouble. Attached to claimant's request were medical reports from Dr. Hugh Miller and Dr. George Throop. Claimant's aggravation rights have expired.

On June 19, 1980, the Board advised the State Accident Insurance Corporation (Fund) of claimant's request and asked it to inform the Board of its position within 20 days.

On June 3, 1980, Dr. Robert Fry examined claimant and found that he had a condition of pseudoarthrosis. Dr. Fry indicated that in 1977, claimant also had the same problem, but surgery was not recommended at that time because he was getting along well with his transcutanious nerve stimulator and a brace. At the present time claimant is still having problems in addition to numbness in both legs and the left arm and lack of sphincter control. Dr. Fry felt the claimant's condition should be studied immediately by a neurologist and that the symptoms should be headed off as soon as possible. He recommended a myelogram be done. On June 9, 1980 a myelogram was performed by Dr. Robert Fry. The diagnosis was pseudo-arthrosis with spinal fusion at the lumbro sacral area. He felt claimant was totally disabled due to the pseudoarthrosis of the spinal fusion.

On July 10, 1980 the Fund advised the Board that it did not oppose an Own Motion Order reopening claimant's claim as of the date of the myelogram, June 9, 1980.

The Board, after thorough consideration of the evidence before it, concludes that claimant's claim should be reopened as of the date of his myelogram, June 9, 1980 and until closed pursuant to the provision of ORS 656.278.

Claimant's attorney is entitled to a reasonable attorneys fee equal to 25% of the increased compensation granted by this order, not to exceed $250.

IT IS SO ORDERED.

CLAIM NO. C 29752 July 24, 1980

SHARON MARRIOTT, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant sustained a compensible injury to her left knee on July 6, 1966. Her claim was first closed on October 14, 1966 and her aggravation rights have expired.

On April 1, 1980, Dr. Robert Steele diagnosed traumatic chondromalacia patella. He felt that claimant's symptoms were severe enough for additional treatment and recommended possible surgery. On May 14, 1980 a left patella ligament and tubercle advancement with quadriceps-plasty was performed by Dr. Steele.

On July 14, 1980 the State Accident Insurance Fund Corporation advised the Board that it would not oppose an Own Motion Order reopening claimant's claim from the date of her surgery, May 13, 1980.

The Board, after thorough consideration of the evidence before it, concludes that claimant's claim should be reopened as of the date she entered the hospital for the surgery performed by Dr. Steele, May 13, 1980, and until close persuant to the provisions of ORS 656.278.

IT IS SO ORDERED.

CLAIM NO. 93-05255 July 24, 1980

CAROLYN J. O'CONNOR, CLAIMANT
Pozzi, Wilson, Atchison, Kahn
& O'Leary, Claimant's Attys.
Lang, Klein, Wolf, Smith, Griffith
& Hallmark, Employer's Attys.
Own Motion Order

On June 10, 1980, claimant, by and through her attorney, requested the Board to exercise its own motion jurisdiction and reopen her claim for an injury sustained on July 16, 1973. Claimant's claim has been closed and her aggravation rights have expired.

Attached to claimant's request for own motion relief were several medical reports. Dr. Vore, on March 7, 1980, indicated claimant's condition was an aggravation of her symptoms with objective neurologic signs over the past two years.

On June 24, 1980, the carrier, by and through its attorney, advised the Board it opposed reopening claimant's claim under the Board's own motion jurisdiction. It requested the Board to wait on the decision until a copy of the September 1979 hospital records could be obtained and claimant could be examined by the Orthopaedic Consultants. Claimant responded to this on June 30 asking the Board to grant its request and not allow an examination by the Orthopaedic Consultants.

The Board, after thoroughly examining the evidence before it, finds that it would be in the best interest of the parties to refer this case to its Hearings Division to be set for a hearing on the issue of whether claimant's current condition is related to her 1973 industrial injury. After the hearing, the Referee shall cause a transcript to be prepared and forwarded to the Board together with his recommendation in this matter.

The Board approves the insurer's request that claimant be examined by the Orthopaedic Consultants on August 7, 1980.

The Board, after thorough consideration of the evidence before it, concludes that claimant's claim should be reopened as of the date of his myelogram, June 9, 1980 and until closed pursuant to the provision of ORS 656.278.

Claimant's attorney is entitled to a reasonable attorneys fee equal to 25% of the increased compensation granted by this order, not to exceed $250.

IT IS SO ORDERED.

CLAIM NO. C 29752 July 24, 1980

SHARON MARRIOTT, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant sustained a compensible injury to her left knee on July 6, 1966. Her claim was first closed on October 14, 1966 and her aggravation rights have expired.

On April 1, 1980, Dr. Robert Steele diagnosed traumatic chondromalacia patella. He felt that claimant's symptoms were severe enough for additional treatment and recommended possible surgery. On May 14, 1980 a left patella ligament and tubercle advancement with quadriceps-plasty was performed by Dr. Steele.

On July 14, 1980 the State Accident Insurance Fund Corporation advised the Board that it would not oppose an Own Motion Order reopening claimant's claim from the date of her surgery, May 13, 1980.

The Board, after thorough consideration of the evidence before it, concludes that claimant's claim should be reopened as of the date she entered the hospital for the surgery performed by Dr. Steele, May 13, 1980, and until close persuant to the provisions of ORS 656.278.

IT IS SO ORDERED.

CLAIM NO. H 830 C 45 15 30 July 25, 1980

DOUGLAS W. GATES, CLAIMANT
Bruce Kayser, Claimant's Atty.
Robert E. Joseph, Jr., Employer's Atty.
Stipulation For Compromise

On or about March 22, 1977, decedent was electrocuted during the course and scope of his employment with Oregon-Portland Cement when he came in contact with a high voltage cable under the control of Crause-Hinds Co.

Fireman's Fund Insurance Companies, the workers' compensation carrier for Oregon-Portland Cement accepted the beneficiaries' claim and has paid the sum of $29,130.02 in death benefits and associated expenses.

An action at law was filed on behalf of the beneficiaries in the United States District Court for the District of Oregon being entitled "Sun Cha Gates, Personal Representative of the Estates of Douglas Wm. Gates, Deceased v. Crause-Hinds Co., Civil # 78-571. The said action at law has been settled for the sum of $400,000. The beneficiaries and Fireman's Fund Insurance Companies desiring to settle and compromise any and all claims under the Oregon workers' compensation laws hereby agree and stipulate as follows:

1. That Fireman's Fund Insurance Companies will be paid out of the proceeds of this settlement aforesaid the sum of $29,130.02 representing all sums paid by them for death benefits under the Oregon workers' compensation law.

2. That all the rest and residue fo said settlement, after deduction of attorney fees and court costs, to be paid to Fellows, McCarthy, Zikes & Kayser, attorneys at law, who have represented the beneficiaries in an action at law against Crause-Hinds Co., said balance being the sum of $370.869.98 to be paid to the beneficiaries as provided in the probate documents appended hereto and made a part of this compromise.

3. That in consideration of said release of any claim by Firemen's Fund Insurance Companies upon the money resulting from the settlement aforesaid the beneficiaries release and waive all future rights and benefits to which they may be entitled under the workers' compensation law of the State of Oregon.

IT IS SO STIPULATED:

The foregoing stipulation for compromise and settlement of the workers' compensation claims of Sun Cha Gates, Cheryl L. Gates, Douglas W. Gates, And Peter J. Gates, is hereby approved and upon payment of the sum set forth above Fireman's Fund Insurance Companies and Oregon-Portland Cement are exonerated from any future liability to said beneficiaries for injuries incurred on March 22, 1977, while in the employ of Oregon-Portland Cement.

WCB CASE NO. 79-4501 July 28, 1980

CARRIE E. CROSS, CLAIMANT
Knappenberger, Tish & Shartel,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Claimant seeks Board review of the Referee's order which granted her an award of compensation equal to 112.5° for 75% loss of her left leg, being an increased of 37.5° for 25% loss of the left leg and awarded claimant's attorney a fee out of the increased compensation. Claimant contends she is permanently and totally disabled.

FACTS

The Board finds that the facts as recited by the Referee in his Opinion and Order are accurate and affirms them. The Referee's order is attached hereto and, by this reference, made a part hereof.

BOARD ON DE NOVO REVIEW

On June 29, 1978, Dr. Marble performed surgery on claimant for a total left knee replacement with duopatella components. The Orthopaedic Consultants, in March 1979, found claimant was showing gradual strengthening of the left knee, but felt the claim could be closed. They rated the loss of function of the knee as moderate. It was their opinion claimant should continue to lose weight and that claimant was capable of relatively sedentary activities which did not require prolonged weight bearing and quick movements of the left leg. Claimant stated she felt her surgery had helped her.

In April 1979, Dr. Marble stated claimant's disability was moderate. He felt her condition might improve slightly, but she would never be able to return to a full time, eight-hour a day, up-on-her-feet type job. Dr. Marble recommended that since claimant would be 65 years old within two months, she ought to retire. In his deposition, Dr. Marble stated claimant, after her surgery had had a better range of motion than he expected. He noted the knee had remained pretty stable. It was his opinion claimant had a 40-50% loss of function of the knee. He noted claimant lacked 5° of full extension of the knee. He commented he had asked claimant to lose weight since she was too heavy, but claimant has failed to do so.

Based on the evidence in this case, the Board would reverse the award of compensation granted by the Referee and restore the Determination Order. The evidence does not indicate claimant is permanently and totally disabled. Likewise, it does not support the Referee's award of compensation. The consensus of the doctors is that claimant has a moderate or 40-50% loss of function of her left leg. Claimant has made an excellent recovery from her last surgery. She has not shown or made any real effort to seek re-employment. It is apparent she has elected to follow Dr. Marble's advice and retire. Further, injured workers have the obligation to mitigate or reduce their disabilities. In this case, claimant has been advised to lose weight. She has failed to do so. A loss of weight would reduce the stress and strain on her knee.

Therefore, the Board reverses the Referee's order and restores and affirms the April 17, 1979 Determination Order.

ORDER

The Referee's order, dated February 29, 1980, is reversed in its entirety.

The April 17, 1979 Determination Order is restored and affirmed.

WCB CASE NO. 79-9417 July 28, 1980

JAMES T. DAVIS, CLAIMANT
Merten & Saltveit, Claimant's Attys.
Lang, Klein, Wolf, Smith, Griffith & Hallmark, Employer's Attys.
Request for Review by Claimant

Claimant seeks Board review of the Referee's order which authorized a myelogram and awarded claimant compensation equal to 96° for 30% unscheduled disability for his back injury. Claimant contends: (1) his claim was prematurely closed; (2) he is in need of further medical care at the Pain Center; and (3) the award of permanent partial disability was not adequate.

FACTS

On October 17, 1978, claimant a 23-year-old dock worker with Delta Lines, injured his back while unloading freight. The injury was diagnosed as a lumbar strain. Dr. Gerald Butler hospitalized claimant on October 31, 1978 for conservative treatment and traction. While hospitalized, claimant had a seizure which was diagnosed as a grand mal seizure disorder.

In November 1978, Dr. Butler reported he found it hard to evaluate claimant because he had so many subjective complaints with very few objective findings.

Dr. Curtis Hill, on January 9, 1979, performed a lumbar laminectomy and discectomy at the L4-5 level.

Dr. Lawrence Franks, in January 1979, reported claimant's pain was "mechanical" in origin. There was no neurological deficit. Dr. Franks recommended claimant begin to use a transcutaneous nerve stimulator and continue with his mobilization and strengthening program.

Dr. John Ebert, in June 1979, reported also that claimant complained of constant pain in his left leg and back. Dr. Ebert felt that because of marked functional overlay referral to a psychologist or the Pain Center was recommended.

In August 1979, the Orthopaedic Consultants opined claimant was medically stationary but precluded from his previous occupation with or without limitations. It was their opinion the total loss of function of claimant's back due to this injury was mildly moderate. Drs. Ebert and Butler concurred with this report.

Dr. Robert Rosenbaum, in October 1979, reported claimant did not have strong objective evidence of neurologic deficits and he recommended a repeat myelogram.

This claim was initially closed by a Determination Order, dated October 23, 1979, which awarded claimant temporary total disability compensation and compensation equal to 64° for 20% unscheduled disability for his back injury.

In November 1979, Dr. Richard Lazere, a clinical psychologist, commenced a program of relaxation therapy for claimant.

At the time of the hearing, claimant was enrolled in a community college night school to upgrade his math proficiency. Claimant testified he was to start an authorized vocational rehabilitation program on January 2, 1980 to become an architectural assistant. Claimant testified to continuing back and leg pain.

The Referee found claimant's claim was not prematurely closed and felt claimant would not benefit from enrollment at the Pain Center. He ordered defendant to authorize a myelogram if claimant's physician so recommended and granted claimant an award of 30% unscheduled disability.

BOARD ON DE NOVO REVIEW

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

ORDER

The Referee's order, dated January 2, 1980, as corrected on January 13, 1980, is affirmed.

WCB CASE NO. 79-611 July 28, 1980

EUNICE McMANAMA, CLAIMANT
Thomas E. Howser, Claimant's Atty.
Heysell, Velure & Pocock, Employer's Attys.
Order

The Board, having received a request for reconsideration of its June 27, 1980 Order on Review, and the appeal rights having almost run,

IT IS HEREBY ORDERED the June 27, 1980 Order on Review be held in abatement until the Board can fully consider the contentions raised by the employer-carrier's attorney and enter an order either amending or reaffirming the June order.

CLAIM NO. A 724627 July 29, 1980

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

On April 9, 1959, claimant suffered a compensable injury to his right leg. Part of the treatment for this injury was surgery on the leg including the use of screws to stabilize the fractures. The claim was closed. Claimant's aggravation rights have expired.

In May 1980, claimant began having pain in the leg in the area where the screws had been placed. On May 28, 1980, Dr. C. Don Platner removed portions of the three screws in claimant's right leg.

On July 21, 1980, the State Accident Insurance Fund Corporation advised the Board of these facts. It indicated it did not oppose an Own Motion Order reopening this claim for the May 28, 1980 surgery.

The Board, after reviewing the information submitted to it, finds the May 28, 1980 surgery is related to the treatment claimant received for his April 9, 1959 injury. Therefore, the Board orders this claim reopened effective May 28, 1980 for payment of compensation and benefits provided for by law, until closed pursuant to ORS 656.278.

IT IS SO ORDERED.

WCB CASE NO. 79-9912 July 29, 1980

VIRGINIA M. AYER, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary, Claimant's Attys.
Schwabe, Williamson, Wyatt, Moore & Roberts, Employer's Attys.
Order of Dismissal

On July 3, 1980, the Board received a request for review from the claimant, by and through her attorney. The Board has been advised that the carrier, by and through its attorney, requested reconsideration of the Referee's order on June 20, 1980. The Board, at this time, has no jurisdiction in this matter and claimant's request for review should be dismissed.

IT IS SO ORDERED.

WCB CASE NO. 79-2074 July 29, 1980

TIMOTHY BLAIR, CLAIMANT
Olson, Hittle, Gardner & Evans,
CLaimant's Attys.
Lang, Klein, Wolf, Smith, Griffith
& Hallmark, Employer's Attys.
Request for Review by Employer

The employer-carrier seeks Board review of that portion of the Referee's order which: (1) ordered this claim reopened and placed claimant on temporary total disability as of August 8, 1979; (2) ordered it to refer claimant to the Callahan Center and pay benefits until closure under ORS 656.268; and (3) ordered the carrier to pay for the treatment rendered by Drs. Lafrance and Burdell. Claimant's attorney was awarded a fee in the sum of $850 for prevailing on the issue of the employer-carrier's refusal to pay medical bills and the failure to provide additional temporary total disability payments. The employer-carrier contends the Referee's order should be reversed.

FACTS

On October 27, 1978, claimant, a 21-year-old cabinet builder with Commodore Corporation, injured his mid-back when he picked up a five-gallon bucket of paint which he thought was empty. Dr. Leslie Pullen, a chiropractor, diagnosed this injury as a thoracic sprain. He referred claimant to Dr. Richard Cronk for an evaluation.

In November 1978, Dr. Cronk diagnosed mild thoracolumbar musculoligamentous strain. Dr. Cronk concluded that claimant had no objective findings and strong elements of functional overlay. He advised claimant he felt he had sustained a mild back strain and that he could return to work. Claimant, at this point, became angry and advised Dr. Cronk he wished a second opinion.

Dr. Don Poulson, in early December 1978, reported he essentially agreed with Dr. Cronk, but he had taken claimant off work. He felt claimant could return to work around the first of January 1979. Claimant did have full range of motion, but had remissions and exacerbations of pain.

In January 1979, the Orthopaedic Consultants reported claimant stated his back, in his opinion, was getting worse. Their diagnosis was chronic thoracolumbar strain by history. They felt claimant's condition was stationary and claimant could return to the same occupation without any limitations. They found no loss of function of the back due to this injury.

Dr. Poulson, on February 1, 1979, reported he would not authorize time loss after December 28, 1978. Dr. Poulson indicated that claimant left his office very irate. Dr. Poulson told claimant he could go find any doctor he liked, because he would not take care of him any more. Dr. Poulson's opinion was claimant could go back to work.

This claim was initially closed by a Determination Order, dated February 27, 1979, which awarded claimant temporary total disability compensation from October 27, 1978 through December 28, 1978.

On August 8, 1979, claimant was seen by Dr. R. Lafrance. The diagnosis was a musculoligamentous strain suffered in the on-the-job incident of October 1978. Dr. Lafrance recommended a period of physical therapy and that claimant be seen at the Callahan Center.

Dr. Mark Burdell, on August 21, 1979, reported he felt claimant had a functional/structural problem. He noted that claimant's pain seemed out of proportion to the amount of structional misalignment of the thoracolumbar spine. Dr. Burdell concurred with Dr. Lafrance's findings and impression and recommended that claimant be referred to the Callahan Center for evaluation and rehabilitation.

In September 1979, Dr. Lafrance reported he felt claimant continued to be disabled at that time from his back pain. He again recommended claimant be referred for evaluation, treatment, physiotherapy, and instruction at the Callahan Center.

The Orthopaedic Consultants again examined claimant. In November 1979, they reported that it was their opinion that claimant's condition continued to be medically stationary and that the claim should not be reopened. They again stated they saw nothing objectively that would prohibit claimant from returning to any type of occupation that he wished to pursue. They also felt that the continued chiropractic treatments, as well as referral to the Callahan Center, would tend to reinforce claimant's somatic complaints and further jeopardize his return to gainful employment.

At the hearing, claimant testified he is now 22 years old and has a high school education. He indicated he worked approximately two seasons for the U.S. Forest Service and then worked Pendleton Woolen Mills. He then began work with this employer. Claimant stated he has continuing back problems. He stated he is in pain all the time and is unable to work.

At the hearing, bills were admitted showing various medical treatment given by Dr. Burdell in an amount of $910. Medical bills from Dr. Lafrance in the amount of $142.50 were also introduced and were noted not to have been paid. The employer-carrier indicated they felt that under the circumstances of this case, this medical treatment was not required and therefore refused to pay the bills.

The Referee found, based on Dr. Lafrance's report of August 8, 1978 that claimant was temporarily and totally disabled as of that date and that claimant should have been placed on temporary total disability. The Referee ordered that claimant should be continued under treatment with Dr. Lafrance and sent to the Callahan Center and receive such treatment or evaluation as deemed necessary. Upon completion of this treatment or if claimant was found medically stationary, the Referee felt the claim should be submitted for closure under ORS 656.268. Further, the Referee found that the medical bills of Drs. Burdell and Lafrance certainly represented proper treatment and ordered that they should be paid.

BOARD ON DE NOVO REVIEW

The Board concurs with the Referee ordering the payment of the medical bills of Drs. Lafrance and Burdell.

The Board, however, does not find that the claim should be reopened nor that claimant needs referral to the Callahan Center. The evidence of record indicates Drs. Cronk, Poulson and the Orthopaedic Consultants found no objective physical findings and found claimant was medically stationary. We are persuaded by the opinions of these doctors.

ORDER

The order of the Referee, dated February 29, 1980, is modified.

Those portions of the Referee's order which ordered claimant to be placed on temporary total disability as of August 8, 1979, and ordered the employer to refer claimant to the Callahan Center and to continue claimant on temporary total disability, ordered the claim resubmitted for closure under ORS 656.268 if the Callahan Center or Dr. Lafrance finds claimant medically stationary, and ordered claimant's attorney be awarded a fee of $850 are reversed.

Claimant's attorney is hereby granted a fee of $500 for prevailing in overcoming the employer-carrier's refusal to pay certain medical bills.

It is further ordered that claimant is entitled to no additional award of compensation or vocational rehabilitation assistance based on the record in this case.

The remainder of the Referee's order is affirmed.

WCB CASE NO. 79-3361 July 29, 1980

SAMUEL LEFFLER, CLAIMANT
Ackerman & DeWenter, Claimant's Attys.
Lang, Klein, Wolf, Smith, Griffith & Hallmark, Employer's Attys.
Request for Review by Employer

The employer seeks Board review of the Referee's order which found claimant's claim for a neck condition compensable and awarded claimant's attorney a fee. The employer contends the claim is not compensable.

FACTS

Claimant had worked for this employer since 1965 as a plumber. On February 24, 1975, claimant advised Dr. Robert Moffitt that upon getting out of bed that morning his neck was stiff. Claimant reported no injury and that this happened every five to seven years. Dr. Moffitt characterized the condition as "typical wry neck". On March 27, 1978, claimant filed a notice of claim (Form 801) alleging an injury to his neck had occurred on January 25, 1978 from "working with arms overhead = caused pain when I slipped in a hole . . .". Dr. Moffitt saw claimant on January 25, 1978 and diagnosed cervical spine strain and tendinitis of the right elbow. In January 1978 the employer was insured by the State Accident Insurance Fund and the claim was accepted.

Claimant testified that during October and November 1978 he again was working under a house in tight quarters with his hands overhead. He stated that he experienced a tightness and tension in his neck and shoulders. He was able to finish work that day and work the next day, but could not work the third day. He stated that as he got up on the third day, November 1, 1978, he felt something snap in his neck. The moment he felt the snap, he experienced a loss of feeling in his right arm and shoulders. He testified that "there was a 24-hour period where something snapped again" and "things went back to a less painful situation". He was examined by Dr. Moffitt on November 2, 1978 with complaints of right side of the neck and shoulder pain. The claimant asked to be referred to a neurologist because he was concerned about the "numbness" he had experienced in his right arm after the first "snapping" of his neck on November 1, 1978.

On November 10, 1978, claimant filed a written notice of a claim (Form 801) alleging an injury on or about November 6, 1978 while working under a house fixing a broken pipe. Claimant testified he was not sure if he injured his neck on October 30 or November 6 but felt fairly sure it was the 30th. Claimant stated that it was very tight quarters and that working with his hands and arms above his head resulted in him straining his neck and shoulder. On that same date, Dr. Donald Stainsby examined claimant and reported that he complained of pain in the neck, both shoulders, and intermittent numbness of the arms. Claimant advised Dr. Stainsby that he had sharp, knife-like pain in the area of the vertebral prominens on the midline, intermittently, since about 1965. Claimant denied any specific injury to the neck prior to the onset of these symptoms. Claimant stated that the neck pain would be brought on and aggravated by working in tight places with his hands above his head and if his neck was held in a strained position for any length of time. He advised Dr. Stainsby that approximately a week prior to his being seen by him that he arose from bed and developed severe pain in the upper neck. Claimant indicated his pain was relieved approximately 24 hours later by a snapping sensation that occurred in the low neck. Dr. Stainsby felt that claimant might have a carpal tunnel syndrome even though various tests for this condition were negative. He scheduled claimant for a myelogram which revealed a small extradural defect at C5-6 and C6-7 on the right side.

The claimant's November 6, 1978 injury claim was reported to the employer's current carrier and on March 5, 1979 the carrier denied the claim. This denial was based on the fact that the evidence available to the carrier indicated claimant's present condition pre-dated the date of their coverage.

Dr. Moffitt, in response to a letter from claimant's attorney in August 1979, opined that claimant's work with this employer materially contributed to his neck and shoulder condition for which he and Dr. Stainsby had treated claimant. He indicated he had found that claimant had decreaesd mobility of his right arm, tenderness over the right supraspinatus muscle with limited neck motion. He indicated that he prescribed a pain medication for claimant.

Also, in August 1979, Dr. Stainsby indicated to the employer's attorney that he could not, in terms of medical probability, state that the extradural defect was caused by claimant's injury in January 1978. He noted that claimant originally had recovered from the January 1978 injury.

At the hearing, claimant testified receiving conservative treatment only for the January 1978 incident which consisted mainly of the use of various drugs. He indicated that he continued to use these medications on a regular basis over the next three months. He stated that subsequent to April 1978

his flare-ups became less severe. He stated that he could feel the tightness in his neck coming on and would take a pain pill to prevent any severe complications. Claimant testified that on October 30, 1978, while working under a house, he felt a tightness in his neck. Claimant stated he was able to finish work that day but his neck was sore. He worked the following day as well. However, he testified that he limited himself to light work on October 31. Claimant stated that on November 1, 1978, when he arose from bed, he felt a snapping sensation in his neck which caused the severe onset of new symptoms involving both arms, shoulder and neck. He felt numbness in his right arm and also the mobility of his right arm and shoulder were decreased. Approximately a day later, he stated his neck again snapped and his symptoms became less severe. Claimant's son testified that on the day in October-November 1978 while working with his father in the house, that his father had emerged from the house and said his neck was sore. Claimant's son testified that prior to this claimant had made no complaints regarding his neck and shoulders for a least two months prior to this episode.

The Referee found that claimant's condition was compensable. He found that Dr. Moffitt's reports supported the conclusion that the October-November event was a material contributing cause of claimant's then symptoms. He found that Dr. Moffitt was more persuasive and that under the last injurious exposure rule the claim was the responsibility of this employer and its current insurance carrier. Therefore, the Referee reversed the denial and ordered the employer and its carrier to accept the claim and provide claimant with benefits to which he is entitled by law 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 does not find that the last injurious exposure rule is applicable in this case. That rule assumes two on-the-job injuries have occurred, leaving the only decision to be made of which one caused the injured worker's disability. In this case, claimant did not suffer two on-the-job injuries. He did sustain an on-the-job injury in January 1978. While it is true claimant, on October 30, 1978, experienced a tightening or stiffening of his neck muscles, he denied any specific injury to or "snapping" of his neck. Claimant sought no medical treatment and did not miss any time from work. At most, claimant's work caused a recurrence of the symptoms of his previous neck injury. The Board does not find the evidence causally relates this incident to the November 1, 1978 incident.

The November 1, 1978 injury or incident occurred at claimant's home. Claimant felt pain and a loss of feeling in his neck, shoulder and both arms, which he had not experienced before. These symptoms decreased in severity when his neck

again snapped approximately a day later. It was this incident and the appearance of new symptoms which caused claimant to seek medical care and treatment.

The preponderance of the evidence does not establish a nexus between claimant's work and the November 1, 1978 incident which occurred at claimant's home.

Therefore, the Board reverses the Referee's order and affirms the employer-carrier's denial.

ORDER

The Referee's order, dated January 9, 1980, is reversed in its entirety.

The denial of the employer-carrier, dated March 5, 1979, is reinstated and affirmed.

WCB CASE NO. 78-7353 July 29, 1980

RICHARD O. HILL, CLAIMANT
Malagon & Yates, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

The beneficiaries of claimant seek Board review of the Referee's order which found claimant was not permanently and totally disabled at the time of his death due to his injury-related physical or psychological conditions or a combination of them. He did feel claimant was permanently and totally disabled, but this was due to a non-related heart attack. The Referee also found claimant's death was not related to his industrial injury. It is contended: (1) claimant's death was related to his injury; and (2) whether or not claimant was permanently and totally disabled at the time of his death.

FACTS

The Board finds that the facts as recited by the Referee in his Opinion and Order are accurate and should be affirmed. A copy of the Referee's order is attached hereto and, by this reference, made a part hereof.

BOARD ON DE NOVO REVIEW

The Board agrees with the Referee that claimant's death and his heart condition were unrelated to the residuals of his industrial injury.

The Board, however, finds the physical residuals of claimant's injury and the psychological impairment were severe enough to render claimant permanently and totally disabled at the time of his death. Dr. Carter felt claimant was unemployable and Dr. Griswold felt claimant had suffered a severe injury. Claimant had few employment skills, a seventh grade education and was 53 years of age at death. Claimant would be severely limited in any retraining efforts. From the record it appears claimant's psychological condition prior to death was deteriorating. For these reasons, the Board finds claimant's beneficiaries are entitled to death benefits as provided by law.

ORDER

The Referee's order, dated Jnauary 14, 1980, is modified.

Claimant was permanently and totally disabled at the time of his death. Claimant's beneficiaries are entitled to benefits as provided for by law.

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.

CLAIM NO. 05X 020005 July 29, 1980

KARL NUSE, CLAIMANT
Malagon & Yates, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On April 23, 1980, the Board issued an Own Motion Order denying claimant's request for own motion relief. Claimant, on June 3, 1980, requested this matter be set for a hearing. Attached to this request were an April 23, 1980 letter of Dr. Renaud, an April 29, 1980 report of Dr. Strukel and a May 2, 1980 report of Dr. Renaud. The employer, on July 16, 1980, responded indicating it felt the Board's Own Motion Order was correct. Attached to this was a May 27, 1980 report of Dr. Renaud.

The Board, after reviewing this request, the medical evidence submitted by claimant and the employer, finds its April 23, 1980 Own Motion Order is correct. There is no medical evidence that claimant's current condition is a residual of or caused by his original industrial injury.

ORDER

Claimant's request that this claim be set for hearing to resolve the disputed facts and to give the Board sufficient information to make a finding on claimant's entitlement to a reopening of his claim is denied.

The Board's Own Motion Order, dated April 23, 1980, is affirmed.

WCB CASE NO. 79-151 July 29, 1980

ALVY M. PHILLIPS, CLAIMANT
Gary K. Jensen, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

The State Accident Insurance Fund Corporation (Fund) seeks Board review of the Referee's order which found that claimant was permanently and totally disabled. The Fund contends that claimant's condition has not permanently worsened since the last arrangement or award of compensation. The Fund further contends that the award granted by the Referee is excessive.

FACTS

On November 30, 1972, claimant, a 54-year-old roofer with Linn Roofing Service, injured his left arm, shoulder and back when he fell off a roof. These injuries were diagnosed as a fractured left scapula, fractured left wrist, and a lumbosacral strain. Dr. A. G. Denker released claimant for regular work on April 9, 1973, however, he noted claimant's condition was not medically stationary. He could not determine if any permanent impairment would result from this injury. Claimant, upon his return to work, experienced continuing back trouble, stiff neck, headaches, and pain radiation to his left side. Claimant had undergone a lumbar laminectomy and disc excision in 1969 or 1970.

In December 1973, Dr. George Harwood, medical examiner for the Fund, reported that he found no impairment of claimant's left shoulder or left wrist. He could not make a determination of the relationship of claimant's current back problem to the previous 1960 injury or to the more recent injury.

The claim was initially closed on January 15, 1974 by a Determination Order which granted claimant an award of temporary total disability compensation and an award of compensation equal to 16° for 5% unscheduled disability for his low back injury. Claimant's aggravation rights expired January 15, 1979.

In January 1974, claimant was hospitalized because of persistent low back pain, side ache symptoms. Dr. George Knox reported also that claimant developed difficulty with his bladder. Dr. Knox related this directly to claimant's injury.

Claimant continued to complain of persistent low back pain and sciatica involving the right lower extremity. He also continued to have difficulty with urinary tract infections. Eventually the urinary tract difficulty was diagnosed as a bladder outlet obstructive disease secondary to benign prostatic hyperplasia. In November 1975, a transurcteral resection of the prostate with removal of approximately 25 grams of tissue was performed. This urinary tract condition was unrelated to the industrial injury.

In July 1976, claimant was contacted by the Vocational Rehabilitation Division for assistance in retraining or job placement. Claimant advised the counselor that he had worked as a roofer for approximately ten years, five years as an animal caretaker, and had worked with a number of different employers. Dr. Knox had indicated in August 1976 that he did not feel claimant would be able to return to his regular job. In September 1976, the Vocational Rehabilitation Division closed its file because claimant had failed to cooperate or contact them.

In January 1977, Dr. George Knox reported that claimant still complained of persistent low back pain and sciatica. He reported claimant had chronic low back pain secondary to degenerative and traumatic disc disease as well as probable cervical radiculopathy with superimposed multiple mononeuropathies involving the right knee and nerve at the wrist and right ulnar nerve at the elbow all related to the industrial injury. He did not feel that claimant's condition was medically stationary and felt that claimant had showed evidence of definite progression of his condition over the last several months. As a footnote, Dr. Knox commented that it had been recently discovered claimant had mononeuropathies involving "RUE are definitely related to the industrial trauma". He noted that surgery had been scheduled for February 1977. In late January 1977, Dr. Henry Bruce reported that claimant's evaluation by Dr. Knox with EMG nerve conduction studies indicated the presence of a right carpal tunnel syndrome and right tardy ulnar palsy. He indicated that claimant attributed these symptoms to his fall at work four years previously. He concluded that claimant's symptoms were indeed related to his work.

On February 14, 1977, Dr. Bruce performed a right carpal tunnel release and transposition of the right ulnar nerve at the elbow.

The Orthopaedic Consultants, in August 1977, reported that claimant still complained of pain in the lumbosacral area which radiated into both legs. Claimant reported that he felt his condition had worsened in the last year or so. He stated he had no numbness in his right hand, however, he presently had some pain at the site of the surgery. It was their opinion that claimant's condition was stationary and the claim could be closed. They felt claimant would require placement in another occupation. They rated the loss of function of the back as it existed at that time to be moderate and due to his injury as mildly moderate. Dr. Knox concurred with the diagnosis made by the Orthopaedic Consultants, but felt that the loss of function of the back was moderately severe.

The claim was again closed by a Determination Order, dated December 6, 1977, which awarded claimant additional temporary total disability compensation and compensation equal to 64° for 20% unscheduled disability for his low back injury and compensation equal to 28.8° for 15% loss of his right arm.

In February 1978, Dr. Knox reported that claimant was still complaining of low back pain and sciatica involving primarily the right lower extremity. Claimant was hospitalized for additional treatment. EEG testing performed was within normal limits. Dr. Knox diagnosed right L5 and S1 radicular irritations due to cicatrix aggravated by the injury of 1973. He also diagnosed a status post-operative lumbar discectomy at L4-5 in 1965 which was followed by a lysis adhension approximately six months later. Dr. Chen Tsai concurred with this diagnosis and recommended that claimant begin flexion exercises. During his hospitalization, claimant developed additional difficulties with his bowel movements. Claimant also reported pain in the left hip. Dr. Knox felt that claimant had residuals of his 1973 injuries and exacerbation of traumatic and degenerative arthropathy of the lumbosacral regions complicated by cerebral dysfunction of an unknown etiology. CT scan revealed no cerebral atrophy.

On May 26, 1978, claimant and the Fund entered into a stipulation in which claimant was awarded an additional amount of compensation equal to 160° for 50% unscheduled disability for his low back injury. The request for hearing by claimant was withdrawn and he accepted this additional compensation in a lump sum after various deductions were made by the Fund.

Claimant continued to complain of chronic back pain and leg pain. He indicated this pain was more severe when he was active. He felt he was unable to return to work and was limited in his daily activities around his home. Dr. J. Ladd,

in December 1978, opined that claimant's symptom pattern and objective findings were consistent with sciatic nerve involvement, probably secondary to disc disease. He did not feel that claimant's osteoarthritis or degenerative disc disease in his back with spurring was a significant component of his illness. He questioned whether it might be beneficial for claimant to consider a myelogram and additional laminectomy.

On January 4, 1979, claimant, by and through his attorney, requested a reopening of this claim. He requested a hearing on the issue of extent of disability contending that claimant was permanently and totally disabled.

In June 1979, Dr. Knox opined that claimant was permanently and totally disabled. He felt this disability existed prior to January 15, 1979. He noted that claimant had demonstrated significant neurological disability probably secondary to traumatic degenerative arthropathy of the lumbosacral spine.

In December 1979, Dr. Erkkila reported that since his 1973 injury claimant had recurrent low back discomfort with right radiculopathy. He noted that claimant had been placed in a body cast as well as a lumbosacral corset. He indicated that none of these forms of treatment offered any significant or long-term benefits to claimant. When he last saw claimant, he reported that claimant was doing quite well, but had not been doing any lifting for a prolonged period of time. Dr. Erkkila felt that claimant had a traumatically induced spondyloarthropathy of the lumbosacral area. It was his opinion that claimant did qualify for total disability according to the Workers' Compensation laws and that this condition existed for many years.

At the hearing, claimant testified that he felt his condition had worsened since May 1978 and had worsened before expiration of his aggravation rights on January 15, 1979. He stated that he has more back and leg pain and discomfort. He indicated that his legs "tie up" and he has trouble sleeping. Claimant's wife, daughter, and a friend, all corroborated claimant's testimony. Claimant has an eighth grade education. He has worked as a farmer, cattle rancher, performed various jobs in the woods and in sawmills, worked in a boiler room and also worked in roofing. He indicated he has not worked since May 1978. He had indicated that he had planned to take a lump sum settlement award and commence his own roofing business. Claimant stated that Dr. Knox had apparently told him he could not be rehabilitated at his age. At the time of the hearing, claimant was 61 years old. He indicated that he had been drawing Social Security benefits since June 1978. According to claimant, prior to 1978 he could get around a lot better, get up and down better and sleep better. Claimant stated that he last worked in April 1976. He was not sure if he would be able to hold down a steady job. He indicated he had not looked for a job since his doctors had originally taken him off work.

The Referee found that claimant was permanently and totally disabled. He concluded that claimant's work-related condition had worsened since May 26, 1978. He found that claimant had not proven premature claim closure. Therefore, the Referee granted claimant an award of compensation for permanent total disability effective May 26, 1978 and awarded claimant's attorney a fee.

BOARD ON DE NOVO REVIEW

The key determination to be made in this case was whether claimant's condition had worsened subsequent to the May 26, 1978 stipulation and prior to the expiration of claimant's aggravation rights on January 15, 1979. The Board, after de novo review, finds that the preponderance of the evidence in this case indicates that claimant's condition has not worsened since his last arrangement or award of compensation in this case.

The medical evidence indicates that the consensus of the medical doctors is that claimant has been unemployable prior to the May 26, 1978 date. There are no medical reports to indicate claimant's condition has worsened since that date. Claimant's physical condition is not such that it alone would entitle claimant to an award of permanent total disability. Therefore, other evidence must be presented such as claimant's age, training, aptitude, condition of the labor market, aptitude for non-physical labor, emotional condition and motivation. The Board cannot say, after reviewing all these facts, that claimant's injuries, though severe, are not such that regardless of the motivation this claimant would likely not be able to engage in gainful and suitable employment. Claimant has not sought work since he was originally taken off of work by his treating physician and has not cooperated with Vocational Rehabilitation attempting to place him in a different form of employment. The Board finds no worsening of claimant's condition since the last award or arrangement of compensation and even if it had found a worsening does not find claimant has established he is permanently and totally disabled. Therefore, the Board reverses the Referee's order in its entirety.

ORDER

The Referee's order, dated February 7, 1980, as amended on February 27, 1980, is reversed in its entirety.

The May 26, 1978 stipulation is affirmed.

WCB CASE NO. 79-5714 July 30, 1980

IRA M. ARBOGAST, CLAIMANT
Donald Yokom, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order of Dismissal

On July 2, 1979, the Board received a Request for Review from claimant in the above entitled case. On June 23, 1980, the Board received a Motion to Dismiss and Affidavit from the State Accident Insurance Fund requesting that claimant's Request for Review be dismissed for his failure to serve the parties a copy of said request. The motion also inferred that claimant's request was untimely. Claimant's attorney, on July 18, 1980, responded to this motion indicating the Request for Review was actually filed one day late and claimant was not entitled to a review of his case.

The Board finds claimant has failed to perfect his Request for Review pursuant to ORS 656.289(3) and 656.295(2) and his Request for Board review of the Referee's order, dated June 1979, should be dismissed with prejudice.

IT IS SO ORDERED.

WCB CASE NO. 79-8006 July 30, 1980

TEDDI BRONSON, 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. 79-5391 July 30, 1980

TED CAMPBELL, CLAIMANT
Heysell, Velure & Pocock, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

The State Accident Insurance Fund Corporation (Fund) seeks Board review of the Referee's order which remanded the claim to it for payment of the medical services of Dr. Bray from November 15, 1978 and awarded claimant's attorney a fee. The Fund contends claimant has no physical impairment and the treatment provided by Dr. Bray is not related to claimant's industrial injury.

FACTS

The Board finds the facts as recited by the Referee in his Opinion and Order are accurate and hereby adopts them. A copy of the Referee's order is attached hereto and, by this reference, made a part hereof.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, modifies the Referee's order. The issue before the Referee was the responsibility for chiropractic treatment after November 15, 1978. In January 1979, Dr. Kelley indicated claimant's subjective complaints outweighed the objective findings. He recommended claimant return to regular employment and felt claimant did not need any additional treatment. Dr. Bray disagreed. He felt claimant's problem was in a different portion of the back than that found by Dr. Kelley and that claimant needed additional chiropractic treatment.

On February 6, 1979, Dr. Melson indicated he agreed with Dr. Kelley. Dr. Melson felt claimant had no disability.

ORS 656.245(1) provides in part: "For every compensable injury the . . . State Accident Insurance Fund Corporation shall cause to be provided medical services for conditions resulting from the injury for such period as the nature of the injury or the process of recovery requires . . .".

Considering the opinions of Dr. Kelley and Dr. Melson together with the above language of ORS 656.245(1), the Board finds that the Fund is required to "cause to be provided" chiropractic treatment by Dr. Bray to February 6, 1979, the date Dr. Melson agreed with Dr. Kelley that no further treatment was necessary.

We find a preponderance of the medical evidence indicates that on and after February 6, 1979 the nature of claimant's injury or the process of recovery no longer required chiropractic treatment or any treatment.

ORDER

The Referee's order, dated January 17, 1980, is modified.

The State Accident Insurance Fund Corporation is ordered to pay for the medical services of Dr. Bray from November 15, 1978 to February 6, 1979, instead of as ordered by the Referee.

Claimant's attorney is granted a fee of $400 in this case for prevailing on obtaining payment of the above chiropractic treatment, instead of the fee granted by the Referee.

WCB CASE NO. 79-3167 July 30, 1980

TINY J. HUBBS, CLAIMANT
S. David Eves, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF.

The State Accident Insurance Fund Corporation (Fund) seeks Board review of the Referee's order which set aside its denial and remanded this claim to it for acceptance and payment of compensation effective December 15, 1978 and awarded claimant's attorney a fee. The Fund contends that the preponderance of the evidence does not support aggravation and, at most, a minimal award for loss of use of the left and right forearms.

FACTS

On March 20, 1978, claimant, a 39-year-old tray packer with Mutual Produce Company, began work with this employer. She filed written notice of her claim on May 8, 1978 for "over exercise of hands and muscles of fingers and wrists". Dr. David Grube diagnosed the condition as a probable bilateral carpal tunnel syndrome. He related this condition to her work with this employer. Claimant ceased her employment on May 5, 1978. Dr. Grube released claimant for modified work on June 29, 1978 and found her condition medically stationary as of that same date. He noted that he did not feel claimant should be working in a position where there would be a lot of digital activity.

The claim was initially closed by a Determination Order, dated August 23, 1978 which awarded claimant temporary total disability compensation from May 6, 1978 through June 29, 1978.

In August 1978, Dr. Richard Cronk reported claimant stated that after quiting work she continued to have intermittent symptoms. Claimant's complaints were numbness and tingling of both wrists and hands. He referred claimant to Dr. George Throop for nerve conduction studies. Dr. Throop performed these studies and found them normal.

Dr. Grube, in early September 1978, reported he had seen claimant on August 8, 1978 and that she had reported symptoms which indicated a continuation of her carpal tunnel syndrome. He reported that claimant had moved some furniture which had exacerbated this condition.

In April 1979, Dr. Grube reported that claimant had been seen by him in November because of back discomfort. He indicated he had hospitalized claimant on December 15, 1978 and released her after a short stay. He noted that she was having chest wall pain. He reported that claimant had been receiving continuing physical therapy and injections for relief of her chronic symptoms of discomfort in the posterior chest wall and the left shoulder.

Also, in April 1979, Dr. Cronk reported that claimant was complaining of pain in the left shoulder girdle. Dr. Cronk found that claimant had a completely normal range of motion in the cervical spine with no localized anterior vertebral body tenderness. He felt that claimant had chronic left shoulder girdle pain of an undetermined etiology and a probable conversion reaction. He could not document any objective orthopedic disease.

On April 26, 1979, the Fund denied the claimant's request to reopen her claim based on aggravation of the original injury. It contended that claimant had sustained an intervening incident which was responsible for her current condition.

On that same day, Dr. Grube reported that claimant was hospitalized in November 1978 but he did not relate her condition to her work. However, review of further history led him to believe the condition "may have been related" to her original industrial incident. However, in May 1979, Dr. Grube stated he was unable to state conclusively that claimant's back problems were related to her original industrial injury. He noted that claimant felt her back condition was related to this incident, but claimant did not describe any back problems until eight months after the injury.

On June 5, 1979, Dr. Grube reported claimant came to see him to reconstruct some of the events of her injury. Claimant has had ongoing conditions and problems with her left shoulder and back and it was his professional opinion it was related to her injury.

At the hearing, claimant testified that in October 1978 she went to work for approximately a month at a nursing home. She stated that when she originally saw Dr. Grube, she complained that her shoulder also bothered her. She stated that she continues to have left shoulder pain and that her hands have improved. In August 1978, she stated that she was assisting her family move. She denied moving any furniture, but indicated she had packed a few things. Afterwards, she said her hands swelled up.

The issues before the Referee were compensability of this claim and, in the alternative, extent of permanent disability arising out of claimant's March 1978 industrial injury. The Referee found that there was no intervening incident sufficent to qualify as a new injury. Based on Dr. Grube's latest report, and because there was no contrary medical evidence in the file, the Referee remanded the claim to the Fund for acceptance as an aggravation.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, reverses the Referee's order. Dr. Grube's opinion as to the relationship of claimant's back and shoulder condition to her original injury has varied during the course of this case. Initially, he did not feel that these conditions were related to the industrial injury; however, after discussing the matter with claimant, he changed his mind and stated that in his opinion they were related. In August 1978, Dr. Cronk reported that he found full range of motion of all the joints of the upper extremities. In September 1978, Dr. Throop reported that claimant had some radiation of pain to the forearm of the right side. He noted she denied any neck or shoulder pain. The first complaint that claimant made of any neck, back or shoulder pain was in November 1978 according to Dr. Grube. This was approximately eight months after the original injury. Studies performed by Dr. Cronk revealed no neurological defects. Dr. Cronk, in April 1979, was unable to determine the cause of claimant's chronic left shoulder girdle pain. Relying on the opinion of Dr. Cronk, the Board finds that claimant has failed to establish a causal relationship between her original industrial injury and her current complaints of back, shoulder and neck problems. Therefore, the Board finds claimant has failed to establish, by a preponderance of the evidence, aggravation of her injury-related condition. We reverse the Referee's order and reinstate the Fund's denial.

Having so ruled, the Board considers claimant's alternative issue, the extent of disability. Claimant testified that her hand condition has improved. The Board does not find that the furniture moving incident in approximately August 1978 was an intervening incident. She indicates she

does have some continuing problems with her hand, but that the main problem apparently is in the shoulder area. Based on all the evidence in this case, the Board finds claimant is entitled to an award of compensation equal to 15° for loss of function of the left forearm and compensation equal to 15° for loss of the right forearm. Claimant's attorney should be granted a fee equal to 25% of the increased compensation not to exceed $3,000.

ORDER

The order of the Referee, dated January 18, 1980, is reversed in its entirety.

The State Accident Insurance Fund's denial, dated April 26, 1979, is reinstated and affirmed.

Claimant is hereby granted an award of compensation equal to 15° for 10% loss of the left forearm and compensation equal to 15° for 10% loss of function of the right forearm.

Claimant's attorney is granted a fee equal to 25% of the increased compensation granted by this order, not to exceed $3,000.

CLAIM NO. B53-148609 July 30, 1980

WILLIAM L. JONES, CLAIMANT
SAIF, Legal Services, Defense Atty.
Amended Own Motion Order

On July 29, 1980 the Board entered an Own Motion Order in the above entitled case, but failed to date said order. On page 2, the order should be amended to show "on this 29th day of July, 1980."

IT IS SO ORDERED.

WCB CASE NO. 80-1583 July 30, 1980

CAROL D. O'NEILL, CLAIMANT
Pozzi, Wilson, Atchison, Kahn
& O'Leary, Claimant's Attys.
Cheney & Kelley, 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.

CLAIM NO. HC 179627 July 30, 1980

CHARLES F. PETERSON, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

On April 29, 1969, claimant suffered a compensable injury to his right foot. This claim was initially closed by a March 16, 1970 Determination Order and claimant's aggravation rights have expired.

The claim was reopened by an Own Motion Order, dated March 31, 1980, for surgery to remove a screw which had been used for the arthrodesis of claimant's great toe. Claimant had been hospitalized on February 24, 1980 and the surgery was performed on the same day.

Claimant was scheduled for an examination by Dr. McNeill, but failed to appear. Claimant was released for work on March 11, 1980 by Dr. McNeill.

The State Accident Insurance Fund Corporation, on July 7, 1980, requested a determination of claimant's disability. The Evaluation Division of the Workers' Compensation Department, on July 24, 1980, recommended this claim be closed and that claimant be awarded additional temporary total disability compensation from February 24, 1980 through March 10, 1980, but not be granted an additional award of permanent partial disability.

The Board concurs in this recommendation.

ORDER

Claimant is hereby granted temporary total disability compensation from February 24, 1980 through March 10, 1980, less time worked. The record indicates that this award has already been paid to claimant.

WCB CASE NO. 80-4345 August 1, 1980

JOHN E. ARDIEL, CLAIMANT
Pozzi, Wilson, Atchison, Kahn
& O'Leary, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On July 14, 1980, the Board entered an Own Motion Order and Determination opening and closing claimant's claim for a September 8, 1972 industrial injury. On July 30, 1980, the Board was advised by claimant's attorney of a case pending before the Hearings Division (WCB Case No. 80-4345) on a claim for a February 20, 1976 injury. Claimant requested that the two claims be consolidated for a hearing to determine which injury was responsible for claimant's current condition.

The Board, after thoroughly considering the evidence before it and claimant's attorney's July 1980 letter, concludes its June 14, 1980 Own Motion Order and Determination should be rescinded and held for naught. The own motion case shall be referred to the Hearings Division to be consolidated for hearing with WCB Case No. 80-4345 for the taking of evidence by a Referee. The Referee shall determine whether claimant's current condition is related to his September 1972 industrial injury or to his February 1976 injury or an unrelated cause. Upon completion of the hearing, the Referee shall cause a transcript to be prepared and forwarded to the Board together with his recommendation concerning the disposal of the own motion case. The Referee shall also enter an appealable order with regard to WCB Case No. 80-4345.

IT IS SO ORDERED.

CLAIM NO. C 242435 August 1, 1980

RICHARD A. BULT, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On February 15, 1980, the Board entered its Own Motion Order denying claimant's request for own motion relief on the grounds that the evidence was not sufficient to show that his current condition was a result of his April 28, 1970 back injury.

On July 23, 1980, claimant, by and through his attorney, requested the Board reconsider its order. Claimant contends that the Board's reason for denying his request was not based on accurate information.

The Fund, in opposing the claimant's request for claim reopening, contended that claimant's current condition involved the lumbar spine and that the 1970 accepted injury claim was for a low dorsal spine and rib cage sprain. Claimant contends that this was true in the initial diagnosis but approximately one month later Dr. Ho diagnosed lumbosacral strain and lumbar adhesive capsulitis. Other medical reports in August 1970 indicated the same finding. Based on these early reports, claimant asks the Board to find his present condition related to the 1970 industrial injury and under its own motion authority order the Fund to reopen the 1970 back injury claim.

The Board, after reconsidering the evidence before it, concludes that it would be in the best interest of the parties to refer this matter to its Hearings Division to be set for an expedited hearing. The Referee is instructed to hold a hearing to determine whether claimant's current condition is related to his April 28, 1970 industrial injury and, if so, whether his condition has worsened since the last award or arrangement of compensation. At the conclusion of the hearing, the Referee shall cause a transcript of the proceedings to be prepared and forwarded to the Board together with his recommendation concerning this claim.

CLAIM NO. 253-0001-80 August 1, 1980

WAYNE Y. BYINGTON, CLAIMANT
SAIF, Legal Services, Defense Atty.
Disputed Claim Settlement & Order of Approval

Wayne Y. Byington, claimant, and Willamette Industries, Inc., employer, agree that the claimant originally filed a claim for hearing loss about February 8, 1980.

The employer, after investigation of claimant's claim, has denied the claim from its inception, and a copy of the denial letter is attached.

Claimant disputes the denial of his claim, and both he and the employer wish to settle without the necessity of obtaining counsel and proceeding through a formal hearing to establish their positions.

Wayne Byington and Willamette Industries therefore agree that this matter may be settled by the payment of the hearing aid and associated medical expenses, which total $876.29, in full and final settlement of this claim and it is agreed that the claimant's claim shall remain in its denied status and that he shall take no workers' compensation benefits on account thereof.

It is further agreed that this resolves all issues of temporary or permanent disability, medical care and treatment, aggravation rights and all other benefits under the Workers' Compensation Act, on a disputed claim basis.

It is further agreed that claimant will hold Willamette Industries, Inc. harmless from any and all future medical expenses related to this claim, and that claimant will pay any such costs himself.

IT IS SO AGREED this 14th day of July, 1980.

Based upon the agreement of the parties hereto and being fully advised in the particulars, the Disputed Claim Settlement is hereby approved.

DATED this 1st day of August , 1980.

WCB CASE NO. 79-4969 August 1, 1980
WCB CASE NO. 79-4048

JAMES EBER, CLAIMANT
Roger D. Wallingford, Claimant's Atty.
Cheney & Kelley, Defense Attys.
Order

On July 23, 1980, claimant, by and through his attorney, requested the Board remand this case to Referee St. Martin for the purpose of taking further evidence because the record had been insufficiently developed and heard at the hearing. In his motion, claimant pointed out that there were errors in the medical reports that the medical reports failed to distinguish between injuries, aggravation, treatment, surgeries and opinions as between the left and right knee. Claimant contends due to these and other problems with the medical reports, the record was completely confused and ambiguous. Claimant feels additional clarifying medical testimony is needed and should be provided for the Referee's consideration.

The Board, after reviewing claimant's motion and supporting documents, denies the motion. Claimant has the burden of proof to establish by a preponderance of the evidence his contentions. If the medical reports were not clear, claimant had the responsibility to rectify this problem prior to the hearing. The various problems with the medical reports recited in the motion, were apparent prior to the hearing and should have been clarified prior to the hearing. The Board does not feel this case should be remanded to the Referee to take additional evidence under these circumstances. Claimant's motion is denied.

IT IS SO ORDERED.

CLAIM NO. KC 298823 August 1, 1980

MARVIN EPLEY, CLAIMANT
Green & Griswold, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On December 18, 1979, claimant, by and through his attorney, requested that his claim for a March 29, 1971 injury be reopened for further medical care and treatment and compensation as provided under ORS 656.278. Attached to claimant's request was a report from Dr. Skirving who related claimant's current condition to his 1971 compensable injury. Claimant's case was initially closed on July 14, 1971 and his aggravation rights have expired.

This case was inadvertently set up as a Hearings matter and the hearing has already been set for August 8, 1980. The attorneys and the Referee, realizing the error, forwarded the file to the Board for an Own Motion Order. It was agreed by all the parties concerned that the matter should be referred for a fact finding hearing in the same time slot as the Hearings case was set. The Board agrees with this and hereby remands the case to its Hearings Division to be heard on August 8, 1980 before Referee Kirk Mulder. Referee Mulder should take evidence to determine if claimant's current condition is related to his 1971 industrial injury and, if so, whether claimant's condition had worsened since his last award or arrangement of compensation. Upon completion of the hearing, Referee Mulder shall cause a transcript of the proceedings to be prepared and forwarded to the Board together with his recommendation in this case.

WCB CASE NO. 78-5327 August 1, 1980

GILBERT ROWLING, CLAIMANT
Joseph Post, Claimant's Atty.
Schwabe, Williamson, Wyatt, Moore & Roberts, Employer's Attys.
Order Denying Motion

Hearings were held in this case on November 7, 1979 and April 15, 1980. The Referee, on May 20, 1980, issued an order on which both the employer and the claimant requested Board review.

On July 1, 1980, claimant, by and through his attorney, requested the Board consider two additional exhibits from claimant's treating physician. The first was dated March 28, 1980 and the second was dated in June 1980. Claimant contended the data in these exhibits could not have been discovered prior to the hearings.

The employer objects to the introduction of these reports. It contends there has been no reasonable showing why the first report could not have been discovered or produced at the second hearing. It contends admission of the second exhibit would delay the review and deny it an opportunity to cross-examine the doctor.

The Board, after reviewing this matter, denies claimant's request. There has been no reasonable showing why the March 28, 1980 report could not have been produced at the second hearing. The Board does not find the second exhibit to be relevant to this case and to accept it would deny the employer's right to cross-examine the doctor. Therefore, the Board denies claimant's request to include the two additional exhibits.

IT IS SO ORDERED.

WCB CASE NO. 78-8513 August 1, 1980

ALLEN SIMS, CLAIMANT
David Hittle, Claimant's Atty.
Lang, Klein, Wolf, Smith, Griffith & Hallmark, Defense Attys.
Order

The Board issued its Order on Reconsideration in the above entitled case on August 1, 1980 but inadvertently dated the order July 1, 1980. IT IS HEREBY ORDERED that the Board's Order on Reconsideration should be corrected to show an issue date of August 1, 1980.

WCB CASE NO. 78-8513 August 1, 1980

ALLEN SIMS, CLAIMANT
Olson, Hittle, Gardner & Evans, Claimant's Attys.
Lang, Klein, Wolf, Smith, Griffith & Hallmark, Employer's Attys.
Request for Review by Employer

On July 28, 1980, claimant requested the Board reconsider its July 3, 1980 Order on Review which had modified the Referee's award of compensation for permanent partial disability in this case.

Claimant is 37 years old and is a high school graduate with two years of college. Dr. Fax rated claimant's disability as mild to moderate. Dr. Coletti recommended claimant engage in no sustained stooping, bending, or lifting and felt claimant could not lift over 50 pounds. The Determination Order in this case awarded claimant compensation equal to 16° for 5% unscheduled disability for his back injury. The Referee granted claimant an award of additional compensation equal to 64° for 20%. The employer appealed contending this award was excessive.

The Board's review of this case is de novo. The Board has the statutory authority to affirm, reverse, modify, or supplement the Referee's order and to make such disposition of the case as it determines is appropriate. ORS 656.295(6). Based on the de novo review of this case, the Board concluded the Referee's award of compensation was excessive, however, found the award of compensation granted by the Determination Order was not adequate. Therefore, the Board modified the Referee's order and granted claimant the award of compensation it did. The Board felt this was an appropriate disposition of this case.

After considering claimant's contentions and reconsidering this case, the Board does not find that its order should be altered. The Board feels its order is correct and makes an appropriate disposition of this case. Therefore, the Board affirms its prior order.

IT IS SO ORDERED.

WCB CASE NO. 79-5412 August 1, 1980

GARY LEE SPEAR, CLAIMANT
Jerry E. Gastineau, Claimnat's Atty.
SAIF, Legal Services, Defense Atty.
Amended Order Of Remand

Pursuant to a request from the State Accident Insurance Fund's attorney, the Board amends its July 21, 1980 Order to Remand (page 3, paragraph one, lines 7 through 9) to reflect the following:

> "Therefore, the Board reverses the Referee's order in its entirety and remands it to the Hearings Division to be set for a hearing to determine whether or not this claim is compensable."

The remainder of the order is affirmed.

IT IS SO ORDERED.

WCB CASE NO. 78-10,003 August 1, 1980

JANE TEMPLE, CLAIMANT
Olson, Hittle, Gardner & Evans,
Claimant's Attys.
Lang, Klein, Wolf, Smith, Griffith
& Hallmark, Employer's Attys.
Order On Reconsideration

On July 2, 1980, the Board issued its Order on Review in this case which modified the Referee's award of permanent partial disability. Claimant requests the Referee's order be reinstated.

The Board makes its own de novo determination of the extent of claimant's disability and cannot rest its decision upon the Referee's determination. Although the Board gives respectful consideration to the findings of the Referee, it is not bound by them. Hannam v. Good Samaritan Hospital, 4 Or App 178, 471 P2d 831, 467 P2d 931 (1971). ORS 655.295(6), gives the Board the authority to "affirm, reverse, modify or supplement the order of the referee and make such disposition of the case as it determines to be appropriate".

The Board, after a de novo review of this case, determined that the appropriate disposition was to modify the Referee's order, which it did.

Now, after considering claimant's contentions and reconsidering the facts in this case, the Board concludes its order was correct. Claimant's injury was diagnosed as a strain. Her permanent impairment was found to be slight. Claimant is precluded from heavy work, but is capable of medium employment. She is in her early 30's and has a high school education. She has not been hospitalized, undergone any surgeries and does not use any medication as a result of this injury. The Board found claimant did not establish a loss of wage earning capacity greater than 20%. Therefore, the Board affirms its July 2, 1980 Order on Review.

IT IS SO ORDERED.

WCB CASE NO. 78-10,033 August 1, 1980

JANE TEMPLE, CLAIMANT
David Hittle, Claimant's Atty.
Lang, Klein, Wolf, Smith, Griffith & Hallmark, Employer's Attys.
Order

The Board issued its Order on Reconsideration in the above entitled case on August 1, 1980 but inadvertently dated the order July 1, 1980. IT IS HEREBY ORDERED that the Board's Order on Reconsideration should be corrected to show an issue date of August 1, 1980.

CLAIM NO. C 460553 August 6, 1980

MILTON BOWKER, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant suffered from bilateral inguinal hernias in May 1973 which were found to be compensable. They were surgically repaired, claimant's claim was closed and his aggravation rights ahve expired.

On June 6, 1980, claimant's claim was reopened by the Board for surgery performed by Dr. Thomas Lindell on February 19, 1980. A report from claimant indicated he returned to work on February 28, 1980. He was last seen by Dr. Warrington on March 7, 1980 who indicated in June 1980 that

claimant's condition was stationary and he would probably have no permanent disability from the last surgery. Attempts to have claimant examined one last time were unsuccessful.

On July 17, 1980, the SAIF Corporation requested a determination of claimant's present disability. The Evaluation Division of the Workers' Compensation Department recommended claimant be granted compensation for temporary total disability from February 19, 1980 through February 27, 1980 and no award for permanent disability.

The Board concurs in this recommendation.

ORDER

Claimant is hereby granted temporary total disability compensation from February 19, 1980 through February 27, 1980. The record indicates that this award has already been paid out.

WCB CASE NO. 79-4543 August 6, 1980

DONALD E. FOSS, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary, Claimant's Attys.
Rankin, McMurray, Osborn, Gallagher & VavRosky, Employer's Attys.
Request for Review by Employer

The employer seeks Board review of the Referee's order which set aside its denial of this claim and remanded it for acceptance and payment of compensation as required by law and awarded claimant's attorney a fee.

FACTS

Claimant was employed as a forklift driver and relief dryer operator. Approximately one or two weeks prior to February 14, 1979, claimant stated he began to experience neck pain. On February 18, 1979, claimant was hospitalized by Dr. Harry Adamo. He was complaining of pain in the neck and back along the spine. Claimant stated that two days prior to his admission to the hospital, he had had an episode of sudden severe pain in the lower neck, which radiated down the spine and down into the shoulder blades. He said he became faint and passed out. A brain scan was performed which was normal. Dr. Adamo diagnosed "cervical neck muscle spasm".

On February 23, 1979, Dr. Kaz Hongo reported he felt claimant had a fibrocytis, which he indicated was a very common "self limited disease which occurrs [sic] at times with stress on the job and also emotional stress". He noted claimant had a lot of fear and anxiety. He felt claimant's lightheadedness and numbness were related to his emotional reaction characterized by fear and anxiety which had caused a hyperventilation syndrome. He did not find any neurological problem.

In late February 1979, Dr. Lawrence Franks reported that he found no neurological abnormalities. He felt claimant was very somatically oriented and a bit of a hypochondriac. He noted claimant was "frightened" and felt that claimant should be continued on conservative treatment.

On March 2, 1979, claimant was again hospitalized complaining of left arm paralysis, nausea, vomiting and collapsing. Various studies were performed, all of which were normal. Dr. Franks commented that this case was rather difficult. He felt claimant's work injury, which had been complicated by a spinal tap headache and his anxiety, had led to claimant's hyperventilation and passing out. Dr. Franks could not find a cause for claimant's left arm weakness. He felt it was related to some type of hysterical conversion reaction. This was the first report which indicated claimant had suffered a work injury. Dr. Franks, on March 18, 1979, reported that claimant's various symptoms of pain in the neck, interscapular and left shoulder region were related to his employment as a forklift operator, and his symptoms are temporarily related to his working in that job.

On March 30, 1979, claimant filed his claim for an alleged injury to his neck, back, and shoulder due to his employment feeding the dryer and also driving a forklift. At that time, claimant was 29 years old and had been employed by this employer for six years.

Dr. Edward Rosenbaum, on May 1, 1979, reported he found no evidence of any organic disease. He stated that after reviewing the history of claimant's case, examining claimant and reviewing copies of claimant's file, it was his opinion that claimant's illness was not related to any industrial accident. He based this opinion on the following facts: (1) there was never any history of any injury at work; (2) none of the physicians which had examined claimant had documented any true objective evidence of a disease; and (3) claimant had had extensive laboratory and x-ray work-ups which revealed no organic disease. Dr. Rosenbaum reported that the assertion fibrocytis is caused by emotional stress and strain is a concept unsupported by scientific medical opinion.

On May 11, 1979, the employer denied this claim on the grounds that its findings did not indicate claimant's problem originated as a result of work activity either as an industrial injury or as an occupational disease.

Dr. Reed C. Wilson, in July 1979, reported claimant had a full range of motion of the neck and shoulders. His diagnosis was cervical dorsal strain and a hyperventilation syndrome by history. He did not feel that these conditions were related to or materially aggravated by claimant's work activities as a hyster driver or dryer feeder. He felt claimant had no permanent impairment.

At the hearing, claimant stated that he suffered occasional pains in his neck. He stated overall he was feeling much better. He said that he used various home remedies to correct any difficulties he had with his neck. He recalled one incident when he was working as a relief dryer feeder when while struggling to straighten some veneer he might have injured his neck.

The Referee found, after reviewing all the evidence, that this claim, by a narrow preponderance of the evidence, was compensable. Therefore, he set aside the denial of the employer and ordered the employer to accept this claim as a compensable injury. He denied the awarding of any penalties as requested by claimant. He awarded claimant's attorney a fee for prevailing on the denial.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, reverses the Referee's order. The Board finds that claimant has failed to prove by a preponderance of the evidence that his claim for problems with his neck, back and shoulder are related to his work. There is no indication that claimant ever suffered any injury while employed by this employer. Likewise, the Board does not find the evidence indicates that claimant's work conditions caused any occupational disease. Dr. Richard Rosenbaum, Dr. Edward Rosenbaum and Dr. Wilson all opined that claimant's conditions are not related to his work. Dr. Hongo felt that claimant's fibrocytis was caused by work-related emotional stress. He fails to mention, however, that claimant did not give a history of any emotional or job-related stress. Dr. Franks, likewise, indicated based on claimant's work injury which the evidence failed to indicate ever occurred, that his symptoms were related to his work. The Board finds that the greater weight of the evidence in this case does not support claimant's contention that this claim is compensable. Therefore, the Board finds that the employer's denial must be affirmed.

ORDER

The Referee's order, dated October 8, 1979, is reversed in its entirety. The employer's denial, dated May 11, 1979, is restored and affirmed.

WCB CASE NO. 79-3583 August 6, 1980

ANEES K. GEORGES, CLAIMANT
Welch, Bruun & Green, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Claimant seeks Board review of the Referee's order which affirmed the Determination Order, dated March 13, 1979, which granted claimant an award of temporary total disability compensation and compensation equal to 112° for 35% unscheduled disability for his back injury. Claimant contends he is permanently and totally disabled or, in the alternative, he is entitled to a larger permanent partial disability award.

FACTS

The Board concludes that the facts as recited by the Referee in his Opinion and Order are accurate. The order is attached hereto and, by this reference, is made a part hereof.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, modifies the Referee's order. All the doctors agree that claimant cannot return to his previous line of employment or one which requires a lot of heavy lifting. The Orthopaedic Consultants felt claimant had a mild disability due to his low back injury. Dr. Rusch felt claimant had a moderate to severe disability due to this injury. Claimant is now 60 years old, has a limited education, and has worked for the majority of his life as a butcher. He continues to have complaints of back pain which affect his ability to sit, to stand, or to sleep. The medical evidence alone in this case does not establish that due to claimant's back injury and psychological condition he is permanently and totally disabled. Claimant has not sought assistance to find a new or different type of employment. He has made no applications for employment nor sought assistance to find a new type of employment. Based on all the evidence, the Board does not find claimant is permanently and totally disabled. However, the Board finds claimant has lost more of his wage earning capacity than that for which he has been compensated. Therefore, the Board grants claimant an award of compensation equal to 208° for 65% unscheduled disability for low back injury in lieu of all previous awards. The Board also would order the Field Services Division to contact claimant and to provide him with extensive assistance in job placement.

ORDER

The Referee's order, dated January 29, 1980, is modified.

Claimant is hereby granted compensation equal to 208° for 65% unscheduled disability for his low back injury in lieu of all previous awards.

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.

The Board would hereby direct the Field Services Division of the Workers' Compensation Department to contact claimant and give him extensive assistance in job placement.

WCB CASE NO. 79-8958 August 6, 1980

CLAYTON JOHNSON, CLAIMANT
Velure, Heysell & Pocock, Claimant's Attys.
William M. Beers, Employer's Atty.
SAIF, Legal Services, Defense Atty.
Order

The State Accident Insurance Fund Corporation (Fund) on June 9, 1980 requested Board review of this case.

It served copies of its request on one of claimant's attorney's, claimant and Energy Windows, one of the employers. It failed to serve claimant's other attorney, the other employer, its insurance carrier and its attorney. Claimant and the other employer both have requested dismissal of the Fund's request for Board review for its failure to serve all parties to the proceedings before the Referee.

The Board grants the motion. ORS 656.295(2) requires that: "The request 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 Fund failed to comply with this requirement. Therefore, the Board dismisses its request for Board review.

IT IS SO ORDERED.

CLAIM NO. KD 358381 August 6, 1980

STANLEY LINDSLEY, CLAIMANT
Hayes Patrick Lavis, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury to his right knee on July 14, 1955 when he cut the surface of the knee with an ax. Claimant's claim was subsequently closed and his aggravation rights have expired.

On February 26, 1979, claimant's claim was reopened by a Board's Own Motion Order as of May 26, 1978, the day claimant underwent an arthrogram of the knee. Additional surgery was performed on June 19, 1978, in April 1979, and in September 1979. Claimant returned to work on January 28, 1980 at a light duty job.

On June 6, 1980, claimant's treating physician found claimant's condition to be stationary and that he was working on a regular basis.

On June 19, 1980, the SAIF Corporation requested a determination of claimant's current disability. On July 22, 1980, the Evaluation Division recommended claimant be granted compensation for temporary total disability from May 26, 1978 through January 27, 1980 and temporary partial disability from January 28, 1980 through June 6, 1980. It also recommended claimant be granted compensation equal to 44° for 40% loss use of the right leg.

The Board concurs in this recommendation.

ORDER

Claimant is hereby granted compensation for temporary total disability from May 26, 1978 through January 27, 1980 and temporary partial disability from January 28, 1980 through June 6, 1980, less time worked. Claimant is also entitled to compensation equal to 44° for 40% loss of use of the right leg. This award is in addition to any previous awards claimant may have been granted for this injury. The record indicates that most of the time loss has already been paid out.

WCB CASE NO. 79-3281 August 6, 1980

ALFRED A. MAY, CLAIMANT
Malagon & Yates, Claimant's Attys.
Lawrence L. Paulson, Employer's Atty.
Request for Review by Employer

The employer seeks Board review of the Referee's order which found claimant was permanently and totally disabled effective April 2, 1979. It contends claimant is not permanently and totally disabled and that the April 2, 1979 Determination Order correctly compensated claimant for the disability due to this injury.

FACTS

The Board finds that the facts as recited by the Referee in his Opinion and Order are accurate and adopts them. A copy of the Referee's order is attached hereto and, by this reference, made a part hereof.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, reverses the Referee's order and restores the April 2, 1979 Determination Order.

The evidence indicates claimant suffered a cervical strain and gross functional overlay from this injury. His impairment as rated by the medical documentation was mildly moderate. The doctors felt claimant was capable of employment and had marketable skills. The psychological disability was rated as minimal to mild.

The Board finds claimant is not permanently and totally disabled and further that he has failed to meet the statutory requirements of ORS 656.206(3) and lacks motivation to return to any gainful employment. Therefore, the Board concludes that the award granted by the Determination Order of 35% unscheduled disability adequately compensates claimant for his loss of wage earning capacity for residuals of this industrial injury.

ORDER

The Referee's order, dated January 18, 1980, is reversed in its entirety.

The Determination Order, dated April 2, 1979, is restored and affirmed.

CLAIM NO. 133 CB 1632130 August 6, 1980

ZELMA OLSON, CLAIMANT
Evohl F. Malagon, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Stipulation & Agreement on Own Motion

COME NOW the Claimant, personally and by her attorney, and the insurer, by its authorized representative, and hereby move the Board for an Order based on the following stipulations of the parties:

1. Claimant, it has been agreed by the parties, has suffered a worsening of her condition over the ensuing years which entitles her to an additional 10% permanent partial disability but her condition remains medically stationary and less than totally disabled. The additional award brings Claimant to a total of 90% for unscheduled disability and 10% for loss of the right leg.

2. Said award shall be paid in a lump sum.

3. Claimant's attorney shall receive 25% of the additional compensation made payable by this Order as and for a reasonable attorneys fee.

4. The issues raised by Claimant in her request for Own Motion Relief dated July 11, 1980, have been resolved and the same shall be dismissed.

IT IS SO STIPULATED:

IT IS SO ORDERED this 6th day of August, 1980.

WCB CASE NO. 79-6278 August 6, 1980

LEE E. SHORT, CLAIMANT
Pozzi, Wilson, Atchison, Kahn
& O'Leary, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

This case is before the Board on the State Accident Insurance Fund Corporation's (Fund) request for review of the Referee's order which found premature closure and ordered it to reopen this claim for treatment of claimant's psychological condition, payment of temporary total disability effective the date claimant began treatment at the Providence Medical Center Day Treatment Program and awarded claimant's attorney a fee.

The facts as set forth by the Referee in his order are correct.

The Board, after de novo review, reverses the Referee's order. This claim was closed on July 10, 1979 by a Determination Order which granted claimant an award of temporary total disability compensation from March 13, 1977 through June 6, 1979. Prior to this closure, Dr. Colbach indicated the claim should be closed, but that claimant should enter a Day Treatment Program at Providence Medical Center. He felt claimant had a mild psychiatric impairment and was psychologically stationary.

Dr. Mary McVay stated that after claimant had been examined by numerous doctors, she could not think of anything which would help claimant. Dr. McVay recommended claim closure and a permanent partial disability award of 10% impairment of the total body. Dr. Parsons essentially concurred with Drs. Colbach and McVay.

Claimant entered the Day Treatment Program prior to her claim being closed. Mr. Kruger, one of the program's counselors, felt claimant would achieve the goals set for her within six months of her enrollment. This program consists of two group therapies per week and thirty to forty-five minutes of individual therapy.

The Board concurs with the Referee's finding that claimant's emotional condition is a compensable consequence of the original industrial injury. The preponderance of the evidence establishes this relationship.

The evidence indicates there was no premature claim closure and the Determination Order of July 10, 1979 was properly entered.

Dr. Colbach, who recommended that claimant take the counseling offered at the Providence Medical Center Day Treatment Program, opined that this treatment was palliative rather than curative. He further found that claimant's psychological condition was stationary in May 1979, and rated her psychological impairment as mild.

Therefore, the Board concludes that claimant is medically and psychologically stationary but is entitled to an award of 35% unscheduled disability for neck and psychological conditions.

ORDER

The Referee's order, dated December 19, 1979, is reversed in its entirety.

Claimant is hereby granted an award of compensation equal to 112° for 35% unscheduled disability for her neck and psychological conditions.

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

Further, the Fund is ordered to pay for claimant's treatment at the Day Treatment Program.

WCB CASE NO. 79-6147 August 7, 1980

CALVIN L. BARNES, CLAIMANT
Malagon & Yates, Claimant's Attys.
Lang, Klein, Wolf, Smith, Griffith & Hallmark, Employer's Attys.
Request for Review by Employer

This case is before the Board on the employer-carrier's request for review of that portion of the Referee's order which set aside its denial of claimant's aggravation claim and awarded claimant's attorney a fee. It contends claimant failed to prove his condition has worsened since the last arrangement of compensation. The Board finds the facts in this case were correctly set forth by the Referee in his order.

The Board, after de novo review, modifies the Referee's order.

The last award or arrangement of compensation was the stipulation of the parties, dated March 27, 1979. The medical evidence thereinafter makes no showing that claimant's condition resulting from his compensable injury has worsened. Therefore, claimant has failed to prove he suffered an aggravation.

Dr. Wilson, however, has recommended that claimant be hospitalized for a myelogram and exploratory surgery. The Board finds claimant is entitled to this elective surgery and the claim shall be reopened and remanded to the carrier upon the date of claimant's hospitalization. The Board does feel, however, that this recommended medical procedure should be carefully evaluated because of the effects it may have upon this claimant.

ORDER

The Referee's order, dated March 7, 1980, as amended on March 12, 1980, is modified.

That portion of the Referee's order which set aside the employer-carrier's denial of the aggravation claim and ordered it to accept the claim and awarded claimant's attorney a fee of $800 is reversed.

The employer-carrier's denial of the aggravation claim is restored and affirmed.

The remainder of the Referee's order is affirmed.

WCB CASE NO. 79-3145 August 7, 1980
WCB CASE NO. 79-1277

CHERYL BONHAM, CLAIMANT
Thompson, Adams & DeBast, Claimant's Attys.
Cavanaugh & Pearce, Employer's Attys.
Request for Review by Employer
Cross-appeal by Claimant

Gleaves-Hyde Volkswagen (Volkswagen) seeks Board review of the Referee's order which found that claimant suffered a compensable injury which arose out of and in the course of her employment. Volkswagen contends her work with it did not materially worsen her underlying disease. Claimant cross-appeals contending the Referee erred in not awarding her penalties and attorney fees for the employer/carrier's failure to timely process her aggravation claim. Further, claimant contends she has suffered permanent disability.

FACTS

The Board finds that the facts as recited in the Referee's Opinion and Order are accurate. A copy of the Referee's order is attached hereto and, by this reference, made a part hereof.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, modifies the Referee's order. Starting on March 16, 1979, the employer refused to cooperate in any manner with claimant in filing her claim. It refused to provide her a claim form (Form 801). Claimant's attorney and his secretary contacted the employer four times and requested a claim form. Claimant's attorney contacted the insurer and requested a claim form. On March 19, 1979, claimant's attorney wrote the employer advising it that claimant had suffered a back injury. After receiving the

Form 801 from the carrier it was filled out and on March 22, 1979 mailed to the employer. The employer returned it to claimant's attorney because the name of a witness had been misspelled. Claimant's attorney obtained a second Form 801, filled it out, and filed it with the employer on March 26, 1979. Then on April 4, 1979, a representative of the employer stated the form would not be signed or sent until the owner of the business returned from his vacation. The carrier contacted the employer and informed it it had to cooperate in submitting the claim. Claimant's attorney, on April 10, 1979, advised the carrier he was obtaining another Form 801 and sending it to them. On that same day, the second Form 801 was signed by the employer. On April 26, 1979, the claim was denied. The Board finds the actions of the employer in this case to be unreasonable. The employer attempted in many ways to obstruct and hinder claimant's filing of this claim. Therefore, the Board would assess a penalty equal to 25% of the temporary total disability due from February 21, 1979 to April 26, 1979.

The medical evidence in this case establishes claimant's condition was temporarily aggravated by her employment. The condition is compensable only to the extent of the temporary aggravation. The same evidence also indicates this temporary aggravation has been resolved and has not resulted in any permanent disability.

ORDER

The Referee's order, dated Jnauary 2, 1980, is modified.

That portion of the Referee's order which granted a penalty equal to 10% of a period of temporary total disability compensation is modified. A penalty equal to 25% of such temporary total disability compensation for the period of February 21, 1979 to April 26, 1979 is assessed against the employer.

The remainder of the Referee's order, including the finding of compensability as modified by the Board in its opinion, is affirmed.

Claimant's attorney is hereby granted as a reasonable attorney's fee a sum equal to $300, payable by Gleaves-Hyde Volkswagen.

WCB CASE NO. 79-4497 August 8, 1980
WCB CASE NO. 79-6913

HAROLD BACHMAN, CLAIMANT
Welch, Bruun & Green, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Amended Order On Review

On August 4, 1980, the Board received a letter requesting that the Board reconsider its award of attorney's fees in its Order on Review, dated July 23, 1980. The Board thoroughly considered the log claimant's attorney submitted of the time spent in connection with this above case. It concludes that claimant's attorney is entitled to a larger fee and would amend its order to so state.

On page one, paragraph five should be completely deleted and the following paragraph put in its place:

> "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."

The remainder of the Board's order should be affirmed.

IT IS SO ORDERED.

WCB CASE NO. 78-5403 August 8, 1980

GERALD HOWARD, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant
Cross-appeal by the SAIF

This case is before the Board on claimant's and the SAIF Corporation's (SAIF) request that the Board review the Referee's order which granted claimant an award of compensation equal to 320° for 100% unscheduled disability for his injuries. Claimant contends he is permanently and totally disabled. SAIF cross-requests review and contends the award granted by the Referee is excessive. The Board finds the facts recited in the Referee's order are correct.

The Board, after de novo review, reverses the Referee's order. The Board finds the medical evidence indicates that from a purely objective standpoint claimant was capable of performing moderate work, but claimant lacks motivation to

return to any gainful employment. Claimant was uncooperative with Vocational Rehabilitation contending he was too disabled to do anything for over an hour. The medical evidence refutes this. Dr. Robertson found claimant's symptoms the same as in the early 1970's and Dr. Serbu found claimant's present condition was primarily functional in nature.

Therefore, the Board concludes that the prior award of 85% unscheduled disability adequately compensates claimant for his loss of wage earning capacity.

ORDER

The Referee's order, dated January 25, 1980, is reversed in its entirety.

The Determination Order, dated June 16, 1978 is restored and affirmed.

WCB CASE NO. 79-3803 August 11, 1980

LUTHER A. BAILEY, CLAIMANT
Thomas C. Howser, Claimant's Atty.
Velure, Heysell & Pocock, Employer's Attys.
Request for Review by Claimant

Claimant seeks Board review of the Referee's order which affirmed the carrier's denial of his claim for a left index finger injury of December 27, 1978.

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 January 25, 1980, is affirmed.

Chairman M. Keith Wilson dissents as follows:

The decision of the Referee which affirmed the denial of compensability should be reversed.

The decision of the Supreme Court in Clark v. U.S. Plywood, 288 Or 255 (1980), is determinative of the issue in this case. In Clark, the Court has prescribed the following test: The compensability of on premises injuries sustained while engaged in activities for the personal comfort of the employees can best be determined by a test which asks: Was the conduct ex-

pressly or impliedly allowed by the employer? The evidence in this case overwhelmingly establishes the finding that the activities of Mr. Bailey were allowed and condoned by the employer, acting through its foreman. The Court, in Clark, referred to the Larson discussion, Sections 21.10 and 21.84 and the cases cited in the Larson discussion.

I agree with counsel for claimant that even if the Jordan tests are applied to this case [Jordan v. Western Electric, 1 Or App 441, 436 P2d 598 (1970)], this injury is compensable.

WCB CASE NO. 78-9342 August 11, 1980

STEVE WALLACE, CLAIMANT
Malagon & Yates, Claimant's Attys.
Jaqua & Wheatley, Employer's Attys.
Request for Review by Claimant

Claimant seeks Board review of the Referee's order which found the employer was not obligated for the treatment received by claimant from Mr. Bossardt and refused to award claimant's attorney a fee. Claimant contends the employer should pay his attorney a fee.

FACTS

On April 28, 1977, claimant suffered a compensable injury to his knee. During his recovery from this injury he and his wife began to receive treatments from Richard L. Bossardt, M.S.W.

In October 1978, Mr. Bossardt reported he was seeing claimant and his wife weekly for marital counseling to reduce some severe problems they were having which he felt were due to claimant's industrial injury. He reported claimant was experiencing mild to moderate depressive reactions secondary to his physical limitations. The employer's attorney, also in October 1978, advised Mr. Bossardt there was some question whether the employer was responsible for the treatment provided by Mr. Bossardt. Mr. Bossardt is a psychiatric social worker. He is associated with Dr. James Martin, a psychiatrist, and performs treatment under Dr. Martin's general supervision.

On November 22, 1978, the employer denied responsibility for the treatment provided by Mr. Bossardt. Claimant retained an attorney who, on November 27, 1978, requested a hearing on this denial, requesting penalties and attorney fees. Two applications to schedule a hearing were filed.

On August 16, 1979, the employer accepted responsibility for future treatments for claimant's injury-related depression.

The Referee found the employer was not obligated to pay for the treatment provided by Mr. Bossardt. Therefore, the Referee found the employer did not have to pay claimant's attorney a fee.

BOARD ON DE NOVO REVIEW

The Board, after de novo review, reverses the Referee's order. The employer originally denied responsibility for the payment of the treatment provided by Mr. Bossardt. Claimant retained an attorney. Claimant's attorney, on his behalf, performed certain services to have the employer accept responsibility for this treatment. Then, the employer accepted responsibility for the treatment provided by Mr. Bossardt. The Board finds the employer should pay claimant's attorney a fee. The employer is responsible for the payment of the treatment provided by Mr. Bossardt. He is associated with a licensed psychiatrist and performs his counseling under the direction of and with the consent and knowledge of the psychiatrist. Claimant was required, when the employer denied responsibility for this treatment, to obtain an attorney. Claimant's attorney was required to do certain things in his representation of claimant. The Board finds that under the facts in this case, claimant's attorney is entitled to a fee of $350. Further, the Board finds the denial of the employer was unreasonable and assesses a penalty equal to 5% of Mr. Bossardt's bill for the treatment up to the date of the denial.

ORDER

The Referee's order, dated November 13, 1979, is reversed.

Claimant's attorney is hereby granted as a reasonable attorney's fee a sum equal to $650, payable by the carrier for his services in this case, both at Hearings and Board levels.

Claimant is also entitled to a penalty for the carrier's unreasonable refusal to pay an attorney fee equal to 5% of Mr. Bossardt's bill for treatment up to the date of the denial.

WCB CASE NO. 77-6376 August 12, 1980

BOYD BAULT, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Attys.
Lang, Klein, Wolf, Smith, Griffith
& Hallmark, Employer's Attys.
Request for Review by Employer

This case is before the Board on the employer's request that the Board review that portion of the Referee's order which found claimant had proven an aggravation of his condition, remanded the claim to the employer for acceptance and payments of benefits and awarded claimant's attorney a fee. The employer contends claimant failed to meet his burden of proving by a preponderance of the evidence that this condition aggravated.

The Board, after de novo review, modifies the Referee's order. This claim was initially closed by the July 26, 1976 Determination Order. Claimant returned to full time work. He stated he left work on September 5, 1977, after being off work due to a labor strike. There is a dispute about why claimant left work. He stated it was due to back pain. Other witnesses testified it was to take care of his ill mother-in-law.

On September 7, 1977, claimant advised Dr. Neal that he was quitting work because of back problems. Claimant stated his work "aggravated" his back. Dr. Neal felt additional treatment would not be beneficial for claimant. On September 20, 1977, Dr. Neal indicated claimant's condition became "materially aggravated and worsened following his return to work".

On October 7, 1977, claimant's attorney advised the employer of claimant's aggravation claim. The claim was denied on October 13, 1977 by the employer's workers' compensation insurance carrier.

In May 1979, Dr. Martens reported claimant's condition was medically stationary. He did not feel claimant was in need of additional testing or treatment.

Dr. Neal was deposed and stated he had not treated or seen claimant on September 9, 1977, but had received a phone call from claimant. Claimant reported his back condition had gotten progressively worse. Dr. Neal stated his reports in September 1977 were based on claimant's statements that his condition was worse.

Dr. Neal, on March 13, 1978, did examine claimant. He felt claimant's condition subjectively was worse than it was in May 1976. Also, Dr. Neal indicated he found some

minor details during his examination which indicated claimant's back was slightly worse. He felt claimant's back condition was still basically the same.

The Board finds claimant has failed to prove his condition has worsened since the last award of compensation. The medical evidence does not establish that claimant's back condition has worsened since May 1976. The other evidence indicated claimant worked for over a year after his claim was closed and after leaving employment with this employer engaged in various vigorous outdoor activities. Therefore, the Board reverses those portions of the Referee's order which set aside the employer-carrier's denial of claimant's aggravation claim, remanded it to it for acceptance and payment of compensation, and awarded claimant's attorney a fee.

However, the Board finds claimant is entitled to temporary total disability compensation from September 7, 1977 (the date reported in Dr. Neal's September 1977 report) to October 13, 1977 (the date of the employer's denial). Claimant is entitled to this interim compensation. Dr. Neal's September 15, 1977 report established a claim for aggravation. Later, it was discovered he had not seen claimant prior to his making of that report. However, the employer-carrier did not discover this until after it had denied claimant's claim. Therefore, the Board grants claimant an award of temporary total disability compensation for that period of time, assesses a penalty equal to 25% of that temporary total disability compensation for its failure to pay interim compensation and awards claimant's attorney a fee of $250.

ORDER

The Referee's order, dated November 30, 1979, is modified.

Those portions of the Referee's order which ordered the employer to accept the claim for aggravation made on October 7, 1977, afford claimant all entitlements under Oregon Workers' Compensation Law and granted claimant's attorney a fee is reversed.

Claimant is hereby granted an award of temporary total disability compensation from September 7, 1977 to October 13, 1977, plus an amount equal to 25% of that temporary total disability compensation as a penalty for the employer's failure to pay interim compensation. Claimant's attorney is granted a fee of $250, payable by the employer.

CLAIM NO. A 848039 August 12, 1980

EUGENE M. CREAMER, CLAIMANT
Malagon & Yates, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On June 25, 1980, claimant, by and through his attorney, requested the Board reopen his back injury claim under its own motion jurisdiction. Claimant had suffered a back injury on January 26, 1961 and his employer's workers' compensation insurance coverage was furnished by the State Industrial Accident Commission. He also injured his back on June 17, 1966 and his employer's workers' compensation insurer was the Reserve Insurance Group.

In June 1980, Dr. Anthony Smith reported claimant had had a laminectomy and fusion in 1963 and in 1967 had a pseudoarthrosis repaired. In October 1978, claimant indicated he had developed increased back and leg pain. Dr. Smith diagnosed "marked low back pain, precise etiology undetermined".

Both of the insurance carriers have denied responsibility for claimant's current condition.

The Board feels it would be in the best interest of the parties if this case were remanded to the Hearings Division. The Referee shall determine if claimant's condition has worsened, if the worsened condition is due to the 1961 or 1966 injury or due to other causes, and if it is due to either the 1961 or 1966 injury which insurance carrier is responsible. After the hearing, the Referee shall forward his recommendation together with all the exhibits introduced at the hearing as well as a transcript of the proceedings to the Board.

IT IS SO ORDERED.

CLAIM NO. 133 CB E03 6584 August 12, 1980

RAYMOND P. DUNLAP, CLAIMANT
Corey, Byler & Rew, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On July 18, 1980, claimant requested the Board exercise its own motion relief jurisdiction and reopen his claim for his May 2, 1974 back injury. This claim was initially closed by an October 3, 1974 Determination Order and claimant's aggravation rights have expired. Claimant indicated he had been unable to work since April 8, 1980.

On April 8, 1980, Dr. Grewe indicated claimant had low back pain which radiated down both legs. He advised claimant to stay off work.

Dr. Grewe hospitalized claimant in April 21, 1980 for chronic pain affecting the left lower extremity. Several tests were performed, one of which revealed a "moderate" bulging disc at the L3-4 level. On April 26, 1980, claimant was discharged from the hospital. Claimant was again hospitalized from May 13, 1980 through May 20, 1980 for persistent pain which affected his low back and left lower extremity.

On August 1, 1980, the carrier advised the Board it was not opposed to the Board reopening this claim under its own motion jurisdiction.

The Board, after reviewing this claim, finds the evidence is sufficient to warrant the reopening of this claim effective April 8, 1980.

ORDER

Claimant's claim for a back injury sustained on May 2, 1974 is hereby reopened as of April 8, 1980 and until closed pursuant to ORS 656.278.

Claimant's attorney is hereby granted 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 $250.

CLAIM NO. GC 449993 August 12, 1980

DELBERT D. GRAY, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On June 12, 1980, the Board issued an Own Motion Determination which granted claimant additional temporary total disability compensation from May 22, 1980 to the date of the order. The Board indicated it would consider reopening this claim if and when claimant entered the Pain Clinic for treatment.

Claimant, on July 23, 1980, advised the Board he was set to enter this program on July 22, 1980. The SAIF Corporation advised the Board there had been a delay in claimant's being referred to the Pain Clinic because claimant's doctor had failed to refer him there. It straightened this problem out and began paying claimant temporary total disability compensation effective July 22, 1980 and requested this claim be reopened. Claimant has requested the Board order the SAIF Corporation to pay temporary total disability from June 12, 1980 to the date he entered the Pain Clinic.

The Board, after reviewing the record in this case, denies claimant's request. It appears any delay in claimant's admission to the Pain Center was due to confusion between claimant's doctor and the Pain Clinic and not due to any fault on the part of the SAIF Corporation. The Board finds the evidence does not indicate claimant is entitled to temporary total disability compensation from June 12, 1980 as he requests.

ORDER

Claimant's request for temporary total disability compensation from June 12, 1980 through July 21, 1980 is denied.

The Board would order this claim reopened as of the date claimant enters the Northwest Pain Clinic program.

WCB CASE NO. 78-7353 August 12, 1980

RICHARD O. HILL, CLAIMANT
Malagon & Yates, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Order

On August 7, 1980, claimant's attorney requested reconsideration of the award of attorney's fees granted to him. He contended the attorney's fee should have been in addition to compensation and not out of the compensation awarded.

The Board, in its Order on Review, affirmed the SAIF Corporation's denial that claimant's heart condition and death were related to his industrial injury. However, the Board found that at the time of his death, claimant was permanently and totally disabled due to the physical residuals and his psychological impairment related to the injury. This was an increase of compensation over that awarded by the Determination Order of September 1978. Therefore, the Board awarded claimant's attorney a fee out of the increased compensation. Based on these findings, the Board denies claimant's attorney's request.

IT IS SO ORDERED.

WCB CASE NO. 78-9233 August 12, 1980

NANCY HUNT, CLAIMANT
Malagon & Yates, Claimant's Attys.
David Horne, Employer's Atty.
Request for Review by Employer

This case is before the Board on the employer-carrier's request that the Board review the Referee's order which granted claimant an award of compensation equal to 64° for 20% unscheduled disability for respiratory problems. The employer-carrier contends claimant did not suffer any permanent disability as a result of her exposure while employed by it. The facts as set forth by the Referee in his order are correct.

The Board, after de novo review, reverses the Referee's order in its entirety. Claimant has a pre-existing condition which can be aggravated by exposure to various substances, such as wood dust, smoke, fresh cut grass, and fumes from welding. Her work with this employer caused her condition to be temporarily worsened. Her condition improved after she left work with this employer, but when exposed to wood dust or other substances, her condition would again worsen.

The Board does not find that the preponderance of the evidence establishes that claimant suffered any permanent partial disability as a result of her work exposure while employed by this employer. Dr. Tuhy's opinion supports this conclusion.

The restrictions placed on the types of employment claimant can engage in does not, in the Board's opinion, establish that claimant has permanent disability as a result of her working for this employer. The evidence indicates claimant's testimony is suspect, as is her medical history she gave to the various medical doctors. She denied having any history of previous difficulties similar to the ones she now experiences. However, the evidence indicates claimant has a history of repeated occurrences of the same or similar difficulties. The Board feels that the restrictions placed on the places or types of employment claimant can engage in are to prevent recurrences of her condition. It is apparent that claimant has not been permanently sensitized to wood dust so as to require these work restrictions. Claimant's condition improves when she is removed from exposure to certain substances and worsens when she is exposed to them.

Based on all the evidence, the Board finds claimant had failed to carry her burden of proving by the preponderance of the evidence that she has suffered permanent partial disability due to her exposure at work while employed by this employer. Therefore, the Board reverses the Referee's order in its entirety and affirms the Determination Orders.

ORDER

The Referee's order, dated March 10, 1980, is reversed in its entirety.

The Determination Orders, dated August 23, 1978 and November 3, 1978 are restored and affirmed.

CLAIM NO. 36-80-8028047R August 12, 1980

FRANK M. KING, CLAIMANT
Rankin, McMurry, Osburn, VavRosky
& Doherty, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Order

The employer has requested the Board issue an order that the Department of Labor and Industries, State of Washington, be petitioned to issue an order for issuance of a subpoena compelling the attendance of Michael Arnold at a deposition to be held in Vancouver, Washington.

The Board denies the employer's motion. The Board has no authority to order the Department of Labor and Industries in the State of Washington to do anything. Therefore, the Board cannot and will not grant the employer's motion.

ORDER

The employer's motion is denied.

CLAIM NO. C 395077 August 12, 1980

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

On June 11, 1980, claimant requested the Board to reopen his claim for a September 5, 1972 back injury. Claimant's aggravation rights have expired.

Dr. Stark, in June 1980, reported claimant had low back pain. Claimant indicated he felt his work aggravated his condition. Dr. Stark diagnosed degenerative lumbar disc disease which was aggravated by claimant's work. He suggested claimant reduce the number of hours he worked.

On July 3, 1980, Dr. Stevland reported claimant continued to have low back pain and left sacroiliac pain. He indicated claimant was scheduled for a left inguinal herniorrhaphy and during that hospitalization claimant would be treated with bedrest and perhaps a trial of transcutaneous nerve stimulation.

The SAIF Corporation, on August 4, 1980, indicated it would not oppose reopening this claim for the proposed left inguinal herniorrhaphy. It did not feel claimant's current back problem was its responsibility, since that condition was related to claimant's current employment.

The Board, after reviewing the evidence before it, finds it is sufficient to warrant the reopening of this claim for the proposed hernia surgery. The Board finds the medical evidence is not sufficient to warrant reopening of this claim for claimant's back condition at this time. Therefore, the Board orders this claim reopened for the proposed left inguinal herniorrhaphy effective the date claimant is hospitalized for it.

IT IS SO ORDERED.

CLAIM NO. C 61411 August 12, 1980

BETTY I. MAHLER, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On February 21, 1967, claimant suffered a compensable injury to her right knee. Her claim was closed and her aggravation rights have expired.

In June 1980, Dr. Van Olst reported claimant had had continuing pain in the right knee. He diagnosed "post traumatic degenerative arthritis, medial compartment, right knee secondary to previous medial meniscectomy". He felt claimant's current condition was directly related to her original injury and treatment for it. Dr. Van Olst recommended claimant undergo an arthroscopy and valgus producing wedge osteotomy of her right tibia. This was scheduled for August 7, 1980.

On July 29, 1980, the SAIF Corporation advised the Board of these facts. It indicated it had no opposition to an own motion order reopening this claim for the proposed surgery.

The Board finds the evidence is sufficient to warrant reopening of this claim effective the date when claimant is hospitalized for the surgery recommended by Dr. Van Olst.

IT IS SO ORDERED.

CLAIM NO. D53-115098 August 12, 1980

RICHARD METHVIN, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

On December 1, 1966, claimant suffered various compensable injuries to his spleen and left leg. After surgery and physical therapy, this claim was initially closed by a Determination Order, dated February 29, 1968, which granted claimant an award of permanent partial disability equal to 15% loss of his left leg. His aggravation rights have expired.

On March 6, 1980, Dr. Ferrin reported he had found an incisional hernia at claimant's surgical scar from his 1966 surgery. He related this condition to the treatment for claimant's original injury. On May 13, 1980, this was surgically repaired. Dr. Ferrin felt claimant could return to work as of July 1, 1980 and that his condition was medically stationary as of May 29, 1980 with no additional permanent impairment.

On July 18, 1980, the SAIF Corporation requested a determination of claimant's disability. The Evaluation Division of the Workers' Compensation Department, on July 29, 1980, recommended this claim be closed with an award of additional temporary total disability compensation from May 12, 1980 through June 30, 1980 with no additional permanent partial disability award.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted temporary total disability compensation from May 12, 1980 through June 30, 1980, less time worked. The record indicates that this award has already been paid to claimant.

CLAIM NO. B53-140563 August 12, 1980

STANLEY MATTIE, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On November 10, 1970, claimant suffered a compensable injury to his back. The claim was closed and claimant's aggravation rights have expired.

On July 14, 1980, Dr. Rosenbaum reported claimant indicated he had had continuing low back pain and left sciatica symptoms. Claimant had been hospitalized in April 1980 for a myelogram which revealed a defect at the L4-5 level on the right. It had been suggested that claimant undergo a lumbar laminectomy and if it was "negative" that he undergo a lumbar fusion. Dr. Rosenbaum felt claimant's current problems were related to his original injury.

The carrier, on July 25, 1980, advised the Board it would voluntarily reopen this claim.

The Board, after reviewing this case, finds the evidence warrants the reopening of this claim effective the date he was hospitalized for the myelogram for payment of compensation and benefits due him pursuant to law.

IT IS SO ORDERED.

CLAIM NO. 133 CB 163 2181 August 12, 1980

ALBERTA M. NORTON, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant requested the Board to reopen his claim for the June 13, 1967 injury to her forearm under its own motion jurisdiction. This claim was initially closed and claimant's aggravation rights have expired.

In April 1980, Dr. Becker reported claimant was complaining of low back pain and pain in her hands. He diagnosed claimant's condition as a chronic lumbosacral strain and "degenerative arthritis in both hands, fusion of the metacarpal carpal joints, having arthritis in the right long finger PIP joint with juxtarticular cyst and degeneration and slight ulnar deviation of the finger". In July 1980, Dr. Becker opined claimant's problem with her right long finger would best be treated by fusion of the right long finger PIP joint.

On August 1, 1980, the carrier indicated it opposed an own motion order reopening this claim. It contended claimant's current condition is degenerative in nature and not part of her original industrial claim.

The Board, after reviewing this claim, finds the evidence is sufficient to warrant a reopening of this claim effective the date claimant is hospitalized for the treatment recommended by Dr. Becker.

IT IS SO ORDERED.

CLAIM NO. EC 273344 August 12, 1980

DENNIS W. PADGETT, CLAIMANT
Thomas J. Flaherty, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

On October 21, 1970, claimant suffered a compensable vertebral L-1 compression fracture. His claim was initially closed by a May 26, 1972 Determination Order and his aggravation rights have expired. Subsequently, a stipulation, a second Determination Order, and two additional stipulations were entered.

This claim was reopened on April 24, 1980 by an Own Motion Order authorizing claimant to attend the Northwest Pain Center and reopening this claim on the date claimant entered that program.

Claimant entered the Pain Center program on June 3, 1980 and was discharged on June 27, 1980. It was felt claimant benefited from his participation in this program.

On July 15, 1980, the SAIF Corporation requested a determination of claimant's disability. The Evaluation Division of the Workers' Compensation Department on July 31, 1980 recommended this claim be closed with additional temporary total disability compensation from June 3, 1980 through June 27, 1980 and did not recommend any additional permanent partial disability award.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted temporary total disability compensation from June 3, 1980 through June 27, 1980, less time worked. The record indicates that claimant has already been paid this award.

CLAIM NO. C 434677 August 12, 1980

JAMES E. POWERS, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On March 18, 1973, claimant sustained a compensable injury to his right knee. After a period of treatment, including surgery, the claim was closed. Claimant's aggravation rights have expired.

On July 3, 1980, Dr. Steven Schachner reported that claimant was complaining of pain in the knee. Claimant indicated that his job required standing and that for a period of a few months he had felt a throbbing sensation in his right knee. Dr. Schachner reported that x-rays indicated that an area of new bone formation in the area claimant complained of having pain. He felt the only way to correct this situation was to remove the new bone formation. Surgery is apparently scheduled to remove this new bone formation on August 13, 1980.

On August 1, 1980, the SAIF Corporation advised the Board of these facts and indicated it did not oppose an Own Motion Order reopening his claim for the surgery that was scheduled August 13, 1980.

The Board, after reviewing this evidence, finds it is sufficient to warrant a reopening of the claim the date claimant enters the hospital for the surgery proposed by Dr. Schachner.

ORDER

This claim is ordered to be reopened effective the date claimant enters the hospital for the surgery as recommended by Dr. Schachner.

WCB CASE NO. 79-6135 August 12, 1980

STEVEN J. RAYMER, CLAIMANT
Richard O. Nesting, Claimant's Atty.
Schwabe, Williamson, Wyatt, Moore & Roberts, Employer's Attys.
Request for Review by Fred Meyer
Cross-appeal by Claimant

This case is before the Board on Fred Meyer, Inc.'s (Fred Meyer) request that the Board review the Referee's order which found claimant had sustained a new injury and remanded this claim to it for acceptance and processing, and awarded claimant's Attorney a fee. Fred Meyer contends under the Weller case claimant has not proven a compensable claim against it.

The Board finds the facts as set forth by the Referee are correct.

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

First of all, the dispute as to compensability of the claimant's condition could have been disposed of in one hearing, as was mentioned by the employer in its argument. Claimant's claim for an aggravation of his Safeway injury and his claim of a new injury at Fred Meyer could have been tried together. However, because of Fred Meyer's acts in delaying claimant's filing of a claim for a new injury while employed by it until after the hearing and an Opinion and Order had been issued denying claimant's aggravation claim, a separate hearing had to be held on his new injury claim. The Board feels in either case the same result would have been reached.

In May 1977, claimant injured his back while employed at Safeway. Claimant returned to work at Safeway and subsequently went to work for Pepsi Cola. He performed moderately heavy work at Pepsi Cola. He injured his back in August 1978 in a motor vehicle accident. In October 1978, he began working for Fred Meyer. The work at Fred Meyer involved heavy lifting of weights up to 140 pounds. Claimant indicated that in January 1979 he began experiencing back problems. The back condition gradually worsened until he sought medical care and later became disabled. The claimant testified he had been without symptoms in his low back for some months prior to his employment at Fred Meyer.

Claimant's condition has been diagnosed as a sprain-strain syndrome of the lumbar spine and spondylolysis a congenital defect at the L5-S1 levels. Dr. Thomas stated that the spondylolysis condition "is a congenital defect in

the pars interarticularis . . . vigorous physical activity such as heavy lifting and recurrent stooping and bending aggravate the symptoms". He felt claimant's work at Fred Meyer aggravated this condition. Dr. Utterback agreed with this diagnosis. He felt due to the mechanical instability in claimant's back, the bending and lifting inherent in the warehouse job were beyond claimant's capabilities. Utterback indicated such activities would result in claimant having "aching low-back pain".

Fred Meyer relies on the case of Weller v. Union Carbide Corporation, 288 OR 27 (1979), for its position this claim is not compensable because claimant's work did no more than make his pre-existing congenital condition symptomatic. The medical evidence indicates that claimant's congenital mechanical low back instability will be symptomatic anytime he engages in vigorous physical activity such as heavy lifting or recurrent stooping. His employment at Fred Meyer required him to perform these types of activities and predictably resulted in the development of low back pain. In Weller (supra.) the Supreme Court quoted from the Court of Appeals' decision.

> " . . . Claimant began working as a crane operator in 1952. He injured his low back in a non-industrial accident in 1968. He continued in the same employment, but had recurrent episodes of low back and leg pain. Claimant quit working in 1975. Several doctors made a variety of diagnoses--all generally indicating degenerative changes in the bone structure of the lumbosacral area of claimant's spine, which caused nerve root irritation, which caused the pain claimant experienced. Subsequent surgery provided partial relief . . . ." (35 Or App at 357).

In this case, the facts are unlike Weller. The claimant herein had a relatively long asymptomatic period between his leaving Safeway and the employment at Fred Meyer. During that interim he had performed moderately heavy work without back symptoms. He further had no symptoms during the early months of his employment at Fred Meyer (October to January).

The Board finds the facts of this case are more like those found in Hutchison v. Weyerhaeuser, 288 Or 51 (1979). In Hutchison, a case decided the same day as Weller (supra.), the Supreme Court, in discussing an occupational disease claim, states: "If the 'mill condition' caused a 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 that exacerbation resulted in even temporary disability, this claim is compensable". In this case the claimant's

pre-existing spondylosis condition was exacerbated, required medical treatment and resulted in temporary disability. This claim to that extent is compensable. Fred Meyer is responsible for any temporary total disability compensation and medical treatment due to claimant's disabling pain resulting from the exacerbation of his pre-existing condition. The Referee's order, as clarified by the Board, is affirmed.

ORDER

The Referee's order, dated February 22, 1980, as clarified by the Board, is affirmed.

Claimant's attorney is hereby granted as a reasonable attorney's fee a sum equal to $200, payable by Fred Meyer, Inc. and its carrier.

WCB CASE NO. 79-2668 August 12, 1980

JAMES RHODES, CLAIMANT
Schwabe, Williamson, Wyatt, Moore & Roberts, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

This case is before the Board on the SAIF Corporation's (SAIF's) request for Board review of the Referee's order which found claimant had proven an aggravation claim and remanded it to SAIF for acceptance and payment of benefits from January 26, 1979 until closed, awarded claimant additional compensation in the form of a penalty equal to 15% of the temporary total disability compensation due from January 26, 1979 to January 7, 1980, and awarded claimant's attorney a fee. SAIF contends the Referee erred in doing this. The facts as set forth by the Referee are correct.

The Board, after de novo review of this case, modifies the Referee's order. Claimant's claim was initially closed by a Determination Order, dated February 16, 1977 and after termination of a vocational rehabilitation program a second Determination Order, dated June 23, 1978, awarded claimant additional temporary total disability compensation.

Claimant left work on January 26, 1979 because of back pain. Claimant's attorney requested the claim be reopened as of that date for medical treatment and temporary total disability compensation.

On February 9, 1979, the Orthopaedic Consultants examined claimant. They felt claimant was not medically stationary and should be hospitalized, placed in traction, given physical therapy and muscle relaxants and then "gradually mobilized".

Dr. Howard, on March 6, 1979, reported claimant was under his care and unable "to perform his usual duties or activities". He indicated claimant's condition was not stationary and claimant was in need of additional treatment.

The SAIF, on March 16, 1977, denied claimant's request to reopen his claim.

The Board agrees with the Referee that the evidence in this case establishes that claimant's condition has worsened since his last award or arrangement of compensation. It notes there is some question about claimant's credibility. However, it finds the preponderance of the evidence supports the Referee's finding regarding the aggravation issue.

However, the Board does not concur with the Referee's assessment of penalty in this case. The denial issued by the SAIF stated it did not have sufficient evidence that claimant's present condition was caused by or was the result of his June 22, 1976 injury. The Referee found this denial was unreasonable and assessed a penalty on the temporary total disability compensation due from January 26, 1979 to the date of his order, January 7, 1980. Claimant was paid temporary total disability compensation up to the date of the denial. At the time of the denial was made, the SAIF had information which led it to doubt the validity of claimant's claim. The Board finds, based on the facts in this case, the denial was not unreasonable. Therefore, it reverses the Referee's award of penalties.

ORDER

The Referee's order, dated January 7, 1980, is modified.

That portion of the Referee's order which granted claimant additional compensation equal to 15% of the temporary total disability compensation due from January 26, 1979 to the date of his order as a penalty is reversed.

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 $250, payable by the Fund.

CLAIM NO. B53-12143 August 12, 1980

DONALD ROWDEN, CLAIMANT
Grant, Ferguson & Carter, Claimant's Attys.
Lang, Klein, Wolf, Smith, Griffith
& Hallmark, Employer's Attys.
Own Motion Order

This case was referred to the Hearings Division to conduct a hearing to determine whether claimant's request that his claim for a December 27, 1967 injury, while employed by Fir Plywood Company, which was insured by Employers Insurance of Wausau, should be reopened. Other issues were also to be decided by the Referee which did not concern the own motion portion of the claim. After a hearing, the Referee recommended to the Board that claimant's request that his claim for the December 1967 injury be reopened under its own motion jurisdiction should be denied.

The Board, after thoroughly reviewing all the evidence in this case, concurs with the Referee's recommendation. The Board would affirm and adopt the order issued by the Referee in this case. A copy of the Referee's order is attached to this order and thereby incorporated into it.

ORDER

Claimant's request that his claim for his December 27, 1967 injury be reopened by the Board under its own motion jurisdiction is denied.

CLAIM NO. A 450970 August 12, 1980

RICHARD TONEY, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant sustained an injury to his right eye on December 2, 1954. This injury required that claimant be fitted with a artificial eye. The claim was initially closed by a February 3, 1955 order which granted claimant compensation equal to 100% loss of vision in the right eye. Claimant's aggravation rights have expired.

On July 7, 1980, claimant was hospitalized by Dr. John Sonntag for additional surgery on the right lower eyelid. Dr. Sonntag diagnosed ectropion of the right lower lid and surgical anophthalmos of the right eye. On that same date, Dr. Sonntag performed a wedge resection of the right lower

eyelid. After this surgery, claimant indicated that he was able to work as of July 28, 1980, however, he was not employed at that point. Dr. Sonntag indicated that he released claimant to work as of July 25, 1980.

On August 1, 1980, the SAIF Corporation advised the Board of these facts and indicated it would not oppose an Own Motion Order reopening this claim for the recent surgery. It felt the claimant was entitled to temporary total disability compensation from July 7 to July 25, 1980 and that claimant's condition was again stationary.

The Board, after reviewing the evidence in this case, agrees with the SAIF Corporation. The Board finds that claimant is entitled to additional temporary total disability compensation for the period from July 7, 1980 through July 25, 1980 as well as being entitled to have the medical treatment he received from Dr. Sonntag to be covered by the SAIF Corporation.

ORDER

Claimant is hereby granted an additional award of temporary total disability compensation for the period from July 7, 1980 through July 25, 1980.

CLAIM NO. 65-60162 August 12, 1980

ANNA ZIEGLER, CLAIMANT
Malagon & Yates, Claimant's Attys.
Velure, Heysell & Pocock, Employer's Attys.
Own Motion Order

On June 27, 1980, claimant, by and through her attorney, requested the Board exercise its own motion jurisdiction and reopen her claim for her September 16, 1967 back injury. Claimant requested a "fact finding hearing to determine the level" of her disability. Claimant's aggravation rights have expired.

In June 1980, Dr. Bert reported claimant's back condition had deteriorated above and below the site of the fusion. He felt claimant was 100% disabled.

On July 31, 1980, the carrier indicated there was insufficient evidence to make a determination of what its position was in regard to claimant's request.

The Board, after reviewing the information in this case, finds it would be in the best interest of all the parties if this case were remanded to the Hearings Division. The Referee shall decide if claimant's condition has worsened since the last award or arrangement of compensation in this case and if it has, determine if claimant's current condition is related to claimant's original injury. The Referee shall forward his recommendation in this case, along with other evidence introduced at the hearing and a transcript of the proceedings to the Board.

IT IS SO ORDERED.

CLAIM NO. C 392277 August 14, 1980

SUSAN L. AULT, CLAIMANT
Malagon & Yates, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant, by and through her attorney, on August 7, 1980, requested the Board exercise its own motion authority and reopen her claim for a 1972 injury. The claimant requests the Board review its Own Motion Order, dated March 17, 1980 in the light of additional medical evidence and reconsider its prior action.

Claimant contends that the three additional medical reports she submitted support her request. The medical reports incidate:

(1) In July 1979, Dr. Golden hospitalized claimant for back pain and "right lower extremity radiation". The right leg pain had begun approximately one week prior to her hospitalization.

(2) Dr. Becker, on October 12, 1979, reported an EMG revealed increased motor unit polypphasicity. He felt this "likely represents a subacute radiculopathy on the right side but cannot be stated with diagnostic certainty".

(3) Dr. Golden, on the same date, opined claimant's symptoms were the result of her 1972 injury. He felt the symptoms had been aggravated and sustained by claimant's "chronic obesity".

The Board, after reviewing all the medical evidence of record does not find the evidence warrants a reopening of this claim. Claimant's request that the Board reopen her August 30, 1972 claim under its own motion authority (ORS 656.278) is at this time denied.

IT IS SO ORDERED.

WCB CASE NO. 79-2932 Augsut 14, 1980

RANDY V. CRAIG, CLAIMANT
David R. Vandenberg, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF
Cross-appeal by Claimant

This case is before the Board on the SAIF Corporation's (SAIF's) request for Board review of the Referee's order which ordered it to accept claimant's aggravation claim, finding no new injury, and ordered it to provide claimant benefits to which he was entitled by law, awarded claimant additional compensation equal to 22.5° for 15% loss of the left leg, and awarded claimant's attorney a fee for overcoming the denial and out of the additional compensation. The SAIF contends claimant suffered a subsequent intervening injury.

The facts as set forth by the Referee in his order are correct.

The Board, after de novo review of this case, reverses the Referee's order.

Based on the evidence in this case, the Board finds the January 25, 1979 injury contributed independently to claimant's disability and superceded the first-accepted injury of March 1978. The January 1979 injury was not related to claimant's work activities. Dr. Holland opined this incident led to the final tearing of the anterior cruciate ligament. Previously, this ligament had been found to be "slack". After the January 1979 injury, Dr. Holland felt it was torn. The Board finds the January 25, 1979 injury was a "new injury" under the last injurious exposure rule. Therefore, the Board reverses the Referee's ordering claimant's aggravation claim accepted. Based on this finding, the Board also does not find claimant has suffered a loss of function of his knee as found by the Referee. The Board finds the Determination Order correctly compensated claimant for his loss of function of his knee. Therefore, the Board reverses the Referee's order in its entirety.

ORDER

The Referee's order, dated February 28, 1980, is reversed in its entirety.

The Determination Order, dated January 29, 1979, is restored and affirmed.

The SAIF Corporation's denial, dated February 22, 1979, is restored and affirmed.

CLAIM NO. GB 66126 August 14, 1980

BARBARA J. FOSS, CLAIMANT
John M. Parkhurst, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On April 28, 1980, claimant requested the Board reconsider its Own Motion Determination and grant claimant additional temporary total disability. In June 1980, claimant's attorney advised the Board that claimant had again been hospitalized with recurrent severe back pain which radiated into her right leg as well as pain in her neck, right shoulder and arm.

On May 22, 1980, Dr. Berkeley advised the SAIF Corporation that claimant had been hospitalized on May 9, 1980 with recurrent severe low back pain which radiated to her right leg as well as pain in the neck, right shoulder and arm which was of two weeks duration. He reported that an additional myelogram was performed which revealed minimal changes in the lumbosacral region, but did not reveal any evidence of recurrent disc or nerve root entrapment. A cervical myelogram had also been performed which revealed there was some swelling in the nerve roots at C5-6 bilaterally. Dr. Berkeley did not feel that this condition required any surgical intervention at that time.

The Orthopaedic Consultants, on July 9, 1980, reported that they had examined claimant in January 1980 and again on July 1, 1980. They felt there was no increase in claimant's disability beyond that which he had been previously granted. The only difference they found with regard to symptomatology were complaints of pain in the neck and right upper extremity which claimant advised them began in April 1980. They reported this symptomatology had not been previously documented and therefore was not considered to be related in any way to claimant's injury of 1964. It was their opinion that the symptoms with regard to her low back and right leg did not appear to be any different than they were before. They felt there was no justification for reopening her claim.

The SAIF Corporation, on August 5, 1980, advised the Board that it would oppose an Own Motion Order reopening this claim. They indicated there was no evidence of any material worsening of claimant's condition for which it was responsible.

The Board, after reviewing all the medical reports submitted to it, finds that the evidence is not sufficient to warrant a reopening of this claim at this time or to justify the relief that claimant seeks. Therefore, claimant's request is denied.

IT IS SO ORDERED.

WCB CASE NO. 79-2769 August 14, 1980

PEARL M. GOULET, CLAIMANT
Galton, Popick & Scott, Claimant's Attys.
Tooze, Kerr, Peterson, Marshall & Shenker, Employer's Attys.
Request for Review by Claimant

This case is before the Board on claimant's request for Board review of the Referee's order which affirmed two Determination Orders which had granted claimant a total award of compensation equal to 32° for 10% unscheduled disability for her mid and low back injury. Claimant contends this award does not correctly reflect her loss of wage earning capacity due to this injury. The Board finds the facts as set forth in the Referee's order are correct.

The Board, after de novo review of this case, modifies the Referee's order. The evidence does not establish claimant's psychological problems are related to her injury. Dr. Painter indicated that although psychological factors play a prominent role in claimant's level of disability, they were "primarily of longstanding, and are not related specifically" to her injury.

Since her August 9, 1977 injury, claimant has undergone an EMG, a myelogram, two-level discogram and a facet rhizotomy at the L4-5 and L5-S1 levels on the left. Because of her continuing complaints of pain, she also has gone through the Pain Clinic program.

Dr. Snodgrass rated the impairment of claimant's low back as minimal. He rated the impairment of claimant's lumbodorsal area as mildly moderate.

Drs. Marble and Yospe have commented on claimant's lack of motivation both for rehabilitation and return to work. Dr. Marble felt claimant could perform an occupation not requiring lifting over ten to fifteen pounds, repetitive bending beyond 30°, pushing and pulling over 30 to 40 pounds and which would allow claimant to move about frequently. He rated her disability as mild to mildly moderate.

Claimant is 55 years old and has a high school education. Her prior work experience has been as a bartender, waitress, and as an assembly worker with Boeing. Claimant has an average to high average intelligence. Based on the evidence in this case, the Board finds claimant has sustained a larger loss of wage earning capacity than that for which she has been compensated. Therefore, the Board grants claimant an award of compensation equal to 96° for 30% unscheduled disability for back injury, in lieu of all previous awards of unscheduled disability for this injury.

ORDER

The Referee's order, dated October 15, 1979, is modified.

Claimant is hereby granted compensation equal to 96° for 30% unscheduled disability for her back injury. This is in lieu of all previous awards of unscheduled disability for this injury.

Claimant's attorney is hereby granted compensation 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 207634 August 14, 1980

LAWRENCE E. HENDERSON, CLAIMANT
W.D. Bates, Jr., Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On September 23, 1969, claimant suffered a compensable injury to his back. Claimant, by and through his attorney, on August 1, 1980, requested the Board reopen his claim under its own motion jurisdiction. This claim was initially closed on April 30, 1970 by a Determination Order and claimant's aggravation rights have expired.

In 1971, claimant had undergone a laminectomy. The SAIF Corporation refused to pay for this treatment. Subsequently, claimant returned to work.

In February 1979, Dr. Matteri indicated claimant had been working and developed left hip pain. He felt claimant needed a lighter type of employment. Dr. Matteri, in July 1980, opined claimant's current problem was an exacerbation of the condition for which he had his lumbar laminectomy performed in 1971.

The SAIF Corporation, on August 7, 1980, advised the Board it opposed an Own Motion Order reopening this claim since it did not have a claim or a file for a low back injury.

The Board, after reviewing the information submitted to it, finds the evidence does not warrant a reopening of this claim. Claimant's original injury in this claim was to the mid-back area and not to the low back area. Claimant's 1971 surgery was in the low back area. Therefore, the Board denies claimant's request.

IT IS SO ORDERED.

CLAIM NO. C 442552 August 14, 1980

JOE HOLMES, JR., CLAIMANT
Welch, Bruun & Green, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On April 30, 1980, claimant, by and through his attorney, requested the Board reopen this claim under its own motion jurisdiction. Claimant had injured his left knee on May 25, 1973 and the claim had initially been closed by a September 27, 1973 Determination Order which granted claimant compensation equal to 7.5° for 5% loss of the left leg. Other awards and arrangements of compensation were subsequently granted which increased claimant's award for this injury to 135° for 90% loss of the left leg. Claimant contends he is entitled to an award of permanent and total disability or, in the alternative, an award of unscheduled disability for his back condition.

In January and March 1980, Dr. Eckhardt reported he felt claimant was entitled to an award of disability for a back condition which was partially due to claimant's abnormal gait because of his knee problem. Claimant had suffered a back injury in 1960. Because of his knee problem, claimant stumbles and has fallen. Dr. Eckhardt felt this aggravated claimant's back problem.

The Orthopaedic Consultants, in July 1980, concurred that claimant's back had been made symptomatic by his recurring falling due to the giving way of his left knee. They felt his back problems were related to this left knee problem. It was their opinion claimant's back condition was not stationary.

On August 4, 1980, the SAIF Corporation indicated it opposed an Own Motion Order reopening this claim since the only issue was the extent of disability of the back.

The Board, after reviewing all the material submitted to it, finds that the back condition is related to claimant's left knee. Claimant is entitled to receive medical care and treatment for his back condition pursuant to ORS 656.245. The Board does not find the evidence indicates claimant's back condition is disabling. Therefore, it cannot order this claim reopened. If medical reports are submitted to it establishing that claimant is disabled due to his back condition, the Board would consider reopening the claim.

ORDER

It is hereby ordered that claimant is entitled to medical care and treatment of his back condition pursuant to ORS 656.245.

WCB CASE NO. 79-5093 August 14, 1980

RICK PRESSEL, CLAIMANT
Allen Knappenberger, 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 Corporation, and said requst 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. 79-10,117 August 14, 1980

DANCHA SAWICKI, CLAIMANT
Malagon & Yates, 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.

CLAIM NO. 360-051-2024 August 14, 1980

LENFORD SIMMONS, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant suffered a compensable injury to his left hip on October 23, 1972. Claimant's claim was closed and his aggravation rights have expired. In July 1980, he requested this claim be reopened.

On July 8, 1980, Dr. Arbeene began treating claimant for hip pain. Claimant gave a history of eight years of low back pain and pain in the right buttock and right lower extremity. Dr. Arbeene feel these problems were related to claimant's original injury. Dr. Schmidt concurred with Dr. Arbeene.

Georgia-Pacific Corporation, on August 6, 1980, advised the Board claimant had been off work since July 7, 1980, but had on two occasions tried to work. It indicated claimant was receiving treatment for his condition.

The Board, after reviewing the medical reports submitted to it, finds the evidence sufficient to warrant reopening of this claim effective July 8, 1980 for the payment of compensation and other benefits provided for by law.

IT IS SO ORDERED.

CLAIM NO. A 509799 August 15, 1980

ETTIS BROCKETT, CLAIMANT
Cash R. Perrine, Claimant's Atty.
Marshall C. Cheney, Employer's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

This case was remanded to the Hearings Division to determine if claimant's present condition was due to an aggravation of his October 24, 1955 injury or a new injury. After a hearing, the Referee found that claimant's current condition was related to the 1955 injury and its sequelae and represented a worsening of its since the last arrangement of compensation. The Referee recommended the Board grant claimant's request for Own Motion relief.

The Board, after reviewing all the evidence in this record, concurs with the Referee. The Board affirms and adopts the Referees order, a copy of which is attached hereto and by this reference is made a part hereof. Therefore, the Board orders this claim reopened January 16, 1979 for payment of compensation, less time worked, and other benefits as provided for by law and until closed pursuant to ORS 656.278. Claimant's attorney is granted a fee equal to 25% of the additional temporary total disability not to exceed $750.

IT IS SO ORDERED.

The above-captioned case was heard in consolidation with WCB Case No. 79-8053 (Claim No. C-79-11-13708) in Bend, Oregon on June 24, 1980 before the undersigned Referee. A copy of the Opinion and Order issued in Case No. 79-8053 is attached and, except for the Order portion, is incorporated herein by reference. Based upon the evidence presented, as discussed in said Opinion and Order, I believe claimant's present condition is materially attributable to his 1955 injury and its sequelae, and represents a worsening thereof since the last arrangement of compensation. It is therefore my recommendation to the Workers' Compensation Board that claimant's request for Own Motion relief be granted.

Pursuant to Notice, a hearing was held in Bend, Oregon on June 24, 1980 before the undersigned Referee. This case concerns a claim filed by claimant alleging an injury sustained in the course of his employment with Brooks Resources Corporation, insured by Industrial Indemnity. Claimant has also filed with the Workers' Compensation Board a request for the Board's Own Motion relief pursuant to ORS 656.278, with reference to an injury he sustained in 1955 while employed by the Sisters Mill. The State Accident Insurance Fund is the responsible insurer with respect to that injury. Pursuant to an Order from the Board, both of these matters were consolidated for hearing on June 24, 1980. Claimant was present and represented by his attorney, Cash Perrine. Brooks Resources

Corporation and its insurer, Industrial Indemnity, were represented by their attorney, Marshall Cheney. The Sisters Mill and SAIF were represented by their attorney, Marcus K. Ward.

The issue to be determined is whether claimant's present disabling condition is due to an aggravation of his original injury or to a new injury or work exposure in connection with his employment at Brooks Resources Corporation.

FINDINGS AND OPINION

Claimant sustained a compensable injury to his low back on October 24, 1955 while employed by the Sisters Mill in Bend. He was subsequently treated by Dr. Howard Cherry, an orthopedic surgeon in Portland, who felt that he was suffering from severe spondylolisthesis that had been aggravated by his injury. He recommended a spinal fusion (Ex. 2).

Claimant underwent a spinal fusion from the L3 to the S1 levels on February 10, 1956 (Ex. 5). Dr. Cherry subsequently determined that a solid fusion had been achieved at two levels, but not at the center level. Therefore, a refusion was performed on April 8, 1957 (Ex. 13).

Claimant received followup care from Dr. Cherry and resumed full-time work in April 1958 as a tallyman (Ex. 24, pg. 1). The job was considered fairly light, and claimant wore a back brace while working (Ex. 23). His claim was closed on July 24, 1958; he received a permanent partial disability award for unscheduled disability equal to 45 percent loss of an arm, which was the evaluation standard utilized at that time (Ex. 25).

Claimant continued working as a tallyman and other relatively light jobs. He occasionally missed work because of substantial back pain. In March 1959 he returned to see Dr. Cherry complaining of leg pain and back pain in the area of the donor site for his fusion (Ex. 27). Dr. Cherry initially treated claimant conservatively. On January 25, 1960 he performed another operation for removal of bone and scar tissue from the donor site (Ex. 35).

Claimant's claim was again closed on September 15, 1960 with an award of additional permanent partial disability equivalent to 15 percent loss of function of an arm (Ex. 38).

Claimant worked for Lelco, Inc., in Bend over the next several years. He returned to see Dr. Cherry in July 1967. He advised Dr. Cherry that he had been having problems since February 1967, involving pain in the area near the top of his fusion and extending into both legs. He told Dr. Cherry that he had been working as a tallyman, which he considered to be light work. Dr. Cherry thought that claimant had an impinging nerve syndrome at the L3-4 level of the spine. He thought this was a direct continuation of claimant's original injury with the added stress being placed at the L3 level due to

the fusion below it. He recommended a myelogram and laminectomy if the myelogram proved to be positive (Ex. 42). A decompression laminectomy at the L2-3 level was done on December 12, 1967 (Ex. 47).

On March 27, 1968 Dr. Cherry noted that the mill where claimant had worked as a tallyman had been closed. He recommended that claimant find future work that did not require heavy lifting or climbing (Ex. 48). Claimant's claim was once again closed on September 12, 1968, with an additional permanent disability award equivalent to 10 percent loss of function of an arm (Ex. 53).

In 1968 claimant went to work for Still's Box Company. He experienced back pain in doing his work, but learned to "work around it." (Ex. 63, pg. 1). In 1970 he went to work for Bend Mill Work. He got along without significant difficulty until 1973. At that time he began feeding moulders. This involved a lot of bending, which bothered his back and legs substantially. This finally caused him to quit his employment there.

In early 1973 claimant began to experience pain in the neck and upper back area, with pain and tingling sensations extending into his right arm. He consulted Dr. Patrick Conner, his family physician in Bend, who prescribed conservative treatment (Ex. 57). Claimant was examined by Dr. Anthony Wattleworth, an orthopedist in Bend, in September 1973 in connection with his neck and back symptoms. He reported that claimant was suffering from persistent low back and right leg pain following his multiple low back operations, and degenerative cervical disc disease. He felt that claimant should not do any work involving lifting over 15 pounds or a great deal of stooping or twisting (Ex. 58).

After leaving his employment at Bend Mill Work in 1973, claimant worked for a brief period as a carpenter, framing houses (Tr. pg. 35). In 1974 he began working at the Black Butte Ranch in Central Oregon, which is owned by Brooks Resources Corporation. He worked in the kitchen washing dishes. Over the next couple of years he worked the graveyard shift at Black Butte and worked a full day shift at L & L Manufacturing as a grade ripper. He was able to do these two jobs without significant problems because he did not have to do any heavy lifting or deep bending (Ex. 63, pgs. 1 and 2). After 1976 he stopped his employment at L & L Manufacturing, but continued on the graveyard shift at Black Butte, doing kitchen work and cleaning up (Ex. 63, pg. 2).

In the Fall of 1978 claimant was still doing kitchen clean-up and maintenance work at Black Butte. Four or five 100-pound flour sacks were delivered about once a week. Claimant had to drag the sacks and lift them about 8" to put them on a pallet. Several 50-pound cubes of shortening and 50-pound buckets of syrup and margarine, and cases of vegetables, were also periodically delivered. Claimant had to move these items out of the way (Tr. pg. 33). The flour barrel in the kitchen would get low nearly every night and claimant had to

empty a flour sack into it. He would drag a sack out of the stock-room, lift it onto a table, and dump it into the barrel (Tr. pg. 47). Claimant's work duties also involved sweeping, mopping, painting ceilings, and crawling through subfloor areas to check and clear the drains (Tr. pg. 26). Claimant was working about nine hours each night, and during the months of September and October 1978 he was working nearly seven nights a week. He was off work for one 12-hour period in September and for about 2-4 days in October (Tr. pgs. 24 and 36).

Claimant began experiencing sharp back pains in the Fall of 1978 while doing various work activities. He often had these pains 15 to 20 times in the course of his work shift. He also experienced a dull continuous ache in his back (Tr. pp. 22 and 23). His legs buckled on him on several occasions while at work (Tr. pg. 31).

In the following months claimant's pain symptoms increased in intensity and frequency (Tr. pg. 23). In January 1979 he consulted Dr. John Carroll, an orthopedist in Bend. At that time he was complaining of mid-lumbar pain, radiating to the right leg, with the right leg sometimes giving way. He told Dr. Carroll that his symptoms had started increasing in August 1978 (Ex. 59) Claimant worked on an intermittent basis over the next several months and Dr. Carroll treated him conservatively. Claimant was taken off work for the last time in June 1979. Dr. Carroll reported at that time that everytime claimant had returned to work he experienced increasing pain. He recommended that claimant retire (Ex. 64 and Ex. 65).

Claimant has not returned to work.

The evidence is clear that claimant's back condition has substantially worsened since 1968, when the last arrangement of compensation was made with respect to his original injury claim. At that time he had residual permanent disability, particularly in terms of lifting and bending limitations. However, over the subsequent 10 years he was able to work within his limitations on a regular basis. His back condition is now such that he has been pronounced totally disabled by both his treating physician, Dr. Carroll, and Orthopaedic Consultants (See Exs. 65 and 71).

The question to be determined is whether claimant's present condition is due to his original injury in 1955 or to a new "injury" sustained while employed in recent years by Brooks Resources Corporation. The evidence in this case does not establish that claimant sustained any specific injury while employed by Brooks. Although claimant may have had several falls at work during the Fall of 1978 and again in May 1979, and though his back condition may have caused

the falls, there is no evidence that these falls had any injurious effect on his back condition. Claimant's "new injury" claim is really based on a repetitive trauma theory, and is in essence an occupational disease claim.

Whether the claim is based upon a specific incident or repetitive trauma, claimant still has the burden of establishing a causal relationship between his work and his disabling condition. In a case such as this one, full liability rests on the subsequent work injury or exposure if the evidence establishes that it even slightly contributed to the causation of the disabling condition, even if the original injury is found to have contributed the major part to the final condition. See Smith v. Ed's Pancake House, 27 Or App 361, 364-365 (1976).

Except in very limited situations, medical evidence is necessary to establish causation. In Uris v. SCD, 247 Or 420 (1967), the Supreme Court held that medical evidence was not necessary to establish causation in an uncomplicated factual situation involving a specific traumatic incident followed by the immediate appearance of symptoms, prompt reporting of the injury and consultation with a physician, and where the worker was previously in good health and free from any disability of the kind involved. See 247 Or at 426. This case does not fit the Uris mold. Claimant certainly was not without disability prior to the alleged harmful work exposure at Brooks. Nor, as noted earlier, was there any identifiable specific injury. Rather, this claim is based upon an allegation that claimant's repetitive work activities over a period of many months materially worsened his pre-existing and partially disabling back condition. Such a causal connection cannot reasonably be established without some quantum of medical expert opinion.

The record in this case contains no such supporting medical evidence. Dr. Carroll reported that claimant's present problems represent a continuation of his original injury and its sequelae (Exs. 66 and 73). Orthopaedic Consultants reported that claimant's condition was due to a combination of his original injury with its aftereffects and the progression of arthritic changes in his back (Ex. 71, pg. 5). Neither Dr. Carroll nor Orthopaedic Consultants said anything about any degree of causal connection between claimant's work activities at Brooks and his disabling condition. There is no other medical evidence in the record on the causation issue. In Barackman v. General Telephone, 25 Or App 293 (1976), claimant sustained a severe lower spinal injury in 1937 and underwent a spinal fusion in 1939. In 1952 he went to work for a new employer, General Telephone Company, and after many years of employment with General Telephone his low back condition reached the point where he required another spinal fusion in November 1973. He filed alternative claims, one based upon an alleged aggravation of the original injury and the other based upon the theory that he had sustained a new injury while employed by General Telephone. Like the present case, there was no evidence of any specific injury incurred by the claimant while employed by General Telephone. Rather, the claimant contended that his repetitive work activities over a

period of time had materially contributed to the worsening of his back condition. The Court of Appeals rejected this new injury claim, which it characterized as an occupational disease claim, because of insufficient medical evidence. See 25 Or App at 297. This indicates that the Court felt that some medical evidence was necessary to establish the claim.

Based upon the evidence presented, I conclude that claimant has not met his burden of proving that his present condition is materially attributable to his work activities at Brooks Resources. Industrial Indemnity's August 2, 1979 denial must therefore be affirmed. My decision concerning claimant's entitlement to Own Motion relief respecting his 1955 injury will be the subject of a separate Opinion and Recommendation to the Board.

ORDER

IT IS THEREFORE ORDERED that Industrial Indemnity's August 2, 1979 denial be, and the same hereby is, affirmed.

WCB CASE NO. 78-7191 August 15, 1980

CLEO E. BROWNER, CLAIMANT
Myrick, Coulter, Seagraves
& Myrick, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

The SAIF Corporation seeks Board review of the Referee's order which found claimant had sustained a compensable injury on or about July 30, 1978 and remanded the claim to it for acceptance and payment of compensation to which she 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 September 18, 1979, is affirmed.

Claimant's attorney is hereby granted as a reasonable attorney's fee a sum equal to $200, payable by the SAIF Corporation.

Board Member McCallister respectfully dissents from the majority opinion of the Board as follows:

I find claimant has not met her burden of proof that her condition arose out of and in the course of her employment.

The medical evidence indicates that two months prior to this alleged injury claimant was diagnosed as having nerve root irritationand degenerative disc disease. After the alleged injury of July 31, 1978, on August 2, claimant was hospitalized and gave a history of low back pain for some time and which had worsened two months prior.

Because of this evidence, medical causal relationship of claimant's condition arising out of her employment must be met. I find no physician makes this causal connection and, therefore, find the claim is not compensable.

WCB CASE NO. 78-64 DIR (MED) August 15, 1980

JOHN T. CHECKAL, D.C.
FOR TREATMENT OF
EDWARD S. WARD, CLAIMANT
Harold W. Adams, Doctor's Atty.
Schwabe, Williamson, Wyatt, Moore & Roberts, Employer's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by WCD

On May 5, 1980, the Referee dismissed Dr. Checkal's Request for Hearing and Review because he did not have jurisdiction in this case. The Workers' Compensation Department requested the Board to review the Referee's order.

This case has been before the Board previously on a separate issue. The Board held it was not the correct body to rule on any issue in this case. These proceedings are controlled by ORS Chapter 183. Under this statute, a party aggrieved by an order of the Workers' Compensation Department can request a hearing before a Referee of the Workers' Compensation Board. Once the Referee has issued a final order, which is considered a final order of the Director of the Workers' Compensation Department, 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. In this case, the Board finds it is not the correct body to review the Referee's order. The Referee's order is appealable to the Court of Appeals.

As an ancillary finding, the Board finds that under the Department rules and Board rules, the Referee does have jurisdiction and should have conducted the hearing. The Referee then should have issued a final order which would be appealable to the Court of Appeals.

Therefore, the Board dismisses the Workers' Compensation Department's request for review in this case.

IT IS SO ORDERED.

CLAIM NO. D 3544 August 15, 1980

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

On July 21, 1980, claimant, by and through his attorney, requested the Board reopen his claim for his January 28, 1974 neck and back injury. This claim had been initially closed on March 27, 1974 by a Determination Order which had granted claimant an award of temporary total disability compensation. Claimant's aggravation rights have expired. Subsequent to the original closure, the claim had been reopened for additional treatment and had been reopened under its own motion jurisdiction in October 1979. The claim was again closed by an Own Motion Determination dated May 2, 1980, which granted claimant additional temporary total disability compensation. Claimant has received a total award of compensation equal to 96° for 30% unscheduled disability for his back injury and compensation equal to 112.5° for 75% loss of function of his left leg.

Dr. Waldram, on July 7, 1980, reported that claimant, in 1975, had developed a serious and deep wound infection after surgery on his left knee. He stated that between 1976 and 1980 claimant had been without active infection. However, in 1980 claimant experienced another severe exacerbation of a staph aureus infection in his left knee. Dr. Waldram reported that claimant was hospitalized and subsequent drainage of the knee resulted in a marked deterioration of the knee. He noted that claimant was making a slow recovery and was still experiencing a significant amount of pain with any walking or moving of his knee. Claimant had been hospitalized on May 8, 1980 for this infection.

The SAIF Corporation, on August 7, 1980, advised the Board that it would not oppose an Own Motion Order reopening this claim for the conditions which claimant currently had. It felt the temporary total disability compensation should begin as of May 8, 1980.

The Board, after reviewing the medical reports submitted to it, finds the evidence is sufficient to warrant a reopening of this claim at this time. Therefore, the Board orders this claim be reopened for the payment of compensation and other benefits provided for by law effective May 8, 1980 and until closed pursuant to ORS 656.278. Claimant's attorney is entitled to a fee for his services in this case equal to 25% of the increased compensation granted by this order, not to exceed $300.

IT IS SO ORDERED.

WCB CASE NO. 78-9902 August 15, 1980

LARRY ENGLISH, CLAIMANT
Lawrence I. Evans, Claimant's Atty.
Lang, Klein, Wolf, Smith, Griffith & Hallmark, Employer's Attys.
Request for Review by Employer

The employer seeks Board review of the Referee's order which remanded claimant's 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 December 24, 1979, is affirmed.

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

Board Member McCallister dissents as follows:

I would respectfully dissent from the majority opinion of the Board and would affirm the denial of compensability.

ORS 656.802(1) defines an occupational disease as follows:

> "Any disease or infection which arises out of and in the scope of the employment, and to which an employe is not ordinarily subjected or exposed other than during a period of regular actual employment therein".

I find the evidence establishes claimant's laryngitis is an infection. The infection is not a condition claimant was "not ordinarily subjected or exposed other than during a period of regular actual employment therein". The conditions of claimant's employment were not unique to the extent that exposure to a "laryngitis" was any greater during employment than at other times during non-employment-related activities.

The medical opinions of Drs. Panian and Parvaresh I find to be persuasive. Dr. Panian felt claimant's laryngitis was caused primarily by heavy cigarette smoking and Dr. Parvaresh felt the laryngitis was unrelated to any stress claimant was exposed to on the job. Dr. Parvaresh further commented that if stresses on the job had anything at all to do with claimant's voice condition then, since claimant was no longer under such exposure, the condition should no longer be a problem to him. This statement is vital to my decision.

Dr. Abbott indicated that the only improvement in claimant's condition came about when he cut down on his cigarette smoking.

The medical reports in the record are inconsistent but seem to lead to non-compensability since cutting down on smoking improved the condition but leaving the work exposure did not.

I conclude that claimant failed to carry his burden of proof and that claimant's laryngitis condition was in no way related to the stress to which claimant was exposed to at his job.

CLAIM NO. B 835 C 353394 August 15, 1980

ANNE M. GOESSLING, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On June 3, 1980, claimant requested this claim for her 1969 back injury be reopened. This claim was closed and claimant's aggravation rights have expired.

Claimant was hospitalized in April 1980 complaining of "acute low back pain", chronic headaches and neck stiffness. An electromyelogram test was normal. A myelogram revealed a defect at the C5-6 disc and a deformity at the C5-6 level which was felt to be a post-operative scar.

In May 1980, claimant was evaluated by the Pain Clinic. It was felt claimant had no significant organic explanation for her complaints of chronic pain. It was felt claimant would benefit from this program.

Claimant requests her claim be reopened for the April 1980 hospitalization and for admission to the Pain Clinic.

The Board, after reviewing the medical reports submitted to it, does not find the evidence sufficient to warrant reopening of this claim. Claimant is entitled to continue medical care and treatment pursuant to ORS 656.245. Therefore, the Board denies claimant's request.

IT IS SO ORDERED.

CLAIM NO. HB 149679 August 15, 1980

ROBERT E. HEWITT, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

On September 30, 1965, claimant suffered a compensable injury to his left eye. This injury resulted in claimant having a surgical aphakia of his left eye. The claim was initially closed by a Determination Order, dated May 14, 1969, which granted claimant compensation equal to 55% loss of vision of his left eye. Claimant's aggravation rights have expired.

Dr. Meyer, on December 18, 1979, performed an anterior vitrectomy with retinal detachment repair of claimant's left eye. This surgery resulted in claimant having a corrected visual acuity in his left eye of 20/20. On Januray 21, 1980, claimant was found to be medically stationary and released to full time work. This evidence was submitted to the Board and on April 30, 1980 the Board reopened this claim under its own motion jurisdiction.

The SAIF Corporation, on June 17, 1980, requested a determination of claimant's disability. The Evaluation Division of the Workers' Compensation Department, on August 5, 1980, recommended that claimant's claim be closed with an additional award of temporary total disability compensation from December 17, 1979 through January 20, 1980. It recommended that claimant be granted no additional permanent partial disability award. The Board concurs with this recommendation.

ORDER

Claimant is hereby granted an award for temporary total disability compensation from December 17, 1979 through January 20, 1980, less time worked. The evidence indicates that claimant has already been paid most of this award.

CLAIM NO. TD 47485 August 15, 1980

ADELMA J. POTTERF, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant, on September 12, 1974, sustained a compensable injury to her neck. This claim was initially closed by a Determination Order, dated December 12, 1974, which granted claimant temporary total disability compensation. Claimant's aggravation rights have expired. Subsequent to the initial closure, the claim was reopened and claimant underwent surgery for this injury. A Second Determination Order was entered and appealed which resulted in claimant being granted an award of permanent partial disability equal to 192° for 60% unscheduled disability for her neck injury.

This claim was reopened on March 10, 1980 by the SAIF Corporation. Dr. Smith, on that date, had reported that claimant was having continuing neck, shoulder and arm pain which was directly related to her September 12, 1974 injury and surgical management. He felt the claimant should have a repeat cervical myelogram to determine the status of her cervical spinal canal. It was his opinion that claimant's

condition was not stationary at that time. A myelogram was performed in June 1980 and revealed defects at the C4-5 and C5-6 levels and was unequivocal at the L4-5 level.

On July 10, 1980, Dr. Smith reported that claimant had also undergone EMG nerve conduction studies. This revealed a mild but definite fibrilation activity of the abductors pollicus brevis on the right with normal latency and conduction velocity measurements in the median nerve on the right. He felt that the results of these tests indicated that claimant had some residual cervical nerve root radiculopathy. He felt this was probably the result of the surgical procedure that had been carried out at the C4-5 and C5-6 levels. Dr. Smith felt there was insufficient objective evidence to suggest that the claimant could benefit from surgical re-exploration. He felt that claimant's condition had not significantly worsened but that she did have an anatomical basis for her continuing complaints of pain. He felt that her permanent partial disability award was correct.

The SAIF Corporation, on July 24, 1980, requested a determination of claimant's current disability. The Evaluation Division of the Workers' Compensation Department, on August 5, 1980, recommended that this claim be closed and that claimant be granted an additional award of temporary total disability from March 10, 1980 through July 10, 1980 and she should be awarded no additional permanent partial disability.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted compensation for temporary total disability from March 10, 1980 through July 10, 1980, less time worked. The record indicates that this award has already been paid to claimant.

CLAIM NO. 05 X 010442 August 15, 1980

RICHARD A. REPIN, CLAIMANT
Malagon & Yates, Claimant's Attys.
Gray, Fancher, Holmes & Hurley,
Employer's Attys.
Own Motion Order

On October 13, 1969, claimant sustained a compensable injury to his back. This claim was initially closed by a September 27, 1972 Determination Order and claimant's aggravation rights have expired. Claimant, by and through his attorney, on June 30, 1980, requested the Board reopen this claim under its own motion jurisdition.

In June 1980, claimant underwent a myelogram which Dr. Wilson interpreted as revealing nearly a complete block of claimant's lumbar canal at the L3-4 level. He felt this blockage was due to an osteophyte formation with "products of degenerative disc disease at the L3-4 level". Surgical decompression was considered as a form of treatment for this condition. Claimant has had three laminectomies and two spinal fusions for his back injury.

The Board, after reviewing the information submitted to it, finds the evidence is sufficient to warrant the reopening of this claim effective the date claimant is hospitalized for the surgery recommended by Dr. Wilson.

Claimant's attorney is entitled to an attorney's fee equal to 25% of the increased compensation granted by this order, payable out of said compensation as paid, not to exceed $300.

IT IS SO ORDERED.

CLAIM NO. AK 403 August 15, 1980

CARROLE ROBERTS, CLAIMANT
Kilpatricks & Pope, Claimant's Attys.
Corey, Byler & Rew, Employer's Attys.
Own Motion Order

This case was referred to the Hearings Division to determine whether claimant's condition worsened since the last award or arrangement of compensation. After a hearing, the Referee found claimant had failed to prove that his condition had worsened since the last award or arrangement of compensation in this case. The Referee recommended to the Board that it decline to exercise its own motion jurisdiction in this case.

The Board, after reviewing the entire record in this case, concurs with the Referee's findings and conclusion and would affirm and adopt the Referee's order, a copy of which is attached hereto and by this reference is made a part hereof.

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.

Pursuant to Notice, this matter came on for hearing on April 22, 1980, in Pendleton, Oregon, before Gayle Gemmell, Referee. The claimant was present and represented by his attorney, Milo Pope of Kirkpatricks and Pope. The defendant was represented by Lawrence Rew of Corey, Byler and Rew. This matter comes on for hearing upon an Own Motion Order of the Workers' Compensation Board issued on July 11, 1979. That Order referred claimant's request for own motion relief for a hearing and directed that evidence be taken on claimant's current condition to determine if claimant's disability has worsened since the approval of a stipulation in October, 1976.

The only issue, as delineated by the Own Motion Order, is whether claimant's condition has worsened since the last award or arrangement of compensation which was a Stipulation approved on November 10, 1976.

The hearing was continued to allow the parties to submit written briefs on the question of the admissibility of a file and film marked as defendant's Exhibits 35 and 36. The record was closed on May 7, 1980 upon receipt of defendant's brief.

Claimant, then 45 years of age, sustained a compensable injury on October 24, 1972 when he experienced sharp pain between his shoulders while lifting a flywheel which weighed 270 pounds. Claimant was at the time employed as a mechanic by Shockman Concrete. On October 26, 1972 claimant came under the care of K.D. Peterson, a chiropractor,who diagnosed upper dorsal strain.

On January 12, 1973 claimant came under the care of Dr. T. D. Lahiri, a neurologist. Dr. Lahiri reported complaints of pains in the back of the neck and down the left arm. He

reported that x-rays revealed degenerative changes a[illegible], C6 and C7, with posterior osteophytes. He treated claimant with cervical traction and physiotherapy.

Claimant was examined on April 27, 1973 by Dr. Theodore Pasquesi, orthopedic surgeon. Dr. Pasquesi diagnosed right cervical and upper dorsal strain with the possibility of thoracic outlet or sclenus anticus syndrome as the result of a straining injury. Dr. Pasquesi felt that claimant could work as a heavy equipment operator rather than as a heavy duty mechanic. He stated that claimant did not have measurable impairment but had continuing symptoms of myositis as the result of the strains. He felt that the claim could be closed.

On August 10, 1973, a Determination Order was issued granting temporary total disability and an award of 5% of the maximum allowable for unscheduled permanent partial disability.

Claimant was again seen by Dr. Lahiri on July 17, 1975. Dr. Lahiri reported that claimant complained of pains in his neck and down his arms and also intermittent low back pain. Dr. Lahiri stated that claimant periodically has flare-ups of his cervical spondylosis for which he takes cervical traction at home which he may have to supplement with physiotherapy. He felt that claimant may also need periodic physiotherapy to his low back, although x-rays showed only minor degenerative changes in that area. Dr. Lahiri stated that claimant was currently unable to work regularly on a sustained basis at his usual occupation. He recommended retraining for some other job than his previous employment as a mechanic.

Claimant was seen by Dr. Gerald Jones who reported in July, 1975 that claimant was still having back problems and was unable to work. He stated that it was unlikely that claimant would be able to return to his previous occupation and referred him to Dr. Philip Corbett, orthopedic surgeon.

Claimant was examined on November 11, 1975 by Dr. Corbett. Dr. Corbett reported that forward flexion of the neck was limited to 25 degrees, extension was limited 35 degrees, lateral flexion was limited to 5 degrees on the right and 15 degrees on the left, and that rotation was limited to 20 degrees bilaterally and to 45 degrees upon distraction. Dr. Corbett reported that claimant stated that he was unable to perform his previous employment and felt that his increasing problems were a progression from his previous status so that his claim should be re-examined.

Dr. Corbett stated that he had not scheduled claimant to return for the care of the neck.

On January 9, 1976 the carrier issued a denial of claimant's aggravation claim. Claimant requested a hearing appealing the denial. On February 17, 1976 Dr. Lahiri

reported his opinion that there was an aggravation and worsening of claimant's 1972 injury. Claimant was again seen by Dr. Lahiri on August 10, 1976 at which time he complained of considerable difficulty with pains in the neck, headaches and difficulty with focusing his eyes. Dr. Lahiri felt that claimant may benefit from wearing a cervical collar but felt that his problems were going to be of a chronic nature. He stated that claimant felt that his symptoms had worsened since he last saw him in January, 1976. He reported that neck motion was limited to either side 40 degrees, that extension was limited to 40 degrees, and forward flexion was limited to 50 degrees.

On November 10, 1976 a Stipulation was approved which provided for acceptance of claimant's claim for aggravation and for an additional award of 22.19% of the maximum allowable by statute for unscheduled disability equal to 71 degrees.

Claimant was again seen by Dr. Lahiri on May 19, 1977. Dr. Lahiri reported that claimant still complained of stiffness in the neck, terrible headache, and of inability to turn the neck very well so that he had to turn his whole body in order to turn sideways. Dr. Lahiri reported the same degrees of limitation of neck motion which he had recorded on August 10, 1976. He stated his opinion that claimant was currently totally disabled from engaging in a gainful occupation. On July 31, 1977 Dr. Lahiri reported that in his opinion claimant's condition had become aggravated to the point that he was currently totally disabled.

On May 25, 1979 claimant requested that the Board exercise its own motion jurisdiction and reopen his claim. The Board referred the matter for hearing to determine whether claimant's condition had worsened since the approval of the Stipulation.

Claimant was again seen by Dr. Lahiri on August 22, 1979. Dr. Lahiri reported that claimant complained of increasingly severe pain in the neck, sometimes so severe that he was unable to move his head. He also complained of pains in the arms and shoulders. Dr. Lahiri reported that neck movements were markedly restricted with rotation to either side possible to only 20 degrees, extension possible to 20 degrees and forward flexion possible to 20 degrees. He reported severe muscle spasm in the back of the neck. Dr. Lahiri prescribed physiotherapy including heat, massage and cervical traction and stated if claimant should fail to improve further investigation would be necessary.

Claimant was again seen by Dr. Lahiri on March 26, 1980. Dr. Lahiri reported that claimant felt that his neck pains had not improved and reported that he was experiencing numbness and shaking of the left arm as well as headaches. Dr. Lahiri again prescribed physical therapy and stated that in his opinion claimant was currently permanently and totally disabled from working in a gainful occupation on a reasonably continuous basis.

Claimant was again examined by Dr. Corbett on April 15, 1980. Claimant complained of continuing and increasing neck pain since last seeing Dr. Corbett. He reported that the pain extending from the neck into the arm had recently become so excruciating that he experienced numbness which caused loss of use of the left arm. Dr. Corbett reported that claimant voluntarily rotated his neck only five degrees to the right and 10 degrees to the left, but that on passive motion, assistive motion and diversion claimant was able to rotate to the right 35 to 40 degrees and to the left 55 to 65 degrees. He reported that extension was limited at 40 degrees and flexion was possible to 20 degrees. Dr. Corbett reported that claimant had much freer range of motion while getting dressed than was elicited under direct observation and voluntary testing. Dr. Corbett stated that x-rays did not show any significant difference from those taken in 1975. Dr. Corbett stated that there did not appear to be any objective evidence of deterioration of claimant's condition since his examination of 1975, although claimant's subjective complaints appeared to have increased .

Claimant has not worked for wages since his industrial injury and has not looked for work. He states that on different occasions following his injury he attempted to return to his former job as a mechanic, but was unable to do the work. Claimant testified that he was unable to work in October, 1976 and is unable to work now. Claimant testified that his only source of income has been buying, selling and trading various items for a profit. He sold his home and had a new home built in the summer of 1979. Claimant testified that his condition has gradually gotten worse since November of 1976. He testified that he currently experiences continuous pain between his shoulder blades and up his neck and that if he remains up for very long he can hardly hold his head up and is required to lie down. He complains of headaches and difficulty sleeping. He complains of numbness in the left arm which has required that he learn to write and perform other activities with his right hand, having been previously left-handed. He testified that he can only turn his head very, very slightly to the left or right or backwards and is required to turn his whole body instead of his neck.

Claimant testified that he is unable to dig with a shovel and that he does not prune trees or haul in a trailer. He stated that he does not work outside of the home i... the yard and has not operated any heavy equipment in the last year, although he operates a garden tractor.

Mr. D. W. Hackler testified that he has known claimant since 1972 and has seen him somewhat regularly since his injury. He testified that in his opinion claimant is definitely worse now than he was at the beginning of 1977. He testified that claimant is unable to turn his head when talking to someone or when driving and has to turn his whole body. He testified that he acts as a banker, loaning money to claimant for his "horse-trading" endeavors.

Mr. Larry Felix, a private investigator, testified that he has been appointed custodian of the business records of Mr. Kenneth Gale, a private investigator who died in October, 1979. He produced a file and a film found in Mr. Gale's records concerning work he had done regarding claimant's worker's compensation case which he testified were a part of Mr. Gale's business records and were ketp in the usual manner of such business records. Objection was made by claimant's counsel to admission of the file and the film. It was agreed that ruling would be reserved pending briefs on this question and that the film would be shown. After reviewing the film claimant testified that at times he was depicted in the films, but at other times the person in the film was not him, b ut was his brother who looks very much like him. Mr. Hackler testified that claimant has a brother who looks very much like claimant.

Mrs. Caroline Felix, a private investigator, testified that she took film of claimant on April 15, 1980 at his residence. The film was shown and claimant was seen digging in his yard and bending at the waist repeatedly. Claimant was also seen operating a tractor and turning his head. He was seen pruning trees. On reubttal claimant testified that he did not ever shovel soil, but that he may have shoveled leaves. He testified that he cut some little branches off of a tree with clippers and that he has operated his tractor a lot around his residence and has hauled and dumped trash in the trailer.

Ruling was reserved on the question of the admissibility of Exhibits 35 and 36 which are the file and the film taken by a private investigator now deceased. These exhibits have been offered under the business records exception to the hearsay rule. ORS 41.690. If so admitted claimant is deprived of the opportunity to cross-examine the author of the documents in the file and the person who took the film. In this case claimant has brought into question whether the film is of him or is at least in part of someone else who looks like him. Under these circumstances absent the opportunity to cross-examine the investigator I find that the file and film should not be received. The objection to Exhibits 35 and 36 is sustained.

The only question to be determined in this case is whether claimant's condition has worsened since November 10, 1976. Claimant experienced an upper back strain as a result of which he has been off work for eight years. The evidence shows that both before and after November, 1976 claimant felt that his condition was such that he was unable to perform any work, that he did not perform any work for wages, and that he did not make any efforts to obtain work. Claimant states that his condition has become worse. The films which were taken of claimant shortly before the hearing do not depict a man as severely limited as claimant's testimony would indicate. He testified that he could not dig with a shovel and that he had not pruned trees and the films showed him performing those activities and others

without apparent limitation or difficulty. A review of the medical evidence shows an increase in subjective complaints by claimant with very little evidence of any objective worsening of his condition. Dr. Corbett's report suggests that claimant voluntarily limits his motion while being observed but that upon distraction his ranges of motion have actually improved since 1975. Dr. Corbett does not feel that claimant's condition is objectively worse. Dr. Lahiri concludes that his condition has worsened. In view of the totality of the evidence in the record I find Dr. Corbett's opinion the more persuasive. Taking into consideration all of the evidence I find that claimant has failed to prove by a preponderance of the evidence that his condition has worsened since November, 1976.

I therefore recommend that the Board decline to exercise its Own Motion jurisdiction in this case.

WCB CASE NO. 79-10,117 August 15, 1980

DANCHA SAWICKI, CLAIMANT
Malagon & Yates, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Order

On July 25, 1980, claimant, by and through her attorney, requested that the Board review the Opinion and Order of the Referee, dated July 23, 1980. On August 11, 1980, claimant's attorney withdrew the request for review and the Board entered an order dismissing the case and making the order of the Referee final by operation of law.

On August 15, 1980, claimant's attorney advised the Board that he did not wish the request for review dismissed but merely withdrawn and held for naught in order to confer jurisdiction back to the Referee. It is the Board's practice to dismiss all cases when the party requests a "dismissal" or "withdrawal" and it will continue to do so unless the requesting party asks for a different action. The Board is willing to accommodate the parties in any way possible but it is not able to read between the lines of a general request for withdrawal. After consideration, the Board concludes that Mr. Yates' telephone request of this date should be granted.

IT IS HEREBY ORDERED that the Request for Review, dated July 25, 1980, is hereby withdrawn and held for naught as is the Board's Order of Dismissal, dated August 14, 1980. The Referee will continue to have jurisdiction until the appeal period runs on August 22, 1980.

WCB CASE NO. 79-5412 August 15, 1980

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

On August 5, 1980, claimant, by and through his attorney, requested the Board study its Order of Remand. Claimant contends the Board's order is ambiguous.

The Board found that, based on the facts in this case, the Referee had incorrectly relied upon the Frasure v. Agripac case. The Referee had found the Fund could not deny responsibility for this claim. The Board reversed the Referee and remanded the claim to be set for a hearing to determine whether or not the claim is compensable. The Board does not find its order to be ambiguous. Therefore, it denies claimant's motion.

IT IS SO ORDERED.

WCB CASE NO. 79-6590 August 15, 1980

KIRK WOLTER, CLAIMANT
Allen & Vick, Claimant's Attys.
Blair, MacDonald, Jensen & Lipscomb,
Employer's Attys.
Request for Review by Employer

This case is before the Board on the employer-carrier's request for Board review of the Referee's order which reversed its July 23, 1979 denial, reversed the Workers' Compensation Department's order of September 13, 1979, ordered it to pay claimant all benefits he is entitled to, awarded claimant a penalty equal to 25% of the compensation due him not to exceed $250 and granted claimant's attorney a fee. The employer-carrier contends claimant was not following a treatment program recommended by the Orthopaedic Consultants and should not have to pay penalties and attorney fees when it relied on an order from the Workers' Compensation Department.

The Board, after de novo review, modifies the Referee's order. The treating physician in this case is Dr. Claiborn. The Orthopaedic Consultants recommended claimant rest for approximately one week in bed, and then begin a period of active exercises which should consist of swimming and Williams flexion exercises of the lumbar spine as taught by a competent physical therapist. They felt that after a month of active exercises claimant could return to work.

On May 21, 1979, the employer-carrier advised claimant it had set up a program on the basis of the Orthopaedic Consultants' recommendations. It also stated it would not pay for any treatment provided by Dr. Clibborn beyond July 16, 1979.

On July 26, 1979, Dr. Clibborn advised the carrier he had recommended swimming as a therapy for claimant. Claimant had swam in a river near his home and indicated this made his back pain worse.

The carrier, on August 13, 1979, requested a determination be made in this case on the basis that claimant had been released for work if he followed the treatment recommended by the Orthopaedic Consultants. It noted claimant had failed to begin this program. On August 24, 1979, the carrier requested permission to suspend payment of compensation for claimant's refusal to submit to recommended treatment.

The Workers' Compensation Department, Compliance Division, on September 13, 1979, advised claimant it had granted the carrier's request that it be allowed to suspend his compensation payments until he entered active treatment. On November 14, 1979, a Determination Order was issued to award claimant temporary total disability compensation after noting his compensation had been suspended for his failure to participate in a recommended treatment program.

In January 1980, Dr. Clibborn reported claimant had returned to work. He had advised claimant that the Orthopaedic Consultants' recommendation of treatment was probably based on inadequate information. He felt the treatment they suggested would have been ineffective and probably worsened claimant's condition. Dr. Clibborn stated he had not been contacted by the carrier to attempt to resolve this conflict.

The Board agrees with the Referee that claimant had no obligation to follow the recommendations of the Orthopaedic Consultants and that his failure to do so did not constitute failure to submit to such treatment. The carrier failed to contact Dr. Clibborn and try to resolve the disagreement over the suggested treatment. The Board is aware that swimming in a river and participating to hydrotherapy under the direction of a trained therapist are two different things. However, the carrier unilaterally terminated or denied paying for the treatment claimant was receiving from Dr. Clibborn.

Once the dispute between Dr. Clibborn and the Orthopaedic Consultants arose, the carrier should have requested assistance from the Workers' Compensation Department to have claimant examined by a third doctor to resolve the conflict. It failed to do this.

The Workers' Compensation Department should have advised the carrier first to check with Dr. Clibborn, the treating physician, regarding the recommended treatment. When it was discovered he disagreed with the Orthopaedic Consultants, the Department should have advised the carrier what the procedures were to resolve the conflict.

Based on the evidence in this case, the Board does not find the carrier should be penalized for doing what the Workers' Compensation Department authorized it to do. However, it should be penalized for unilaterally denying payment of additional treatment provided by Dr. Clibborn. Therefore, the Board would reverse the Referee's award of a penalty equal to 25% of all the "appropriate benefits" he found claimant was entitled to and awards claimant a penalty equal to 25% of all the unpaid medical bills of Dr. Clibborn occurring from the date of its denial of them to the date claimant returned to work.

ORDER

The Referee's order, dated February 25, 1980, is modified.

The Referee's award of an additional amount equal to 25% of the amounts payable under paragraph (3) of his order, not to exceed to $250 is reversed.

Claimant is hereby awarded an amount equal to 25% of all of the unpaid medical bills of Dr. Clibborn from the date of the carrier's denial to the date claimant returned to work.

Claimant's attorney is hereby granted as a reasonable attorney's fee for his services at Board review a sum equal to $250, payable by the carrier.

WCB CASE NO. 79-3259 August 18, 1980

KENNETH L. COLVIN, CLAIMANT
Willner, Bennett, Bobbitt
& Hartman, Claimant's Attys.
Keith D. Skelton, Employer's Atty.
Request for Review by Employer

This case is before the Board on the employer-carrier's request that it review that portion of the Referee's order which granted claimant an additional award of compensation over that of the Determination Order equal to 32° for 10% unscheduled disability for his low back injury, making the aggregate award 64° or 20% unscheduled disability.

The Board, after de novo review, reverses that portion of the Referee's order which increased the permanent disability award and restores and affirms the Determination Order, dated March 23, 1979. Claimant is 34 years old, has a 10th grade education, a GED and some training in radio-electronics. He has worked as a log truck driver, automobile mechanic, radio operator, choker setter and farm worker. Drs. McVay and Rusch did not feel claimant could return to his regular job. However, claimant did return to his regular job. He stated he is able to do everything except use a jackhammer which he had done occasionally prior to his injury. Claimant is able to use a 16-pound sledge hammer, a 30-50 pound air wrench, and lift up to 70 pounds. He experiences soreness, has trouble straightening up after bending over and prolonged standing causes him difficulty. Claimant's supervisor testified he does not "favor" claimant at work in any way. Based on all the evidence in this case, the Board finds that the Determination Order correctly awarded claimant compensation for any loss of wage earning capacity he has suffered. The Referee's award of additional compensation is not supported by the evidence. Therefore, the Board reverses that portion of the Referee's order which granted claimant additional compensation and granted his attorney a fee out of the increased compensation. The Board agrees with the Referee's finding that claimant is not entitled to any additional temporary total disability compensation.

ORDER

The Referee's order, dated December 28, 1979, is modified.

That portion of the Referee's order which granted claimant an award of permanent partial disability equal to 64° for 20% unscheduled disability for his low back injury and granted claimant's attorney a fee out of the increased compensation is reversed.

The Determination Order, dated March 23, 1979, is restored and affirmed in its entirety.

CLAIM NO. D53-115098 August 18, 1980

RICHARD METHVIN, CLAIMANT
SAIF, Legal Services, Defense Atty.
Amended Own Motion Determination

On August 12, 1980, the Board entered an Own Motion Determination in the above entitled matter. It has been brought to the Board's attention that it incorrectly cited the SAIF Corporation as the insurance carrier in this case. All references to the SAIF Corporation in the August 12, 1980 Own Motion Determination should be changed to read "Employers Insurance of Wausau".

IT IS SO ORDERED.

WCB CASE NO. 78-1168 August 18, 1980

CLEDIS RAVELLE, CLAIMANT
Robert Burns, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

The State Accident Insurance Fund Corporation seeks Board review of the Referee's order which granted claimant compensation for permanent total disability. The SAIF Corporation contends this award is excessive.

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 November 7, 1979, is affirmed.

Board Member McCallister respectfully dissents from the majority opinion of the Board as follows:

I find that claimant has not sustained his burden of proving that he is permanently and totally disabled. No medical report in evidence finds claimant permanently and totally disabled nor incapable of gainful employment. Claimant is only 41 years of age and the Orthopaedic Consultants rated his physical impairment as mild and Dr. Pasquesi rated it as 40% of the whole man. The Disability Prevention Center found claimant capable of light to medium work.

I find claimant is not so physically disabled to not have to comply with the provisions of ORS 656.206(3). Claimant has not sought any employment since this injury and has no motivation to return to employment or to help himself. Further, claimant was uncooperative at the Disability Prevention Center and was administratively discharged for non-participation.

For the above reasons, I conclude that claimant has failed in his burden of proof and is not permanently and totally disabled. However, I do find that the physical limitations placed on claimant affect his wage earning capacity to the extent that he would be entitled to an award of 50% unscheduled disability.

WCB CASE NO. 79-7169 August 18, 1980

BEVERLY S. SMITH, CLAIMANT
David R. Vandenberg, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

This case is before the Board on the SAIF Corporation's (SAIF's) request that it review the Referee's order which granted claimant an additional award of compensation equal to 112° for 35% unscheduled disability for her back injury. SAIF contends this award is excessive.

The Board, after de novo review, modifies the Referee's order. Claimant had a pre-existing severe scoliosis with early myelopathy. This injury was a strain-sprain superimposed on the pre-existing conditions.

Claimant is in her late thirties and has an eighth grade education. She has worked as a waitress and bartender. Some of the medical evidence indicates claimant will not be able to return to these types of employment. However, in June 1979, the Orthopaedic Consultants reported claimant could work as a bartender "with limitations". They rated the physical impairment of claimant's spine as mildly moderate and as due to this injury mild.

Dr. Laubengayer's report, in August 1979, rated claimant's impairment as moderately severe due to the scoliosis, arthritis and chronic back pain. He noted claimant's condition had been gradually improving over the last several months.

The Board finds that the Referee's award of compensation in this case, based on all the evidence, is excessive. In this case, claimant suffered strain-sprain of her back. Claimant subsequently was involved in an automobile accident

which caused increased symptoms and worsened her back problems. The Board believes the evidence as a whole supports a conclusion that the claimant's condition after this injury but before the automobile accident does not warrant the award granted by the Referee. Although the medical evidence tends to indicate claimant is unable to return to waitress or regular bartending work, the preponderance of all the evidence indicates claimant could perform a number of other types of employment.

The Board grants claimant an award of compensation equal to 80° for 25% unscheduled disability for this injury. This is in lieu of all previous awards of unscheduled disability in this case.

ORDER

The Referee's order, dated February 11, 1980, is modified.

That portion of the Referee's order which granted claimant additional compensation equal to 112° for 35% unscheduled disability for this injury is reversed.

Claimant is hereby granted an award of compensation equal to 80° for 25% unscheduled disability for her back injury. This is in lieu of all previous awards of unscheduled disability in this case.

The remainder of the Referee's order is affirmed.

WCB CASE NO. 78-9790-E August 18, 1980

LON E. SMITH, CLAIMANT
Young, Freeman & Jennings, Claimant's Attys.
Helfrich & MacMillan, Employer's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant
Cross-appeal by the SAIF

This case is before the Board on claimant's and the SAIF Corporation's (SAIF's) request that the Board review the Referee's order which found claimant was a subject employee, the employer was a non-complying employer, and the injury was not compensable. Claimant contends his injury was work-related and therefore compensable. SAIF contends the Referee lacked jurisdiction to hear this case. The Board finds the facts recited in the Referee's order are correct.

The Board, after de novo review of this case, reverses the Referee's order. Claimant was injured August 4, 1977 while employed by this employer. On that date, the employer was a non-complying employer, meaning it was required to provide workers' compensation coverage for its employees, but it failed to do so.

On September 19, 1977, this claim was forwarded to SAIF for processing as outlined in the OAR 436-52-010 to 436-52-060. SAIF, on December 6, 1977, advised the employer it had accepted the claim and advised the employer if it objected to this, it had to request a hearing within 60 days. The employer was further advised if it failed to do so, the determination of compensability of the injury was final. The employer, on December 8, 1978, requested a hearing contesting SAIF's acceptance of this claim as a compensable injury.

OAR 436-52-040(1)(c) requires SAIF when it accepts or denies a claim referred to it by the Compliance Division of the Workers' Compensation Department to notify the claimant, employer and Compliance of its action within the time required by ORS 656.262. Subsection (1)(d) requires each of the parties be advised of his right to a hearing on the issue of compensability. The administrative rules incorporate the statutes which apply to the timeliness of filing requests for hearing and raising the issue of compensability.

The Board finds that in this case the employer was late in filing his request for a hearing. The employer waited over a year after it had been advised that SAIF had accepted the claim. The Referee lacked jurisdiction in this case. Therefore, the Referee's order is not valid and must be reversed.

If the Board had not reversed the Referee's order for the reasons stated above, it would have reversed the Referee's order on the merits of this case. The Board found that the preponderance of the evidence in this case indicates: (1) claimant was a subject employee, (2) the employer was a non-complying employer, and (3) that claimant did suffer a compensable injury.

ORDER

The Referee's order, dated February 14, 1980, is reversed in its entirety.

CLAIM NO. C 457596 August 20, 1980

JAMES L. CAWARD, CLAIMANT
Cramer & Pinkerton, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On June 17, 1980, claimant, by and through his attorney, requested that the Board exercise its own motion jurisdiction and reopen this claim for the July 3, 1973 heart attack. This claim had been accepted and initially closed by a Determination Order, dated June 27, 1974, which had awarded claimant temporary total disability compensation and and compensation equal to 96° for 30% unscheduled disability for the injury to his heart. Claimant's aggravation rights have expired. Attached to claimant's request were various medical reports.

Claimant was hospitalized from October 21, 1979 through November 19, 1979 at a veterans' hospital in New Mexico. It was reported that claimant had suffered myocardial infarctions in 1973, September 1979 and October 1979. The diagnosis was severe arteriosclerotic heart disease with severe left ventrical dysfunction. Dr. David Law felt this condition was a progression of the same disease which claimant suffered from in July 1973.

On July 21, 1980, Dr. Weldon Walker reported that after claimant's initial myocardial infarction he had continued to smoke, gained additional weight, and had been drinking more heavily. Claimant had been free of angina pain between 1976 and 1979. It was noted that claimant also suffered from hypertension and had been treated for that condition for a number of years. Dr. Walker did not see how the first infarction which had occurred in July 1973 could have necessarily caused the progression of claimant's underlying disease process. He noted that claimant had obviously continued a life style that was potentially deleterious to his health and increased the likelihood of progressive coronary heart disease. Dr. Walker felt it seemed more likely that the progression of claimant's disease resulted from continuing uncorrected risk factors and was not related to his initial injury.

The SAIF Corporation, on July 30, 1980, advised the Board it would oppose an Own Motion Order reopening this claim. It felt that claimant's most recent heart attack was precipitated by his failure to take appropriate care of himself following the original attack.

The Board, after reviewing the evidence submitted to it, concludes it would be in the best interest of all parties if this case was remanded to the Hearings Division. The

Referee shall determine whether or not claimant's most recent myocardial infarction was related to the July 1973 myocardial infarction and represents a worsening of claimant's condition since the last award or arrangement of compensation made in this case. Upon the conclusion of the hearing, the Referee shall forward along with his recommendation on the above issues, a transcript of the proceedings and all evidence introduced at the hearing to the Board.

IT IS SO ORDERED.

WCB CASE NO. 78-7359 August 20, 1980

EUGENE MARSHALL, CLAIMANT
Dean Richards, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

This case is before the Board on claimant's request that the Board review the Presiding Referee's order which dismissed his request for hearing. Claimant contends this case has not been abandoned.

The Board, after de novo review, reverses the Referee's order and orders the request for hearing reinstated. This claim is for an occupational disease arising from claimant's exposure to asbestos while employed in the shipyards. (WCB Case No. 78-7359). Claimant died and his widow and child have filed a survivor's claim for death benefits. (WCB Case No. 79-146). An Order to Show Cause was issued in WCB Caes No. 78-7359. The attorney for claimant filed a response, but used the claim number assigned to the other claim (WCB Case No. 79-146). His response was filed under that claim and not under this claim. Having no response to the Order to Show Cause, the Presiding Referee dismissed the request for hearing.

It is obvious to the Board that due to a mix-up of the case numbers by one of claimant's attorneys and a lack of communication between the parties and the Hearings Division, this request for hearing was dismissed. After reviewing the material in this file and considering the manner in which this case was processed, the Board finds this case has not been abandoned and was not abandoned at the time the Presiding Referee dismissed claimant's request for hearing in this case. Therefore, the Board reverses the Presiding Referee's order and orders the Request for Hearing in this case reinstated.

ORDER

The Presiding Referee's order, dated February 15, 1980, is reversed.

The Request for Hearing, dated September 19, 1978, is reinstated.

Claimant's attorney is hereby granted as a reasonable attorney's fee for his services at Board review a sum equal to $100, payable by the SAIF Corporation.

WCB CASE NO. 79-6838 August 20, 1980

RAY H. OAKLEY, CLAIMANT
D. Keith Swanson, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

This case is before the Board on the SAIF Corporation's (SAIF's) request that the Board review the Referee's order which granted claimant an award of compensation equal to 256° for 80% unscheduled disability for his back injury and granted claimant's attorney a fee. SAIF contends this award is excessive.

The facts as recited by the Referee in his order are correct.

The Board, after de novo review, modifies the Referee's order. Claimant is in his late fifties and has a fourth grade education. He has worked on farms when he was younger and worked as a custodian. Dr. Lawton rated claimant's disability as moderate. He felt claimant could perform light work which did not require repeated bending or heavy lifting. Drs. Bright and Melgard concurred with Dr. Lawton.

Dr. Anderson felt the total loss of function of claimant's back due to this injury was mildly moderate. He felt claimant could return to work which did not require "the heaviest type of stooping, bending or lifting activities".

The evidence establishes that claimant is not motivated to return to work. He has not fully cooperated with the vocational assistance offered to him by the Field Services Division. Further, claimant has not actively pursued employment. He has applied at two janitorial services for jobs. He has not contacted employment agencies, other janitorial services, or used other means to obtain re-employment.

Based on all the evidence in this case, the Board finds the Referee's award of compensation in this case is excessive. The Board grants claimant an award of compensation equal to 160° for 50% unscheduled disability for his back injury. This is in lieu of all previous awards of unscheduled disability granted in this case.

ORDER

The Referee's order, dated March 5, 1980, is modified.

Claimant is hereby granted an award of compensation equal to 160° for 50% unscheduled disability for his back injury. This is in lieu of all previous awards of unscheduled disability granted in this case.

The remainder of the Referee's order is affirmed.

WCB CASE NO. 79-2684 August 26, 1980

BOBBY L. AUSTIN, CLAIMANT
David R. Vandenberg, Jr., Claimant's Atty.
Velure, Heysell & Pocock, Employer's Attys.
Request for Review by Claimant

This case is before the Board on claimant's request that it review the Referee's order which approved the employer-carrier's denial of his aggravation claim and assessed a penalty against it on the basis it unreasonably resisted and delayed payment for medical services.

The Board, after de novo review, modifies the Referee's order. The Referee found that the evidence did not establish that claimant was unable to work. Therefore, the Referee concluded claimant had failed to establish a compensable aggravation claim.

The Board does not agree with the Referee's conclusion that claimant has to establish an inability to work in order to have a compensable aggravation claim. ORS 656.273(1) provides that: " . . . after the last award or arrangement of compensation an injured worker is entitled to additional compensation, including medical services, for worsened conditions resulting from the original injury". ORS 656.273(7) provides that if the evidence as a whole shows a worsening of the claimant's condition, the claim for aggravation shall be allowed. In this case, the Board finds the evidence does establish claimant's condition has worsened since the last award or arrangement of compensation. An injured worker does not need to establish an inability to work in order to

establish a compensable aggravation claim. Therefore, the Board reverses the Referee's affirmation of the employer-carrier's denial and orders that denial be set aside and remands claimant's claim for aggravation to it for acceptance and payment of benefits to which claimant is entitled pursuant to law.

The Board concurs with the Referee's assessment of a penalty in this case. At the time the denial was entered the only evidence before the employer-carrier was Dr. Viet's report which supported claimant's aggravation claim. The Board finds, based on the facts in this case, the carrier's failure to pay medical bills constitutes unreasonable resistance to payment.

ORDER

The Referee's order, dated January 25, 1980, is modified.

That portion of the Referee's order which affirmed the denial of claimant's aggravation claim is reversed.

The employer-carrier's denial of claimant's aggravation claim is set aside and the claim for aggravation is remanded to it for acceptance and payment of compensation and other benefits to which claimant is entitled pursuant to law.

Further, the Referee's award of $700 attorney fee in this case is modified. The Board finds the attorney fee was excessive. Claimant's attorney is awarded the sum of $1,100 at both the Hearings and Board levels as a reasonable attorney's fee for prevailing in this case. This is in lieu of the fee granted by the Referee.

The remainder of the Referee's order is affirmed.

WCB CASE NO. 79-4840 August 26, 1980

KENNETH CHAPMAN, CLAIMANT
Steven Joseph, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order

Claimant retained an attorney to represent him in this case. Claimant's attorney was instrumental in obtaining additional temporary total disability compensation for his client. The SAIF Corporation advised the Board of these facts and indicated it had withheld $500 from the temporary total disability compensation for payment to claimant's attorney. The SAIF Corporation requested the Board authorize payment of this sum to claimant's attorney.

The Board approves the payment of the $500 withheld by the SAIF Corporation to claimant's attorney as and for a reasonable attorney's fee for his services in this case.

IT IS SO ORDERED.

WCB CASE NO. 76-4936 August 26, 1980

EDWARD H. GIBSON, CLAIMANT
Galton, Popick & Scott, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Order

On August 5, 1980, the SAIF Corporation (SAIF) moved the Board to correct its Order on Remand in this case by adjusting the award of attorney fee.

This issue was before the Court of Appeals and the Supreme Court of Oregon. The award of attorney fees was affirmed by both courts. The Board cannot adjust awards approved by these courts. Therefore, the Board denies SAIF's motion.

ORDER

The SAIF Corporation's motion to correct the Order on Remand is denied.

CLAIM NO. 21C100369 August 26, 1980

ALDINE KEITH, CLAIMANT
Pozzi, Wilson, Atchison, Kahn
& O'Leary, Claimant's Attys.
Black, Kendall, Tremaine, Boothe
& Higgins, Employer's Attys.
Own Motion Order

On July 11, 1980, claimant, by and through her attorney, requested the Board reopen her claim for her May 2, 1969 back injury under its own motion jurisdiction. Claimant's aggravation rights have expired. Attached to this request were several medical reports.

Dr. Leveque, on March 27, 1980, reported claimant's back was "subjectively getting progressively worse". He recommended claimant be sent to the Pain Clinic.

The Orthopaedic Consultants, in June 1980, reported claimant's condition was not stationary. They felt claimant should be referred to the Pain Center for "drug removal, etc."

On August 8, 1980, the employer-carrier advised the Board it opposed an Own Motion Order reopening this claim. It indicated it was willing to and had authorized claimant's referral to the Pain Center for drug withdrawal therapy. It contended such treatment could be provided under ORS 656.245.

The Board, after reviewing the evidence submitted to it, does not find it warrants reopening of this claim at this time for all purposes. However, the Board would order that claimant be treated at the Pain Clinic pursuant to the provisions of ORS 656.245.

IT IS SO ORDERED.

CLAIM NO. C 55518 August 26, 1980

EUGENE J. MONTANO, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On March 24, 1967, claimant suffered an amputation of the left hand at the wrist. This claim was closed and claimant's aggravation rights have expired.

Claimant continued to have difficulty with his left arm in the form of pain, muscle spasm and recurrent "phantom sensations". Claimant had been fitted with a prosthesis after the original injury.

In June 1980, Dr. Sobolik reported claimant was working as a truck driver. He indicated the "harness" from claimant's left arm prosthesis caused a strain of the cervical and thoracic musculature.

In August 1980, Dr. Lenzi reported claimant also continued to have pain in his arm, back and numbness of his right hand. On July 22, 1980, claimant stopped working. He was hospitalized on July 24, 1980 and on the next day underwent a neurectomy and transposition of the ulnar nerve of the left forearm.

The SAIF Corporation advised the Board of these facts. It indicated it had no opposition to an Own Motion Order reopening this claim effective July 22, 1980.

The Board, after reviewing the information submitted to it, orders this claim reopened effective July 22, 1980 for payment of compensation and other benefits provided for by law until closed pursuant to ORS 656.278.

IT IS SO ORDERED.

CLAIM NO. HC 128954 August 26, 1980

CHARLES L. VICKERS, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

On May 10, 1968, claimant suffered a compensable injury to his right knee. The claim was initially closed by a January 30, 1970 Determination Order which awarded claimant temporary total disability compensation and compensation equal to 15° for 10% of the right leg. Claimant's aggravation rights have expired.

On December 21, 1978, Dr. Graham requested this claim be reopened for additional treatment. The Board, on March 19, 1979, ordered this claim reopened under its own motion jurisdiction.

Dr. Graham, on April 3, 1979, performed a high valgus producing tibial osteotomy on claimant's right leg. After this surgery, claimant developed numbness in the ulnar distributation of his left hand. This was related to claimant's use of crutches or bed rest after surgery. Left ulnar nerve surgery was performed on February 28, 1980 by Dr. Graham.

On July 21, 1980, Dr. Graham opined claimant's condition was stationary. He did not feel claimant could return to his job as an over-the-road truck driver.

On July 28, 1980, the SAIF Corporation requested a determination of claimant's disability. The Evaluation Division of the Workers' Compensation Department, on August 13, 1980, recommended this claim be closed with an award of additional temporary total disability compensation from April 2, 1979 through July 21, 1980, less time worked, and additional compensation equal to 15° for 10% loss of function of the right leg and compensation equal to 15° for 10% loss of function of the left hand.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted compensation for temporary total disability from April 2, 1979 through July 21, 1980, less time worked. Claimant is also granted compensation equal to 15° for 10% loss of function of the right leg and compensation equal to 15° for 10% loss of function of the left hand. These awards are in addition to any previous awards claimant has been granted for his May 10, 1968 industrial injury.

WCB CASE NO. 79-8673 August 27, 1980

ROBERT BRILEY, CLAIMANT
Rick W. Roll, Claimant's Atty.
Lang, Klein, Wolf, Smith, Griffith & Hallmark, Employer's Attys.
Order

On August 5, 1980, claimant, by and through his attorney, moved the Board to include as new and material evidence a June 26, 1980 prescription of Dr. Hunt. The hearing was held on June 12, 1980 in this case. Claimant contends this evidence was not available at the time of the hearing.

The employer contends this evidence is not relevant to the issues decided by the Referee. Further, it contends this evidence was obtainable prior to the hearing. The employer requested claimant's motion be denied.

The Board, after being fully advised, denies claimant's motion on the grounds and for the reasons set forth by the employer.

ORDER

Claimant's motion is denied.

CLAIM NO. A 721998 August 27, 1980

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

On August 21, 1980, the SAIF Corporation (SAIF) advised the Board claimant had, on June 12, 1980, undergone a fusion of psuedoarthrosis of L4-5 with Harrington rod instrumentation for stability. Claimant had, on March 23, 1959, injured his back. Claimant's aggravation rights have expired. SAIF advised the Board it did not oppose an Own Motion Order reopening this claim effective June 12, 1980.

The Board, after reviewing the material in this file, finds the evidence sufficient to warrant the reopening of this claim effective June 12, 1980 for the payment of compensation and other benefits provided for by law until closed pursuant to ORS 656.278.

IT IS SO ORDERED.

WCB CASE NO. 79-3038 August 27, 1980

In the Matter of the Compensation
of The Beneficiaries of
ROBERT A. CARTER, DECEASED
Jolles, Sokol & Bernstein, Claimant's Attys.
Schwabe, Williamson, Wyatt, Moore
& Roberts, Employer's Attys.
Request for Review by Employer

This case is before the Board on Crown Zellerbach's (employer's) request that the Board review the Referee's order which ordered it accept the decedent's widow's (claimant) claim and pay benefits provided for by ORS 656.204 and to pay her attorney a fee. The employer contends that claimant has failed to establish legal and medical causation that her husband's death was related to his employment.

The Board finds that the facts recited by the Referee, in his order, are correct.

The Board, after de novo review, reverses the Referee's order in its entirety. The Board finds that the claimant did not prove by a preponderance of the evidence both legal and medical causation that her husband's death was related to his work. There is no evidence that the decedent was engaged in any exertion of any type at the time of his

death. The testimony of his activities prior to his death, especially relating to his effort in unclogging a jam in one of the conveyor belts, is pure speculation. No one observed the decedent working on the conveyor belt. The mere fact that his death occurred at work does not establish legal causation.

Further, the Board finds that the preponderance of medical evidence does not establish medical causation. Dr. Smith, claimant's treating physician since his initial heart attack, opines that decedent's death was the result of the natural progression of the disease and that his death was not related to his employment. Dr. Rogers, a cardiologist, saw no causative or aggravating relationship between decedent's work and his death. He noted that the mechanism of plaque hemorrhage was unknown. Dr. Grossman opined that claimant's death was related to his work. However, his opinion was based on the assumption that decedent had been egaged in some form of exertion of a moderate degree prior to his death. The Board, in this case, gives more weight to the opinions of Drs. Smith and Rogers. Dr. Smith is an internist who has treated the decedent since 1969. Dr. Rogers is a Board certified cardiologist who reviewed the history and medical records. Dr. Grossman is not a cardiologist nor had he ever examined or treated the claimant; he too examined the history and the medical records. The Board finds the opinions of Dr. Smith and Dr. Rogers more persuasive.

Based on all the evidence in this case, the Board finds that the claimant has failed to meet her burden of proving legal and medical causation. The Board does not find the evidence indicates decedent was exerting himself in the performance of the job at the time he began to have heart difficulties which led to his death. Further, the Board finds that the preponderance of the medical evidence indicates that decedent's death was not related to his work. Therefore, the Board reverses the Referee's order in its entirety.

ORDER

The Referee's order, dated January 15, 1980, is reversed in its entirety.

Crown Zellerbach's denial of this claim, dated March 21, 1979, is restored and affirmed.

CLAIM NO. B830C407793 August 27, 1980

GORDON COVEY, CLAIMANT
Malagon & Yates, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

On October 28, 1973, claimant suffered a compensable injury to his back and right hand. This claim was initially closed by a Determination Order, dated December 20, 1974, which granted claimant an award of temporary total disability compensation and compensation equal to 64° for 20% unscheduled disability for his back injury and compensation equal to 30° for 20% loss of use of his right hand. Claimant's aggravation rights have expired.

This case was reopened by an Own Motion Order, dated April 24, 1980, when and if he was hospitalized for an evaluation suggested by Dr. Smith. On May 14, 1980, claimant underwent the myelogram suggested by Dr. Smith. No defects were found. Claimant was discharged from the hospital on May 18, 1980.

On July 22, 1980, the SAIF Corporation requested a determination of claimant's current disability. The Evaluation Division of the Workers' Compensation Department, on August 18, 1980, recommended this claim be closed with an award of additional temporary total disability from May 14, 1980 through May 18, 1980 and no additional permanent partial disability.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted temporary total disability compensation from May 14, 1980 through May 18, 1980, less time worked. The record indicates that claimant has already been paid this award.

Claimant's attorney has already been awarded a reasonable attorney's fee by the Own Motion Order of April 24, 1980.

WCB CASE NO. 78-9492 August 27, 1980

HERBERT FLOWERDAY, CLAIMANT
Malagon & Yates, Claimant's Attys.
Keith D. Skelton, Employer's Atty.
Request for Review by Claimant

Claimant seeks Board review of the Referee's order which affirmed the carrier's denial of his claim for surgery for an esophageal hiatus hernia.

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.

Further, the Board does not find there ever was a contract entered into between the parties regarding responsibility for the transthoracic repair of claimant's esophageal hiatus hernia. Claimant contends a representative of the insurance carrier authorized this surgery. This was denied by the insurance carrier. After reviewing all of the evidence concerning this point, the Board does not find that the parties ever agreed or had a "meeting of the minds" that the insurance carrier authorized this surgery. Therefore, the parties never reached an agreement and never formed a contract. The Board affirms the Referee's order.

ORDER

The order of the Referee, dated January 11, 1980, is affirmed.

CLAIM NO. C 322560 August 27, 1980

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

On August 1, 1980, claimant, by and through his attorney, requested the Board reopen his claim for his August 25, 1971 injuries to his left elbow and forearm. Claimant's aggravation rights have expired. Attached to claimant's request were numerous medical reports concerning this claim.

The Board requested the SAIF Corporation (SAIF) to advise it of its position with regard to claimant's request. On August 14, 1980, SAIF responded indicating it opposed an Own Motion Order reopening this claim as it did not appear there had been an objectively material worsening of claimant's psychological condition since the last award or arrangement of compensation. SAIF indicated it was continuing to pay for claimant's current medical treatment under ORS 656.245.

The Board, after reviewing the evidence submitted to it, does not find the evidence warrants a reopening of this claim at this time under its own motion jurisdiction. The Board does not find any evidence that claimant's condition has worsened. It feels the treatment claimant is receiving is appropriate and provided for under ORS 656.245. Therefore, the Board denies claimant's request.

ORDER

Claimant's request that the Board reopen this claim under the own motion jurisdiction is denied.

WCB CASE NO. 79-8576 August 27, 1980

VICTOR HAUTH, CLAIMANT
Frank J. Susak, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

This case is before the Board on claimant's request that the Board review the Referee's order which granted claimant an award of compensation equal to 52.5° for 35% loss of the right leg and found claimant was not eligible for a Workers' Compensation Department sponsored vocational rehabilitation program. Claimant contends the award of permanent partial disability is low and he is eligible for a vocational rehabilitation program.

The Board finds the facts as recited in the Referee's order are correct.

The Board, after de novo review, modifies the Referee's order. Claimant's injury was diagnosed as a torn medial meniscus of the right knee. This was surgically repaired. His recovery from this surgery required extensive physiotherapy.

The Orthopaedic Consultants, in July 1979, opined claimant could perform work which was sedentary or light. They felt clamant should avoid work requiring walking long distances, standing more than 50% of the time and avoiding going up and down stairs. They rated the loss of function of claimant's knee as "in the lower limit of mildly moderate".

Based on all the evidence in this case, the Board finds the Referee's award of compensation was excessive. His right knee is painful and occasionally buckles, causing him to fall. The Board finds that claimant has lost 25% of the function of his right leg and awards him compensation equal

to that amount. The Board concurs with the Referee's finding that claimant failed to establish his eligibility for a vocational rehabilitation program.

ORDER

The Referee's order, dated March 14, 1980, is modified.

Claimant is hereby granted an award of compensation equal to 37.5° for 25% loss of function of his right leg. This is in lieu of any previous awards of scheduled disability for this injury.

The remainder of the Referee's order is affirmed.

WCB CASE NO. 78-9325 August 27, 1980

BERNARD LAMBRECHT, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Attys.
Cheney & Kelley, Employer's Attys.
Request for Review by Claimant

This case is before the Board on claimant's request that it review the Referee's order which granted claimant an award of compensation equal to 192° for 60% unscheduled disability for his back injury and granted his attorney a fee. Claimant contends that this award is not adequate and that he is permanently and totally disabled.

In 1944 claimant first injured his back. This resulted in a fusion from L5, S1. He again injured his back in 1966 and underwent a left L4-5 discectomy and laminectomy. He again injured his back in 1968 and in March 1968 underwent a fusion from L4 to L5. Claimant had received awards of compensation totalling 40% loss of function of an arm for these injuries.

On July 21, 1967, claimant, then 64 years old, was employed by this employer as a maintenance man. On August 10, 1977, he again injured his back while lifting a heavy piece of iron tubing. Claimant was hospitalized approximately a month after this injury. The discharge diagnosis was lumbar spine pain with lumbar disc disease, post two lumbar spine surgeries with lumbar nerve root radiculopathy at that time and diabetes mellitus, adult onset, which required insulin.

Dr. Embick, in September 1977, reported that his diagnosis was a lumbar back sprain which aggravated his pre-existing lumbar degenerative disc disease. He prescribed physical therapy, partial bedrest and medication. Claimant, at that time, was complaining of right buttocks and upper thigh pain. In December 1977, Dr. Embick reported that because of claimant's age he felt it was unlikely that claimant would ever recover sufficiently to return to his former occupation.

In March 1978, the Orthopaedic Consultants examined claimant and reported that he had an 8th grade education and had obtained a GED. Claimant was a widower. He indicated he had worked mainly as a logger but had been working for approximately 10 years for this employer. It was their opinion that claimant's condition was not stationary and felt that claimant should undergo a lumbosacral myelogram which would rule out a probable compressive radiculopathy.

Dr. Embick, in May 1978, reported that he agreed with the recommendations of the Orthopaedic Consultants. However, he had discussed the matter of the myelogram with claimant and indicated that claimant did not wish to have any further surgery nor a myelogram. It was his feeling that claimant was still unable to work. Dr. Embick also noted that claimant had been interviewed by the Department of Vocational Rehabilitation in regard to rehabilitation. He indicated that claimant did not want to engage in this activity since he had experience with them in the past.

In August 1978, Dr. Embick reported that claimant had an acute sprain of the lumbar spine due to his August 10, 1977 injury with underlying degenerative changes. He indicated that claimant had a spondylolisthesis at L4-5 and a psuedo-arthrosis at that level as well. It was his opinion that claimant's condition was stationary and the claim could be closed. He believed that claimant had a considerable degree of permanent impairment resulting from this injury and that with his previous back problem, claimant was now permanently and totally disabled.

The Orthopaedic Consultants again examined claimant and in October 1978 opined that his condition was stationary. They rated the loss of function of his back as severe and felt the loss of function due to this injury was mildly moderate.

A Determination Order, dated November 16, 1978, granted claimant an award of temporary total disability compensation and compensation equal to 64° for 20% unscheduled disability for his low back injury.

In February 1979, the Field Services Division indicated it had contacted claimant and he stated he was going to retire. Because he was going to retire, his file was closed. The coordinator indicated that if claimant wished assistance he should re-contact them.

In August 1979, Dr. Nickila opined that claimant should not return to any gainful employment. In late September 1979, Dr. Embick indicated that in his opinion claimant was permanently and totally disabled as a result of his August 10, 1977 injury.

At the hearing, claimant testified that he has done a little to try to return to work. He stated he had made one trip to the employment office and was advised they had no work for him. He stated he has checked the want ads to see if anything appeared in them which he felt he could do. So far he has been unable to find anything he feels he could do. Claimant stated that he feels there is nothing he can do on a sustained basis and questions if he could sustain himself in any type of work over an eight-hour day or a 40-hour week. Claimant does have a small farm and does a little work around it. He indicates, however, that his back hurts all the time and that he has pain in his right leg and right hip. He states that he can walk one-fourth of a mile and lift up to 25 pounds on an occasional basis. Claimant states he cannot sit for prolonged periods of time and that any activity requires him to lie down. He states that he lies down several times a day. He indicates that he can no longer do many of the chores around his farm that he used to do. He also has limited his other activities such as fishing.

The Referee found because of this injury claimant was not permanently and totally disabled. The Referee concluded that claimant had lost approximately 60% of his earning capacity as a result of this injury. Therefore, the Referee granted claimant an award of compensation equal to 192° for 60% unscheduled disability for this back injury and awarded claimant's attorney a fee equal to 25% of the increased compensation not to exceed $3,000.

The Board, after de novo review, modifies the Referee's order. The Board, like the Referee, finds the evidence indicates that claimant is not permanently and totally disabled because of this injury. The medical evidence alone does not establish that claimant's condition was so severe as to justify an award of permanent total disability. Considering other factors, such as claimant's age, education, work experience and motivation to return to work, the Board concludes that the award granted by the Referee correctly compensates claimant for his loss of wage earning capacity due to this injury. Therefore, the Board affirms the Referee's order. However, the attorney fee awarded by the Referee is incorrect. Claimant's attorney is entitled to a fee out of the increased compensation. Pursuant to Board rules, the maximum fee he is entitled to is $2,000. Therefore, the Referee's order is modified.

ORDER

The Referee's order, dated February 14, 1980, is modified.

Claimant's attorney is entitled to an attorney fee equal to 25% of the increased compensation not to exceed a maximum of $2,000.

The remainder of the Referee's order is affirmed.

CLAIM NO. D 7986 August 27, 1980

BRUCE MILLER, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On August 19, 1980, the SAIF Corporation (SAIF) advised the Board this claimant had suffered a compensable injury on November 11, 1974 involving his left foot. It attached a July 24, 1980 report from Dr. Jerry Nye who requested this claim be reopened. He indicated claimant had developed excessive callus formation on the amputation tip of the left great toe. It was decided to excise the distal phalanx. This surgery was scheduled for July 23, 1980. SAIF indicated claimant's aggravation rights had expired and it did not oppose an Own Motion Order reopening this claim for the surgery.

The Board orders this claim reopened effective July 23, 1980 for the payment of compensation and other benefits provided for by law and until closed pursuant to ORS 656.278.

IT IS SO ORDERED.

WCB CASE NO. 79-43 August 27, 1980
WCB CASE NO. 79-4697

CLAUDE PETTY, CLAIMANT
Allan H. Coons, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On July 28, 1980, claimant, by and through his attorney, requested that the Board exercise its own motion jurisdiction and remand the April 3, 1974 claim to its Hearings Division to be heard in consolidation with another case. Both of the above entitled cases actually went to a hearing before it was discovered that WCB Case No. 79-4697 was initially closed on May 21, 1974 and, therefore, claimant's aggravation rights had expired in that claim. The hearing is being held open for this decision from the Board.

On August 12, 1980, the SAIF Corporation advised the Board that it opposed the Board's exercising its own motion jurisdiction in this case.

The Board, after thoroughly considering the evidence before it, concludes that it would be in the best interests of all the parties to remand this claim to the Hearings Division to be consolidated with WCB Case No. 79-43 and be set for a hearing before Referee Terry Johnson. The Referee shall take evidence on all the issues in both claims and forward to the Board a copy of the transcript of the proceedings together with his recommendation as to the disposal of the issues in Claim No. TD 13771. An appealable Opinion and Order shall be entered in WCB Case No. 79-43.

IT IS SO ORDERED.

WCB CASE NO. 79-5781 August 27, 1980

JAMES W. VIOL, CLAIMANT
Pozzi, Wilson, Atchison, Kahn
& O'Leary, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

This case is before the Board on the SAIF Corporation's (SAIF) request that the Board review the Referee's order which found that it had violated a Board's Order on Review, ordered it to pay claimant temporary total disability compensation from the date of his injury until July 11, 1979, awarded claimant's attorney a fee of $1,000 to be paid by SAIF for prevailing on the failure to pay temporary total

disability compensation, awarded a penalty equal to 25% of the temporary total disability compensation (less that previously paid) to claimant for SAIF's unreasonable delay and for failure to pay said compensation and awarded claimant's attorney a fee of $550 based on its failure to pay compensation due under the Board's order.

The Board finds that the facts as recited in the Referee's order are correct.

The Board, after de novo review, affirms the Referee's order. The Board concurs with the Referee's findings in regard to ordering SAIF to pay the temporary total disability compensation and his finding that it had violated the Board's Order on Review. Further, the Board concurs with the Referee's assessment of a penalty equal to 25% of said compensation for the reasons recited by the Referee. However, the Board feels it must clarify the award of attorney's fees in this case. The Board finds that the attorney's fees awarded to claimant's attorney should be consolidated since they were awarded based on the SAIF's refusal and failure to pay temporary total disability compensation pursuant to the Board's order. Therefore, the Board would clarify this issue by awarding claimant's attorney a sum of $1,550 as a reasonable attorney's fee to be paid by the SAIF for prevailing on the temporary total disability issue and SAIF's refusal to pay said compensation.

ORDER

The Referee's order, dated December 19, 1979, as clarified, is affirmed.

Claimant's attorney is hereby granted as a reasonable attorney's fee a sum equal to $350, payable by the SAIF Corporation.

WCB CASE NO. 79-697 August 28, 1980

RANDY L. HOWARD, CLAIMANT
Malagon & Yates, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF
Cross-appeal by Claimant

This case is before the Board on the SAIF Corporation's (SAIF) and claimant's request that the Board review the Referee's order which granted claimant an award of compensation equal to 128° for 40% unscheduled disability and awarded claimant's attorney a fee out of the increased compensation.

SAIF contends this award is excessive and asks that the Determination Order, dated June 27, 1979, which awarded claimant temporary total disability compensation only be reinstated and affirmed. Claimant contends that the award granted by the Referee does not adequately compensate him for his loss of wage earning capacity as a result of this injury.

The Board finds that the facts as set forth in the Referee's order are correct.

Based on these facts and after de novo review of this case, the Board reaches a different conclusion than that of the Referee. The Board does not find that the facts in this case establish claimant has lost as much of his wage earning capacity as that for which he was compensated by the Referee. The Board, after reviewing the facts in this case and comparing this case with other cases it has reviewed, concludes that claimant has lost 25% of his wage earning capacity and would grant him an award of compensation equal to that amount. Therefore, the Board would modify the Referee's order and award claimant an award of compensation equal to 80° for 25% unscheduled disability for his back injury in this case. This award is in lieu of any previous awards for unscheduled disability which claimant has been granted.

ORDER

The Referee's order, dated March 10, 1980, is modified.

Claimant is hereby granted an award of compensation equal to 80° for 25% unscheduled disability for his back injury. This award is in lieu of any previous awards of unscheduled disability granted in this case. The remainder of the Referee's order is affirmed.

WCB CASE NO. 79-1813 August 28, 1980

FRED R. LYNCH, CLAIMANT
Campbell & Moberg, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

This case is before the Board on claimant's request that it review the Referee's order which affirmed the Determination Order of January 25, 1979 which had granted claimant an award of temporary total disability compensation and compensation equal to 16° for 5% unscheduled disability for

his low back injury. Claimant contends that his condition is not medically stationary or, in the alternative, the award of compensation is not adequate.

The Board finds that the facts recited by the Referee in his order are correct.

The Board, after de novo review, modifies the Referee's order. The Board affirms the Referee's finding that claimant was medically stationary. The Referee, in this case, gave more weight to Dr. Paxton's report and opinion. The Board finds that the opinion of Dr. Pasquesi is more persuasive. Dr. Paxton examined claimant on one occasion while Dr. Pasquesi examined claimant on three different occasions. Dr. Pasquesi opines that claimant has combined impairment of the whole man equal to 31%. He felt that claimant could engage in some activity not requiring repetitive bending, stooping, twisting, lifting more than 25 pounds, or having to sit or stand without being able to change positions as he felt necessary. The claimant is relatively young and has a high school education with two years of college work. The Board finds, based on the facts in this case which indicate claimant was precluded from all heavy labor employment, claimant is entitled to an award of compensation equal to 64° for 20% unscheduled disability for his back injury. Therefore, the Board modifies the Referee and grants claimant an award of compensation in this amount.

ORDER

The Referee's order, dated November 27, 1979, is modified.

Claimant is hereby granted an award of compensation equal to 64° for 20% unscheduled disability for his March 2, 1977 back injury. This award is in lieu of any previous awards of unscheduled disability compensation claimant has been granted for this injury.

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.

PATRICIA J. McCLINTOCK, CLAIMANT
David Hittle, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

This case is before the Board on the SAIF Corporation's (SAIF) request that it review the Referee's order which granted claimant an award of compensation for permanent total disability effective April 28, 1979 and granted claimant's attorney a fee out of the increased compensation. SAIF contends claimant is not permanently and totally disabled.

On September 24, 1976, claimant, a 32-year-old police officer with approximately three months on the job, injured her right shoulder while taking a self-defense class. Her injuries were diagnosed as a right shoulder strain and contusion of her right lower ribs.

Dr. Jon Vessely, in October 1976, reported claimant was "a very functional type patient who was almost hysterical in her non use of the right arm." He found claimant's complaints of discomfort were greatly out of proportion to her injury.

In March 1977, claimant was entered into the Disability Prevention Center. She complained of headaches and a throbbing type of discomfort in her right shoulder. The medical examiner felt claimant displayed a "good deal of anxiety". It was felt claimant had some type of personality disorder. Dr. May, a psychologist at the Center, reported claimant had a 10th grade education and had obtained a GED. Dr. May found evidence of considerable anxiety which he felt was directly related to claimant's interpretation of her injury. He also found moderate depression. Dr. May opined claimant's symptoms were directly traceable to anxiety and its conversion into physical discomfort.

Dr. Ian Brown felt claimant needed psychiatric-psychological studies and care. He diagnosed conversion hysteria, superimposed upon the trauma to her shoulder and post-concussion syndrome.

In July 1977, Dr. Hickman, a psychologist, reported claimant was not psychologically ready for any training. He noted claimant was experiencing considerable anxiety, was discouraged and was not motivated. Dr. Hickman began treating claimant.

Dr. Pasquesi, in August 1977, stated claimant had peritendinitis in the region of the right shoulder. He indicated claimant had considerable limitation of motion and impairment in her shoulder, which he felt were due to functional factors.

In October 1977, Dr. Quan, a psychiatrist, diagnosed: "Anxiety neurosis, chronic, mild to moderate, pre-existing the injury". He felt claimant's injury aggravated claimant's pre-existing condition. Dr. Quan noted claimant had been "chronically anxious" for a long time.

The Orthopaedic Consultants, in February 1978, reported it was impossible to document any serious residuals from claimant's injury because of her neurosis and rigid protective attitude. They did not feel claimant was responding to the treatment being provided to her. Their diagnosis was a contusion of the right shoulder and severe anxiety neurosis and functional overlay, documented as a conversion neurosis. It was their opinion claimant could return to her previous occupation with some modification of the job. They felt claimant's condition was stationary and her loss of function was mild. However, they commented claimant was vocationally handicapped because of psychologic factors.

In April 1978, Dr. Parvaresh, a psychiatrist, diagnosed claimant's condition as an anxiety neurosis. He felt this was obviously of "long standing" and opined claimant's psychiatric problems were not related to her injury. Dr. Parvaresh felt if claimant returned to work with the passage of time, bring about the control of her anxiety.

This claim was initially closed by a Determination Order, dated June 1, 1978, which granted claimant a period of temporary total diability compensation and compensation equal to 16° for 5% unscheduled disability for his psychiatric condition.

In August 1978, Dr. Fleming indicated claimant's injury and the affect it might have on her return to police work caused claimant to experience moderate severe anxiety in July 1977. He felt through treatment this had been reduced, but claimant was still not stationary as of April 28, 1978. He felt claimant was continuing to improve.

Dr. Hickman, in September 1978, reported claimant was at a point where rapid progress could be made. He noted claimant continued to have complaints of right shoulder problems. Shortly after this Dr. Hickman died.

In January 1979, Dr. Metzger, who took over after Dr. Hickman died, reported claimant had completed a month long rehabilitation program and was continuing to receive therapy. He stated that she had been placed on anti-depressant medication and was less depressed. Dr. Metzger, in April 1979, reported from June 1978 through January 1979 claimant showed signs of continued regression and depression. He indicated claimant was at times "actively suicidal". This condition improved with therapy and medication. He felt claimant's condition would stabilize within the next few months.

In October 1979, Dr. Colbach, a psychiatrist, reported claimant was in a very deteriorated mental condition. He felt claimant was a marginal individual with poor intelligence who had become a police officer. It was his opinion this was very stressful for claimant and she used her injury to get out of it. Dr. Colbach felt claimant's problems were the result of longstanding personality problems and that her injury provided "a vehicle for it all to come to the fore". He stated claimant's condition was not stationary, but appeared to be deteriorating. He felt claimant was heading towards being psychotic.

Dr. Roberts, in November 1979, diagnosed claimant's condition as a schizophrenic illness. He indicated claimant was extremely fearful, suspicious, and concerned over the death of Dr. Hickman. It was noted claimant had contemplated suicide and had held a revolver to her head before being talked out of shooting herself. At the hearing, Dr. Roberts testified claimant's illness began as depression and her anxiety level rose and rose until it reached a point that led to decompensation and loss of control of her anxiety which put claimant into a psychotic "phase". He felt this condition was permanent.

The Referee found, based on all the evidence, claimant's present psychological condition was a result of her industrial injury. Further, the Referee found claimant was permanently and totally disabled.

The Board, after de novo review, affirms the Referee's order. The Board finds the evidence establishes claimant's psychological condition is related to her industrial injury. Dr. Roberts, in his latest reports and his testimony at the hearing, stated claimant is unable to work at any suitable and gainful employment. It is his opinion that this condition is permanent. Based on all the evidence, the Board concurs with the Referee's decision in this case.

ORDER

The Referee's order, dated November 28, 1979, is affirmed.

Claimant's attorney is hereby granted as a reasonable attorney's fee for his services at Board review a sum equal to $350, payable by the carrier.

WCB CASE NO. 79-9150 September 3, 1980
WCB CASE NO. 79-9151

DEE ALLEN, CLAIMANT
Danner & Humber, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

This case is before the Board on the claimant's request at it review the Referee's order which affirmed the SAIF rporation's (SAIF) denial of his two aggravation claims. aimant contends this was in error.

The Board finds that the facts recited by the Referee his order are correct.

The Board, after de novo review of this case, remands is case to the Referee for further development pursuant to S 656.295. In this case, claimant has suffered two injuries, e to his left knee and neck which is the condition claimant ntends has aggravated and another to his right foot. aimant also has developed an aseptic necrosis condition as ll. Dr. Keist feels this condition is related to the 1975 ft knee and neck injury.

The Orthopaedic Consultants, in October 1979, indicated aimant was complaining of bilateral hip pain. They indicated at this began with an episode occurring in October 1975 en claimant was involved in a motor vehicle accident and jured his left knee and neck. In October 1978, claimant jured his right foot. Claimant also had complaints of in in his hips and a total hip replacement was suggested correct this problem. The Orthopaedic Consultants noted at Dr. Keist felt that the avascular necrosis was related the automobile accident occurring in October 1975. They agnosed avascular necrosis at both hips which was progres- ve, status post left medial malleolar fracture which had solved and status post left index finger sprain which had solved. They felt claimant's condition was stationary and

at his hip disease was not related to the October 1978 jury. They felt that claimant's hip condition was not ationary and would require further treatment as outlined Dr. Keist.

The Board, based on all this evidence, finds that the cord was not fully developed by the Referee. Therefore, e Board remands this case to the Hearings Division for the velopment of the record to determine whether or not the 75 injury and resulting condition has been aggravated.

IT IS SO ORDERED.

WCB CASE NO. 79-2647 September 3, 1980

FRANK W. GIBSON, CLAIMANT
David F.P. Guyett, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

This case is before the Board on the SAIF Corporation's (SAIF) request it review the Referee's order which found SAIF was responsible under ORS 656.245 for claimant's nursing home care from April 17, 1978 and awarded claimant's attorney a fee. SAIF contends it is not responsible for this care and even if it is the attorney fee awarded by the Referee is excessive. The Board finds the Referee correctly recited the facts in his order.

The Board, after de novo review, reverses the Referee's order. Dr. Sinkey, in 1971, diagnosed claimant as having early signs of presenile dementia. He did not feel this condition was related to claimant's January 1971 injury. Dr. Kuykendall agreed and did not feel claimant's injury had any "direct bearing" on this condition. Dr. Reisner stated he "would not think that his [claimant's] accident is the cause of his [claimant's] cerebral atrophy but would instead feel that this gentleman has a primary pre-senial dementia with cortical atrophy and the most likly cause for this is Alzheimer's disease". All these opinions were made by doctors treating claimant in 1971.

In early 1979, Dr. White raised the question whether claimant's presenile dementia or cerebral atrophy was related to his 1971 injury or represented a natural phenomenon. Later, Dr. White stated "one would certainly entertain the idea that the injury was certainly responsible for his [claimant's] present condition due to the extreme exposure."

In June 1978, Dr. Sinkey reported that in 1971 Dr. Rose felt claimant's memory loss after the injury was due to post-traumatic encephalopathy. Dr. Sinkey felt it was impossible to state claimant's mental deterioration was due to his injury. However, he felt that since claimant did not have any previous mental problems prior to his injury and since the injury had a steady deterioration of his mental condition, he would have to presume that there was a direct relationship between the two.

Dr. Much, medical consultant for SAIF, in August 1978, opined claimant had a history of poor cerebral circulation causing claimant's pre-senile dementia. He felt this condition was not related to claimant's injury.

The Board finds the opinions of the doctors who examined and treated claimant at that time in 1971 to be more persuasive. The consensus of those opinions is that claimant's mental condition was not related to his injury. Dr. White did not begin to be involved in this case until 1978 and does not clearly state there is a relationship between claimant's condition and his injury. Dr. Stinkey has reversed his opinion. In 1971, he did not feel there was a relationship between claimant's injury and his mental condition. In 1978, he felt there was. However, he defers to Drs. Rose and Reimer. The Board finds his earlier opinion is more persuasive. Based on all the evidence, the Board finds claimant's mental condition is not related to his January 1, 1971 injury. Therefore, SAIF is not responsible for claimant's nursing home care from April 17, 1978.

ORDER

The Referee's order, dated February 28, 1980, is reversed in its entirety.

WCB CASE NO. 78-7359 September 3, 1980

EUGENE MARSHALL, CLAIMANT
Dean Richards, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order On Reconsideration

On August 20, 1980, the Board issued an Order on Review which reversed the Referee's Order of Dismissal and awarded claimant's attorney a $100 fee. Claimant had appealed the Referee's order. The SAIF Corporation contended the Referee's Order of Dismissal was correct.

The Board, after reconsidering this case, affirms its Order on Review. Claimant appealed the Referee's order and prevailed at the Board level. Claimant's attorney was required to spend time to prepare a brief on behalf of claimant and is entitled to a fee for his work. Therefore, the Board awarded claimant's attorney a fee.

ORDER

The Board's Order on Review, dated August 20, 1980, is affirmed.

WCB CASE NO. 78-9373 September 3, 1980

EDDY NELSON, CLAIMANT
Malagon & Yates, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

This case is before the Board on claimant's request it review the Referee's order which granted an award of compensation equal to 48° for 15% unscheduled disability for his back injury. Claimant contends this award does not adequately compensate him for his loss of wage earning capacity due to this injury. Further, he contends the SAIF Corporation (SAIF) failed to make timely payments of temporary total disability compensation and his claim was prematurely closed. The Board finds the facts recited by the Referee in his order are correct.

The Board, after de novo review, modifies the Referee's order. Claimant's injury was diagnosed as a chronic lumbosacral strain. The consensus of the medical evidence is that claimant cannot return to truck driving, a job he has done for most of his working years. He also has done some welding, air conditioning work, automobile mechanical work, automobile body work and painting. It was the feeling of the medical examiners claimant could not perform automotive body repair and painting or upholstery work because they required excessive use of the back.

Dr. Pasquesi felt claimant would need employment not requiring repetitive bending, stooping and twisting, lifting over 30 pounds, prolonged sitting and standing without allowing claimant to change positions. He felt claimant had a 16% impairment and felt claimant's condition was medically stationary. This is similar to the limitations set by Dr. Kohlheim.

On November 28, 1978, Dr. Mahoney found claimant's condition stationary as of September 1, 1978. This claim had been initially closed by a January 3, 1979 Determination Order which awarded claimant temporary total disability compensation to November 28, 1978 and compensation equal to 32° for 10% unscheduled disability for his back injury. This claim was reopened when claimant entered a vocational rehabilitation program to become an auto parts person. Claimant withdrew from this program prior to its completion. A Second Determination Order, dated July 9, 1979, awarded claimant additional temporary total disability compensation from February 19, 1979 through June 18, 1979.

The Board finds this claim was not prematurely closed. There is no evidence that claimant's condition had changed and was not medically stationary when it was closed. Claimant was released for lighter work and vocational rehabilitation.

Further, the Board finds claimant failed to establish that SAIF's payments of temporary total disability compensation were not timely. Claimant testimony is the only evidence of any late payment. However, his testimony is so indecisive about what and when he was paid, the Board does not find he proved the payments of temporary total disability were not timely.

On the issue of the extent of disability, the Board grants claimant an award of compensation equal to 80° for 25% unscheduled disability for his back injury. Claimant cannot return to his previous job and is limited to the jobs he can perform. He is in his early thirties and has a 10th grade education. He has certain limitations placed on the type of work he should engage in. The Board feels, based on all the evidence, claimant has lost more of his wage earning capacity than that which he has been previously compensated for and grants claimant an increase in his award of compensation.

ORDER

The Referee's order, dated January 8, 1980, is modified.

Claimant is hereby granted compensation equal to 80° for 25% unscheduled disability. This is in lieu of any previous awards claimant has been granted for this injury.

The Board does not find this claim was prematurely closed and finds claimant failed to establish the payments of temporary total disability were timely. Therefore, it denies claimant's requests for additional temporary total disability, penalties and attorney fees on these issues.

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

WCB CASE NO. 78-9545 September 3, 1980

MICHAEL PROPES, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

This case is before the Board on the SAIF Corporation's request that the Board review the Referee's order which found it could not make an offset for an alleged overpayment against any future compensation awards with respect to this case and granted claimant's attorney a fee. The SAIF Corporation contends that it should be allowed to take the offset against any future awards of compensation in this case. The Board finds that the facts as recited in the Referee's order are correct.

The Board, after de novo review, reverses the Referee's order in its entirety. The Board does not concur with the Referee's application of the doctrine of res judicata in this case. Pursuant to a .307 order, a different carrier paid claimant certain funds. After a hearing, it was found that SAIF Corporation was responsible and it was ordered to repay to the other carrier sums that it had expended in this case. The other carrier paid claimant at a rate higher of compensation than that which SAIF Corporation would have had to pay. This resulted in claimant receiving a sum equal to $3,770.68 over what SAIF Corporation would have had to pay. It was this amount that SAIF contends should be offset. After SAIF Corporation requested that this amount be repaid by claimant, claimant requested a hearing.

The Board finds, under the facts of this case, the issue of adjustments necessitated by the entry of the .307 order and the overpayment were not fully litigated by the parties. The sole issue litigated at the previous hearing was which of the two carriers was responsible for claimant's condition and his current disability. The issue of the rates of compensation and the reimbursement or adjustments to be made between the parties was not an issue at the previous hearing. Therefore, the doctrine of res judicata does not apply.

In conclusion, the Board finds that the SAIF Corporation is entitled to reimbursement it seeks. Claimant has been overpaid a sum of money and has been unjustly enriched thereby. The Board finds that the SAIF Corporation could offset this overpayment, if necessary, from its future obligations in this claim, in installments which would be reasonable.

ORDER

The Referee's order, dated March 17, 1980, is reversed in its entirety.

IT IS HEREBY ORDERED that the SAIF Corporation is allowed to make any offset in a reasonable manner in the sum of $3,770.68 against any future compensation awards granted in this case.

WCB CASE NO. 78-5527 September 3, 1980

DAVID A. REYNOLDS, CLAIMANT
Pozzi, Wilson, Atchison, Kahn
& O'Leary, Claimant's Attys.
Schwabe, Williamson, Wyatt, Moore
& Roberts, Employer's Attys.
Request for Review by Claimant
Cross-appeal by Employer

Claimant seeks Board review of the Referee's order which found he was not entitled to additional temporary total disability but granted him additional compensation for a total award equal to 128° for 40% unscheduled back disability. Claimant contends his claim was prematurely closed and he is entitled to more compensation for unscheduled disability. The employer contends the award granted by the Referee was excessive.

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 January 16, 1980, is affirmed.

Chairman Wilson dissents as follows:

I would reverse that portion of the Referee's order which awarded an additional 20% permanent partial disability, and would affirm the determination by the Evaluation Division of the Workers' Compensation Department and affirm the balance of the Referee's order.

The vast preponderance of the evidence establishes that the loss of earning capacity attributable to the residuals of claimant's injury does not exceed 20%. The condition of stiffness of the low back has not been established as being caused or aggravated by the injury. Even Dr. Manley can express no opinion as to the cause of this stiffness. The burden of proof is on the claimant to establish this relationship and he has failed to carry it.

Claimant has intelligence and a varied background, he is comparatively young and has demonstrated adaptability. His loss of earning capacity does not equate to more than 20%.

WCB CASE NO. 78-9166 September 3, 1980

JAMES D. VAN CLEAVE, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary, Claimant's Attys.
Lang, Klein, Wolf, Smith, Griffith & Hallmark, Employer's Attys.
Merten & Saltveit, Employer's Attys.
Request for Review by General Foods & American Motor Ins.

This case is before the Board on General Foods and its insurance carrier, American Motor Insurance Companies, request that the Board review the Referee's order which remanded claimant's aggravation claim to it for acceptance and payment of compensation, approved the Kinzua Corporation's (Kinzua) denial of claimant's claim for a new injury and awarded claimant's attorney a fee payable by General Foods. General Foods contends first of all that the claimant's condition is not compensable and secondly that if it is compensable it is the responsibility of Kinzua.

The Board finds that the Referee correctly recited the facts in his order.

The Board, after de novo review, reverses the Referee's order. The Board finds the evidence indicates that claimant sustained a new injury while employed by Kinzua in October 1978. Claimant testified that on or about October 10, 1978, while employed by Kinzua, he twisted his left wrist while pulling veneer. He testified that between the time he began work with Kinzua, in July 1978, and October 10, 1978 he did not miss any time from work. Claimant indicated that he missed approximately one month of work because of this incident. The medical evidence indicates that claimant had a pre-existing condition which had been

diagnosed as Keinbock's disease. The Board finds that the evidence indicates that claimant's work activity caused a temporary exacerbation of his pre-existing condition so as to require medical services that would not have otherwise been necessary and resulted in temporary disability. Applying the test as set forth by the Supreme Court in the cases of Weller v. Union Carbide, 283 Or 27, ___ P2d ___ (1979), and Hutcheson v. Weyerhaeuser Co., 288 Or 51, ___ P2d ___ (1979), the Board finds that this claim is compensable as a temporary exacerbation of claimant's pre-existing condition. Therefore, the Board reverses the Referee's order and finds that Kinzua is responsible for the month of time loss and medical care and treatment which claimant sustained as a result of his October 10, 1978 injury while employed by Kinzua Mills.

ORDER

The Referee's order, dated January 29, 1980, is reversed in its entirety.

This claim is remanded to Kinzua Corporation and Employees Benefits Insurance Companies for acceptance and payment of compensation to which claimant is entitled. The denial of General Foods and American Motor Insurance Companies is reinstated and affirmed. It is further ordered that Kinzua Corporation and EBI Companies reimburse General Foods and American Motors Insurance Companies for any sums expended pursuant to the Referee's order.

Claimant's attorney is hereby granted as a reasonable attorney's fee for his services at Board review a sum equal to $75, payable by General Foods and American Motor Insurance Company.

WCB CASE NO. 79-7832 September 4, 1980

MARGARET L. ANDERSON, CLAIMANT
Don G. Swink, Claimant's Atty.
Schwabe, Williamson, Wyatt, Moore & Roberts, Employer's Attys.
Order

On April 30, 1980, claimant filed with the Field Services Division of the Workers' Compensation Department a "Notice of Appeal" of a Referee's April 4, 1980 Opinion and Order. In her request for review of the Referee's order, claimant did not indicate if she had served the other parties to the hearing.

The employer, on June 6, 1980, indicated it had not been served with the request for review. On July 10, 1980, Fred S. James indicated it had not been served with the request for review. The employer, on July 14, 1980, moved the Board to dismiss claimant's request for review for failing to comply with ORS 656.295.

The Board, after reviewing the material in this file, finds claimant failed to comply with ORS 656.295 and did not serve copies of her request for review on all the parties to this proceeding before the Referee. Therefore, the Board grants the employer's motion and dismisses claimant's request for review.

IT IS SO ORDERED.

WCB CASE NO. 78-9948 September 4, 1980

FRANKLIN L. ASHCRAFT, CLAIMANT
Kenneth H. Colley, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

This case is before the Board on claimant's request that the Board review the Referee's order which granted claimant an award of compensation equal to 160° for 50% unscheduled disability for his January 1978 back injury and granted claimant's attorney a fee out of the increased compensation. Claimant contends that he is permanently and totally disabled.

The Board finds that the facts set forth by the Referee in his order are correct.

The Board, after de novo review, would modify the order of the Referee. The Board concurs with the Referee's finding that claimant is not permanently and totally disabled.

We find it was the medical opinions of Drs. Halferty, Krakauer and Steele that claimant was now precluded from his regular employment and because of this injury was limited to sedentary or light employment. The physical restrictions placed on claimant by these physicians further precludes him from his other past work experiences.

Claimant has only an eighth grade education and is 52 years of age. Although he lacks motivation to return to work his loss of wage earning capacity is greater, in our opinion, than that awarded by the Referee. We find claimant is entitled to an award of 256° for 80% unscheduled disability.

ORDER

The Referee's order, dated March 10, 1980, is modified.

Claimant is hereby granted an award of compensation equal to 256° for 80% unscheduled disability for his January 3, 1978 back injury. This award is in lieu of any previous award of unscheduled disability granted for this injury.

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.

CLAIM NO. C 464440 September 4, 1980

KARL BARRETT, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

In July 1980, claimant requested the Board exercise its own motion jurisdiction and reopen this claim. Claimant had been injured on September 15, 1973 and this claim was closed. His aggravation rights have expired.

The SAIF Corporation (SAIF), in August 1980, forwarded to the Board three reports from Dr. Mueller. He indicated claimant had undergone surgery on his left foot on June 10, 1980 and related the need for this surgery to claimant's September 15, 1973 injury. SAIF indicated it did not oppose an Own Motion Order reopening this claim for the June 10, 1980 surgery.

The Board, after reviewing the material submitted to it, finds the evidence warrants reopening of this claim. The Board orders this claim reopened effective the date claimant was hospitalized for the June 10, 1980 surgery for payment of compensation and other benefits provided for by law until closed pursuant to ORS 656.278.

Claimant's attorney is entitled to a fee equal to 25% of the increased compensation granted by this order, payable out of said compensation as paid, not to exceed $250.

IT IS SO ORDERED.

ROBERTA F. CALVIN, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

On June 1, 1972, claimant sustained a compensable injury to her back. This claim was initially closed by a Determination Order, dated November 4, 1974, which granted claimant an award of temporary total disability compensation and an award of compensation equal to 32° for 10% unscheduled disability for the low back. Claimant's aggravation rights have expired.

On January 28, 1980, claimant was hospitalized with complaints of low back pain and right lower extremity pain. Dr. Smith diagnosed a possible recurrent lumbar disc and suggested a myelogram be done. The myelogram was performed and did not reveal any definite evidence of a protruded intervertebral disc. Dr. Smith felt that it was reasonable claimant may have a recurrent lumbar disc in spite of the negative myelogram. He referred claimant to Dr. Berkeley.

In February 1980, Dr. Berkeley suggested claimant undergo a lumbosacral exploration. On April 18, 1980, claimant underwent an exploration of the L5-S1 and L4-5 disc space on the right side. Dr. Smith performed a laminectomy at the L4-5 and L5-S1 level on the right with removal of lateral bone spur at the L5-S1 level and decompression of the L4-5 and L5-S1 nerve roots on the right.

Dr. Smith, on July 24, 1980, reported that claimant was released from further surgical follow-up care. He did not feel that claimant could return to her previous type of work as a nurse's aide. He felt claimant would have to undergo vocational counseling and job placement into a lighter type of work or be retrained. He rated claimant's physical impairment after the additional surgery as mildly moderate to moderate.

On June 18, 1980, the Board reopened this claim under its own motion jurisdiction. The claim was reopened effective the date claimant had been hospitalized prior to her April 18, 1980 surgery.

On July 30, 1980, the SAIF Corporation requested a determination of claimant's current disability. The Evaluation Division of the Workers' Compensation Department, on August 21, 1980, recommended that this claim be closed with an award of additional temporary total disability from January 28, 1980 through July 23, 1980 and claimant be granted an additional award of compensation equal to 32° for 10% unscheduled disability for her low back injury.

The Board, after reviewing the material in this file, concurs with the Evaluation Division's recommendation of additional temporary total disability compensation. However, the Board does not agree the Evaluation Division's recommendation of additional unscheduled disability. Claimant is now barred from returning to her previous employment and cannot do heavier forms of work. Dr. Smith has rated claimant's impairment as mildly moderate to moderate. Based on all the evidence in this file, the Board finds that claimant has lost more of her wage earning capacity due to this more recent surgery. Therefore, the Board would grant claimant an award of compensation equal to 96° for 30% unscheduled disability for her low back injury. This award is in lieu of any previous awards for unscheduled disability for this injury.

ORDER

Claimant is hereby granted compensation for temporary total disability from January 28, 1980 through July 23, 1980, less time worked, and compensation equal to 96° for 30% unscheduled low back disability. The award for permanent disability is in lieu of any previous awards granted for claimant's June 1, 1972 industrial injury.

WCB CASE NO. 79-8937-E September 4, 1980

MARVIN C. CONLEY, CLAIMANT
Gerald C. Knapp, Claimant's Atty.
Rankin, McMurry, Osburn, Gallagher & VavRosky, Employer's Attys.
Request for Review by Employer
Cross-appeal by Claimant

This case is before the Board on the employer's and claimant's request that the Board review the Referee's order which affirmed the Determination Order of October 8, 1979, denying the employer's request the award of compensation be lowered and awarded claimant's attorney a fee. The employer contends the Referee's order should be reversed and the Determination Order award should be significantly reduced. Claimant contends the award should be increased. The Board finds the Referee correctly recited the facts in his order.

The Board, after de novo review, modifies the Referee's order. Based on the facts in this case, the Board finds the Determination Order award of permanent partial disability is excessive.

Claimant is 58 years of age with an eighth grade education. Past work experience has been farming, dairies, logging, tree topping and he owned his own landscaping business. Claimant's impairment from this industrial injury was rated as 10%. Claimant has had no hospitalization, no surgeries and takes no medication.

Claimant has not sought employment. Claimant declined to attend the Callahan Center. Claimant also declined to follow-up on several job leads developed by his vocational counselor. It is apparent once the hearing was scheduled, claimant declined to even consider any job leads until after the hearing. ORS 656.325(3) encourages an injured worker to make a reasonable effort to reduce his disability. The Board finds that this claimant has not done so. He has shown no motivation to return to work after suffering a mild injury. Therefore, based on the facts of this case, the Board reduces the award of compensation granted by the Determination Order from 176° for 55% unscheduled disability to 80° for 25% unscheduled disability.

ORDER

The Referee's order, dated March 24, 1980, is modified.

The Referee's affirmance of the Determination Order of October 8, 1979 and the awarding of an attorney's fee of $550 is reversed. Claimant is hereby granted an award of compensation equal to 80° for 25% unscheduled disability for this injury. This is in lieu of all previous awards of unscheduled disability for this injury.

CLAIM NO. DC 293764 September 4, 1980

ALAN W. DAVIS, CLAIMANT
A.C. Roll, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

This claim was reopened pursuant to a February 15, 1980 Own Motion Order. On December 27, 1978, claimant had undergone a laminectomy and fusion for low back injury.

In March 1980, Dr. Keist reported claimant had a known arachnoiditis. He felt claimant could not work at a regular job for which he was ". . . fitted from background or training on a regular basis now or in the foreseeable future". He felt claimant was permanently and totally disabled and could not think of any job he would hire claimant for " . . . now or in the foreseeable future".

The Orthopaedic Consultants, on July 10, 1980, found claimant's condition to be medically stationary and the claim could be closed. They rated the impairment of claimant's lumbar spine as severe.

The SAIF Corporation, on July 29, 1980, requested a determination of claimant's disability. The Evaluation Division of the Workers' Compensation Department, on August 22, 1980, recommended claimant be granted an award of additional temporary total disability compensation from December 25, 1978 through August 20, 1980 and award claimant compensation for permanent total disability.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted compensation for temporary total disability from December 25, 1978 through August 20, 1980 and compensation for permanent total disability for his July 9, 1969 industrial injury. The award for permanent disability is in lieu of any previous awards claimant has been granted.

CLAIM NO. C 335142 September 4, 1980

GEORGE ROBERT DOW II, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On October 22, 1971, claimant suffered a compensable right knee injury. This claim was closed and claimant's aggravation rights have expired.

The SAIF Corporation (SAIF), in August 1980, forwarded to the Board various medical reports concerning this claim. Dr. Weinman, on July 18, 1980, performed additional surgery on claimant's right knee. The SAIF's medical consultant related the need for this surgery to claimant's original injury. SAIF indicated it did not oppose an Own Motion Order reopening this claim for the July 18, 1980 surgery.

The Board, after reviewing the material submitted to it, finds the evidence warrants reopening of this claim. The Board orders this claim reopened the date claimant was hospitalized for the July 18, 1980 surgery for payment of compensation and other benefits until closed pursuant to ORS 656.278.

IT IS SO ORDERED.

WCB CASE NO. 78-6096 September 4, 1980

STEPHEN HENSLEE, CLAIMANT
Charles Paulson, Claimant's Atty.
Lang, Klein, Wolf, Smith, Griffith & Hallmark, Employer's Attys.
Request for Review by Employer

This case is before the Board on the employer's request it review the Referee's order which denied the employer's motion to dismiss claimant's request for hearing, granted claimant an award of compensation equal to 30° for 20% loss of function of his left leg and granted claimant's attorney a fee out of the increased compensation. The employer contends claimant's request for hearing was untimely and if it wasn't the award of compensation granted by the Referee is excessive. The Board finds the facts as recited by the Referee in his order are correct.

The Board, after de novo review, modifies the Referee's order.

The Board affirms the Referee's finding that claimant timely requested a hearing in this case. The Determination Order was issued on August 8, 1977. Claimant's request for hearing was signed on August 7, 1978 and mailed on August 8, 1978. The requirement for filing requests for hearing are statutory. ORS 656.268(5) and 656.319(2) require that a request for hearing be filed within one (1) year after the determination is filed. However, the first day is not counted in determining the year time period. ORS 174.120. Therefore, one year time period does not commence until August 9, 1977 and the filing of a request for hearing on August 8, 1978 was timely.

As to the issue of extent of disability, the Board modifies the Referee's award of compensation. Claimant has suffered repeated injures of his left knee and undergone surgeries for them. After this injury, claimant underwent an arthroscopy, lateral meniscectomy, removal of several loose bodies and a shaving and drilling of the lateral femoral condyle by Dr. Baldwin. Dr. Baldwin, in February 1977, stated he felt this injury resulted in very little disability superimposed on claimant's previous injuries. He felt claimant should avoid employment requiring running or prolonged stooping.

The Board, based on the evidence in this case, modifies the Referee's award of disability. The evidence indicates that claimant has very little disability in his left leg due to this injury. The Board finds the Referee's award of compensation is not supported by the evidence. Therefore, the Board modifies the Referee's order. Claimant is hereby

granted an award of compensation equal to 15° for 10% loss of function of the left leg. This is in lieu of any previous awards of scheduled disability for this injury.

ORDER

The Referee's order, dated March 10, 1980, is modified.

Claimant is hereby granted an award of compensation equal to 15° for 10% loss of function of the left leg. This is in lieu of any previous awards of scheduled disability granted for this injury.

The remainder of the Referee's order is affirmed.

CLAIM NO. C 214818 September 4, 1980

RUBY IRVINE, CLAIMANT
SAIF, Legal Services, Defense Atty.
Amended Own Motion Determination

On July 10, 1980, the Board entered an Own Motion Determination awarding claimant additional temporary total disability compensation from March 4, 1980 to May 6, 1980. Dr. Gerald Lisac, on August 15, 1980, advised the Board that claimant was disabled from work due to her March surgery until August 7, 1980 when he released her for work.

Based on this additional evidence, the Board amends its prior order in this claim and grants claimant an award of temporary total disability from March 4, 1980 through August 7, 1980.

ORDER

The Board's Own Motion Determination, dated July 10, 1980, is amended. Claimant is awarded additional temporary total disability compensation from March 4, 1980 through August 7, 1980 instead of through May 6, 1980. The remainder of the Board order shall be undisturbed.

CLAIM NO. 425 September 4, 1980

ARCHIE F. KEPHART, CLAIMANT
Starr & Vinson, Claimant's Attys.
Cheney & Kelley, Employer's Attys.
Own Motion Order

This claim was referred for a hearing on September 7, 1979 to determine if claimant's current condition, resulting in his hospitalization in July 1979, was related to his December 5, 1969 industrial injury and represented a worsening thereof since the last arrangement and award of compensation on July 10, 1978. Claimant, on July 20, 1979, requested the Board reopen this claim under its own motion jurisdiction.

After a hearing, the Referee found claimant's current condition was materially attributable to his 1969 injury and its sequelae and represented a worsening thereof since the last arrangement of compensation. The Referee recommended the Board grant claimant's request for own motion relief.

The Board, after reviewing the record in this case, concurs with the Referee's recommendation. The Board orders this claim reopened effective the date claimant was hospitalized for the July 1979 surgery for payment of compensation and other benefits provided for by law until closed pursuant to ORS 656.278. Claimant's attorney is entitled to a reasonable attorney's fee 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.

CLAIM NO. C 363645 September 4, 1980

ETHEL B. LOVE, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On August 7, 1980, claimant, by and through her attorney, requested the Board reopen this claim under its own motion jurisdiction. On April 6, 1972, claimant had sustained a compensable back injury. This claim was closed and claimant's aggravation rights have expired. Attached to claimant's request were several medical reports.

In March 1980, the Orthopaedic Consultants reported claimant was complaining of left leg pain and left shoulder pain. They had examined claimant in 1977 and felt her

condition organically and objectively was the same, but her symptoms were worse. They suggested claimant enter the Northwest Pain Center.

Dr. Johnson reported claimant's condition had imporved with physical therapy. In May 1980, claimant underwent a CT scan which was interpreted as normal. He did not feel claimant needed another myelogram and that as of June 4, 1980 her condition was stationary.

On August 15, 1980, the SAIF Corporation advised the Board it opposed an Own Motion Order reopening this claim since it did not appear claimant's condition has organically or objectively worsened since the last award or arrangement of compensation. It indicated it continued to pay for all related medical expenses under ORS 656.245.

The Board, after reviewing the material submitted to it, does not find that the evidence warrants a reopening of this claim under its own motion jurisdiction at this time. The consensus of the medical reports is that claimant's condition is medically stationary. There is no evidence her condition has worsened since the last award or arrangement of compensation. Therefore, the Board denies claimant's request that it reopen this claim under its own motion jurisdiction.

IT IS SO ORDERED.

CLAIM NO. B 76564 September 4, 1980

MARGARET MOSBRUCKER, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On April 11, 1980, claimant requested the Board reopen this claim under its own motion jurisdiction. On August 21, 1964, claimant had injured her right hip and leg in a fall. This was closed and claimant's aggravation rights have expired.

On July 17, 1980, Dr. Hopkins indicated he had first treated claimant in April of 1978. In 1965 a diagnosis of traumatic arthritis of the right hip had been made. Dr. Hopkins felt, based on claimant's statments that she has had continuing pain in her back and right hip since her fall, that her present problems were related to her original fall in 1964. He suggested claimant undergo a total hip replacement.

In 1966, Dr. Davis had reported claimant had developed arthritis in her uninjured hip as well as her injured hip. He felt the arthritis pre-dated claimant's injury, however, it was more severe in her right hip.

The SAIF Corporation, on August 21, 1980, indicated it opposed an Own Motion Order reopening this claim. It felt the claimant had had bilateral arthritis of the hip at the time of her injury and this claim was established only for a temporary exacerbation of claimant's pre-existing condition.

The Board, after reviewing the evidence submitted to it, finds it would be in the best interest of the parties if this case were referred to the Hearings Division and a hearing held. The Referee presiding at the hearing shall determine if claimant's current right hip condition and the need for the total hip replacement as suggested by Dr. Hopkins is related to her August 21, 1964 injury and represents a worsening thereof since the last award or arrangement of compensation made in this case. The Referee, upon conclusion of the hearing shall forward a recommendation on this issue to the Board along with a transcript of the proceeding and other evidence introduced at the hearing to the Board.

IT IS SO ORDERED.

CLAIM NO. 131 45626 September 4, 1980

RICHARD PETERSEN, CLAIMANT
Pozzi, Wilson, Atchison, Kahn
& O'Leary, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury to his back on June 10, 1968. The claim was initially closed by a Determination Order dated September 30, 1970 which granted claimant temporary total diability compensation and compensation equal to 32° for 10% unscheduled disability for his low back. A Stipulated Order increased the award of unscheduled disability to 40%. Claimant's aggravation rights have expired.

On June 12, 1979, the Board reopened this claim under its own motion jurisdiction. Dr. Holbert had suggested that claimant undergo a fusion of his back.

On November 13, 1979, Dr. Holbert performed a fusion of L5 to the sacrum. In May 1980, Dr. Holbert released claimant to go back to work as a mechanic but did place some limitations on his lifting and other physical activity. Dr. Holbert, on June 23, 1980, reported claimant's condition was stationary and the claim could be closed. He reported that claimant's back was significantly better now than it had been prior to his fusion. Claimant no longer had any leg trouble but did continue to have some backache in the low back.

On June 26, 1980, the insurance carrier requested a determination of claimant's disability. The Evaluation Division of the Workers' Compensation Department, on August 21, 1980, recommended this claim be closed with additional temporary total disability from November 12, 1979 through June 23, 1980, less time worked, and recommended no additional permanent disability.

The Board, after reviewing the medical reports in this case concurs with the recommendation of the Evaluation Division.

ORDER

Claimant is hereby granted compensation for temporary total disability from November 12, 1979 through June 23, 1980, less time worked. The record indicates that this award has already been paid out.

Claimant's attorney has already been awarded a reasonable attorney's fee by the Own Motion Order, dated July 12, 1979.

WCB CASE NO. 79-69 September 4, 1980

MICHAEL RODMAN, CLAIMANT
Bloom, Ruben, Marandas & Sly,
Claimant's Attys.
Lang, Klein, Wolf, Smith, Griffith
& Hallmark, Employer's Attys.
Order.

On August 7, 1980, claimant, by and through his attorney, moved the Board to receive additional evidence in this case. Claimant contends he is permanently and totally disabled. After the issuance of the Referee's order in this case, claimant was found to be unable to engage in substantial gainful employment within the regional economy by the Social Security Administration. Claimant moved that this

finding, since it could not have been presented at the time of the hearing, be made part of the record in this case.

The employer opposed admission of this evidence. It contends the tests applied in Social Security hearings and Workers' Compensation hearings are different. Further, it contends this evidence was obtainable at the time of the hearing.

The Board, being fully advised in this case, denies claimant's motion. The Board does not find the evidence claimant seeks to have admitted relevant to these proceedings since the test applied in Social Security hearings and Workers' Compensation hearings to determine if a claimant is permanently and totally disabled are different. Therefore, the Board denies claimant's motion.

IT IS SO ORDERED.

CLAIM NO. C 107629 September 4, 1980

LONNIE E. SAPP, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

On December 17, 1967, claimant sustained a compensable injury to his back. His claim was initially closed by a Determination Order and claimant's aggravation rights have expired.

On November 29, 1979, Dr. Nickila reported that he had authorized claimant to stay off work for the entire month of December because of his back condition. He diagnosed claimant's condition as a lumbar strain/sprain.

The Orthopaedic Consultants, in May 1980, reported that claimant's condition was medically stationary. They felt that claimant was not in need of any additional treatment and was capable of performing some type of light work. At the time of their examination, claimant reported no symptoms of any back condition.

The Board, in an Own Motion Order, dated June 20, 1980, reopened this claim as of November 29, 1979 until closed pursuant to ORS 656.278, less time worked, and/or verified time loss due to this injury.

Dr. Spady, on June 17, 1980, reported that he agreed with the Orthopaedic Consultants' report. He indicated that claimant had episodes of low back symptoms that required palliative treatment and that was what he was essentially

receiving at that time. He indicated that claimant's release date to return to work remained as of January 1, 1980. A month later, Dr. Spady indicated that claimant continued to complain of pain in his back although claimant's condition was not significantly worse. Dr. Spady indicated he was willing to treat with a course of physical therapy, but this did not require reopening the claim for a change in claimant's disability status.

On August 8, 1980, SAIF Corporation requested a determination of claimant's disability. The Evaluation Division of the Workers' Compensation Department, on August 20, 1980, recommended this claim be closed with an award of additional temporary total disability from November 29, 1979 through December 31, 1979 and claimant be granted no additional award of permanent partial disability.

The Board, after reviewing the evidence in this file, concurs with the recommendation of the Evaluation Division.

ORDER

Claimant is hereby granted compensation for temporary total disability from November 29, 1979 through December 31, 1979, less time worked. The evidence indicates that this award has already been paid to claimant.

CLAIM NO. D 435663 September 5, 1980

JAMES RUSSELL BRANSON, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On August 26, 1980, the SAIF Corporation forwarded copies of various medical reports in this claim. It advised the Board claimant's aggravation rights had expired and this case was being referred for reopening under the Board's own motion jurisdiction. Claimant, on April 27, 1973, had suffered a compensable injury to his right wrist. He underwent a re-grafting of a non-union of his carpal navicular on July 14, 1980 by Dr. Lynch, who related this surgery to claimant's original injury. SAIF Corporation indicated it did not oppose an Own Motion Order reopening this claim for the surgery.

The Board, after reviewing the material submitted to it, finds the evidence sufficient to warrant reopening of this claim effective the date claimant was hospitalized for the July 14, 1980 surgery for payment of compensation and other benefits provided for by law until closed pursuant to ORS 656.278.

IT IS SO ORDERED.

WCB CASE NO. 78-9807 September 5, 1980

DOROTHY I. BROWN, CLAIMANT
Lyle C. Velure, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

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

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 November 5, 1979, is affirmed.

Board Member Lewis dissents as follows:

I find claimant's claim for aggravation is compensable. The claim for aggravation is clearly supported by the medical report of claimant's treating physician, Dr. Narus, dated February 6, 1979. In that report the statutory requirements of ORS 656.273 are met. Dr. Narus reported that in his opinion, claimant's condition over the last six months had worsened and claimant was no longer able to sustain herself and was unemployable. He further stated that claimant's present low back condition and radiculopathy were aggravated by her industrial injury of July 28, 1975.

I further find that claimant's hospitalization for diagnostic procedure in September 1978 required a claim reopening for compensation for temporary total disability and was related to claimant's 1975 injury. The myelogram performed at that time showed a defect.

There is a difference of opinion in the medical records between Drs. Narus and Weinman, but that difference deals strictly with diagnosis and does not change the compensability status of the claim. Dr. Narus felt claimant's injury of July 27, 1975 caused further herniation of the L4-5 disc. Dr. Weinman, on the other hand, felt the injury did not further herniate the disc but the injury only irritated the pre-existing scar tissue causing pain.

I find no contrary medical evidence against a finding of aggravation, in fact, in Dr. Weinman's deposition he testified claimant's injury, in his opinion, was only a soft tissue injury but may have aggravated the scar tissue.

None of Dr. Weinman's comments go against a finding of aggravation occurring in 1979. For the above reasons I would order compensation for temporary total disability as of September 7, 1978 until hospital discharge and reopen the claim for aggravation as of Dr. Narus' report of February 6, 1979 which is a valid claim for aggravation.

CLAIM NO. C 346551 September 5, 1980

LISETT K. HAGLUND, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On May 1, 1980, claimant requested the Board reopen her claim for her January 6, 1972 back injury under its own motion jurisdiction. This claim had been closed and claimant's aggravation rights have expired. Attached to claimant's request were several medical reports.

Dr. Fagan has followed claimant since 1975. Claimant continued to complain of back pain and leg pain. In April 1978, Dr. Fagan indicated claimant should have a CAT scan. He had noted some osteoporosis in claimant's back.

In December 1979, Dr. Waller hospitalized claimant and performed various tests. A myelogram revealed a "tight constriction of the subarachnoid space centered at the L4-5 disc level". The CT scan was interpreted as lumbar stenosis. On January 21, 1980, Dr. Waller performed a total laminectomy at the L4-5 level. The post-operative diagnosis was L4-5 spondylolisthesis with cauda equina syndrome.

In May 1980, Dr. Fagan reported claimant had less back and leg pain. He felt all of claimant's difficulty was related to her 1972 injury.

The SAIF Corporation, on August 22, 1980, indicated it opposed an Own Motion Order reopening the claim. It contended this claim was established for a temporary exacerbation of a pre-existing condition which had returned to pre-injury status at the time the claim was closed. It did not feel it was responsible for the January 1980 surgery to correct the pre-existing problem.

The Board, after reviewing the material submitted to it, finds the evidence is sufficient to warrant reopening of this claim for the January 1980 surgery. The Board finds

the need for this surgery is related to claimant's 1972 injury. Therefore, the Board orders this claim reopened as of December 5, 1979 for payment of compensation and other benefits provided for by law until closed pursuant to ORS 656.278.

IT IS SO ORDERED.

CLAIM NO. AJ 53-109217 September 5, 1980

HAROLD L. JONES, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

This claim for claimant's February 23, 1966 compensable injury to his right upper extremity was reopened by a February 8, 1980 Own Motion Order. Claimant's aggravation rights have expired. Claimant has received a total award of compensation equal to 130.5° for 90% loss of the right arm.

Claimant has undergone numerous surgeries on his right arm. On January 14, 1980, Dr. McVay performed a "Zancolli capsuloplasty metacarpal phalangeal joints, ring and little finger, right hand". Dr. McVay, on July 23, 1980, reported the claim could be closed. Dr. McVay indicated claimant had no increase in his residual impairment and recommended no additional permanent partial disability. This was based on an April 17, 1980 examination.

On August 5, 1980, Employers Insurance of Wausau requested a determination of claimant's disability. The Evaluation Division of the Workers' Compensation Department, on August 27, 1980, recommended the claim be closed and claimant be granted additional temporary total disability compensation from January 13, 1980 through April 17, 1980, less time worked.

The Board concurs in this recommendation.

ORDER

Claimant is hereby granted compensation for temporary total disability from January 13, 1980 through April 17, 1980, less time worked. The evidence indicates that a portion of that award has already been paid to claimant.

CLAIM NO. A 623922 September 5, 1980

ARNIE PETER, CLAIMANT
W.D. Bates, Jr., Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On July 31, 1980, claimant, by and through his attorney, requested the Board reopen this claim for his July 24, 1957 right ankle injury. This claim was initially closed in March 1958 and claimant's aggravation rights have expired. Attached to claimant's request were several medical reports.

In January 1979, claimant was seen by Dr. Brooke, who reported claimant had increasing pain and soreness in his ankle and "pitting edema up to the tibial tubercles bilaterally". He prescribed medication for claimant and asked this claim be reopened. The arthrodesis of the right ankle was sound. In July 1980, claimant began complaining of right knee pain. The medication had helped claimant.

Dr. Davis opined the right knee problem was due to "degenerative joint disease, medial compartment, right knee, probably secondary to loss of midtarsal and subtalar joint function of the right footankle area". He noted claimant was retiring and opined that he would probably resolve most of his symptoms.

On August 12, 1980, the SAIF Corporation advised the Board it opposed the Board issuing an Own Motion Order reopening this claim.

The Board, after reviewing the evidence submitted to it, does not find the evidence is sufficient to warrant the reopening of this claim at this time. There is no proof claimant is disabled due to his right ankle injury and sequelae or that his condition has worsened since the last award or arrangement of compensation in this case. Therefore, the Board denies claimant's request for own motion relief.

IT IS SO ORDERED.

WCB CASE NO. 80-557 September 8, 1980

LEOTA G.A. OSBORN, 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. 79-8148 September 8, 1980

JAMES A. TAYLOR, CLAIMANT
Ralf H. Erlandson, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

This case is before the Board on claimant's request for review the Referee's order which approved the SAIF Corporation's (SAIF) denial of his claim. Claimant contends he was in the course and scope of his employment at the time of his injury. The Board finds the Referee correctly recited the facts in his order.

The majority of the Board, after de novo review, affirms the Referee's order. The majority of the Board finds that claimant had deviated from the course and scope of his employment and had not returned to it at the time of his injury. The facts indicate the following: (1) claimant's activity in driving the truck to Montana and back did not benefit the employer; (2) his activity was not contemplated by the employer or the employee at the time he was hired or later; (3) the activity was not an ordinary risk of, and incidental to, claimant's employment; (4) claimant was not paid for this activity; (5) the injury did not occur on the employer's premises; (6) the injury did not occur during claimant's scheduled or regular hours of employment; and (7) the employer was not exercising control over claimant or the place where the injury occurred. The evidence further indicates that claimant's trip was for his own personal "mission". At the time of his injury, claimant was returning to the work area, but still was outside of the scope and course of his employment. His personal mission had not

terminated. Claimant was using a vehicle provided for use of the employees at the time of the injury and was returning to the work area to prepare to go to work on what was a non-work day for other employees. Claimant's activity was not directed by, but may have been acquiesced in by, the employer. Weighing all of these facts, the majority of the Board finds the preponderance of the evidence is that claimant was outside the course and scope of his employment at the time of his injury. Therefore, the Referee correctly found this claim not to be compensable.

ORDER

The Referee's order, dated February 15, 1980, is affirmed.

I respectfully dissent from the majority opinion of the Board as follows:

I would reverse the Referee's order and find this claim is compensable as arising out of and in the scope of claimant's employment.

The testimony reveals that Mr. Taylor and his co-worker were going directly to the job site. The employer-owned pickup truck was loaded the night before with the necessary tools and equipment. If, in fact, the cleaning of the lines could have been done on Monday, then both men would not have been going to work on Saturday (normally their day off).

Use of the employer-owned vehicle was a practice acquiesced in by the foreman, who represents the employer. It is my finding that at the time of the injury, claimant's deviation had ended because his sole objective was getting to the employment site. Claimant was within a reasonable distance to the job site and his travel route brought him back within the going and coming rule. Any personal motivation the claimant had at that time had been spent. Also, his traveling at that hour back to the work site was for the sole benefit of the employer.

WCB CASE NO. 79-2581 September 10, 1980

LINDA (WILSON) LEACH, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Order of Dismissal

A request for review and cross-request for review having been duly filed with the Workers' Compensation Board in the above entitled matter by the claimant and SAIF Corporation, respectively, and said request for review and cross-request for review now having been withdrawn,

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

CLAIM NO. C 465282 September 15, 1980

JOYCE BATSON, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant sustained a compensable injury to her back on August 15, 1973. She has requested that her claim be reopened. Because her aggravation rights have expired, the SAIF Corporation referred the matter to the Board for consideration under its own motion jurisdiction.

Dr. John Serbu began seeing claimant in early 1978 for complaints of leg pain. Both at that time and in May 1980 he felt it was difficult to differentiate between the "hysteroid and organic phenomenon" in claimant. On June 27, 1980, Dr. Serbu decided to hospitalize claimant for a myelogram in order to better determine claimant's real problem. He recommended the claimant's claim be reopened for this study. On July 28, 1980, a myelogram was done and the following day Dr. Serbu performed surgery on claimant's back.

The SAIF Corporation advised the Board that it did not oppose a reopening of claimant's claim for the surgery performed by Dr. Serbu.

The Board, after considering the evidence before it, concludes that claimant's claim should be reopened as of the date she entered the hospital for the myelogram and surgery done in July 1980 and until closed pursuant to the provisions of ORS 656.278.

IT IS SO ORDERED.

WCB CASE NO. 79-4186 September 15, 1980

TIMOTHY D. BONTRAGER, CLAIMANT
David Hittle, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

This case is before the Board on the SAIF Corporation's (SAIF) request the Board review the Referee's order which found SAIF was responsible for a $90 medical bill for services rendered by Dr. Moore after December 12, 1978, under ORS 656.245, and awarded claimant's attorney a $200 fee for prevailing on that issue. SAIF contends this was in error.

Claimant injured his back on February 4, 1974 while lifting a cabinet. Dr. Cohen diagnosed this injury as a strained interspinous ligament of the eighth dorsal vertebra. He felt claimant would have some permanent partial disability due to this injury. On May 15, 1975, Dr. Cohen found claimant's condition stationary.

A Determination Order, dated June 5, 1975, awarded claimant temporary total disability compensation.

On September 21, 1977, claimant wrote SAIF stating his condition had worsened. He indicated Dr. Moore felt his back needed additional treatment. Claimant requested his claim be reopened. SAIF advised claimant he could receive medical treatment without reopening his claim. On October 4, 1977, claimant's attorney requested a hearing on the de facto denial. In December 1977, he again wrote SAIF asking his claim be reopened.

On September 25, 1978, the SAIF issued a formal denial of aggravation and on October 9 claimant's attorney amended his request.

On November 27, 1978, Dr. Fax reported he felt claimant's condition was stationary.

A Disputed Claim Settlement, approved December 12, 1978, provided that claimant's requests for hearing raising the issues of temporary total disability, de facto denial,

denial of aggravation, penalties and attorney fees, were dismissed since SAIF agreed to pay claimant and claimant agreed to accept $2,000. The stipulation provided the aggravation claim was settled and in no way affected claimant's future right to file an aggravation claim.

In February 1979, claimant's attorney forwarded to SAIF certain medical bills totalling $442. These bills were for medical treatment provided before and after the stipulation was entered into. SAIF denied responsibility for these bills. It took the position the Disputed Claim Settlement barred claimant from seeking further sums except as provided under ORS 656.273.

The Referee found that a portion of the medical bills were unpaid at the time the stipulation of December 12, 1978 was entered into. The Referee found that the stipulation barred claimant from seeking recovery of the medical bills for treatment prior to the date of the stipulation. However, the Referee found SAIF responsible for $90 for medical services rendered by Dr. Moore after the stipulation and awarded claimant's attorney a fee of $200.

The Board, after de novo review, modifies the Referee's award. ORS 656.245 provides that an injured worker is entitled to medical services as may be required after a determination of permanent disability if they are related to the condition caused by the industrial injury. There was no provision made in this statute for terminating medical services. They run for the life of the injured worker. He cannot stipulate them away and they cannot be taken. The Board finds in this case SAIF is responsible for all the medical services rendered by Drs. Moore and Fax related to claimant's industrial injury. Therefore, the Board modifies the Referee's order and remands the medical bills of Drs. Moore and Fax to SAIF for acceptance and payment.

ORDER

The Referee's order, dated November 27, 1979, is modified.

The medical bills of Drs. Moore and Fax are remanded to SAIF for acceptance and payment under the provisions of ORS 656.245.

Claimant's attorney is hereby granted as a reasonable attorney's fee a sum equal to 25% of the medical bills claimant is relieved of paying as a result of this order.

The remainder of the Referee's order is affirmed.

CLAIM NO. C 454856 September 15, 1980

RAYMOND N. CROOKS, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On August 29, 1980, the SAIF Corporation forwarded to the Board severeal medical documents in regard to claimant's July 24, 1973 industrial injury claim. It indicated that claimant's aggravation rights had expired and it would not oppose reopening the claim under the Board's own motion jurisdiction.

On August 11, 1980, Dr. John Maxwell, a neurosurgeon, indicated claimant was complaining of left medial scapular pain, some pain in the left shoulder and his left arm "feels like it's asleep in the distribution of C6-7". He related this to the 1973 industrial injury and resulting surgeries. He recommended that a myelogram be done and that he undergo a C6-7 anterior cervical fusion for the pain and discomfort.

The Board, after considering the evidence before it, concludes that claimant's claim for his July 24, 1973 injury should be reopened as of the date he enters the hospital for the treatment and surgery recommended by Dr. Maxwell and until closed pursuant to the provisions of ORS 656.278.

IT IS SO ORDERED.

CLAIM NO. BC 374097 September 15, 1980

ROBERTA F. CALVIN HENDERSON, CLAIMANT
SAIF, Legal Services, Defense Atty.
Amended Own Motion Determination

The Board, on September 4, 1980, issued an Own Motion Determination which granted claimant an award of temporary total disability from January 28, 1980 through July 23, 1980 less time worked and compensation equal to 96° for 30% unscheduled low back disability. This was in addition to any previous awards. Claimant was hospitalized on January 28, 1980 for a myelogram. She was discharged on February 2, 1980. The Board previously had issued an Own Motion Order reopening this claim effective the date claimant was hospitalized prior to her April 18, 1980 surgery. The Board amends its September 4, 1980 order and grants claimant an award of temporary total disability compensation from January 28, 1980 through February 2, 1980 and from April 17, 1980 through July 23, 1980.

The Board notes that claimant's married name is Henderson and the September 4, 1980 Own Motion Determination should be amended to show that name.

IT IS SO ORDERED.

CLAIM NO. 3W-109357 September 15, 1980

WALLACE E. JOHNSON, CLAIMANT
Galton, Popick, & Scott, Claimant's Attys.
Lang, Klein, Wolf, Smith, Griffith & Hallmark, Employer's Attys.
Own Motion Order

On July 2, 1980, claimant, by and through his attorney, requested the Board exercise its own motion jurisdiction and reopen his claim for an injury sustained on March 1, 1974. Claimant's claim was initially closed on March 18, 1975 and his aggravation rights have expired. Attached to his request were supporting medical reports, including the operative report for surgery performed by Dr. Gritzka on May 16, 1980.

Although it was obvious that claimant had a badly degenerated back, the evidence did not conclusively connect claimant's present problems with his 1974 industrial injury. The carrier, by and through its attorney, felt that until such proof was made available, the request for own motion reopening should be denied.

On August 15, 1980, Dr. Gritzka advised claimant's attorney that his problem was due, in part, to degenerative arthritis of the lumbar spine. He felt that claimant's "underlying degenerative back condition was rendered permanently symptomatic by the injury of 1974". He stated that the 1974 injury triggered the problem which resulted in the need for surgery in May 1980.

The carrier was still unable to agree that the claim should be reopened and requested that the matter be set for a hearing.

The Board, after thorough consideration of the evidence before it, finds that claimant's claim should be reopened as of the date he was hospitalized for the May 16, 1980 surgery and until closed pursuant to the provisions of ORS 656.278. Claimant's attorney is entitled to a 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. 78-10,285 September 16, 1980

ELDON J. NELSON, CLAIMANT
Bodie, Minturn, Van Voorhees,
Larson & Dixon, Claimant's Attys.
Lang, Klein, Wolf, Smith, Griffith
& Hallmark, Employer's Attys.
Request for Review by Employer

This case is before the Board on the employer's request that it review the Referee's order which set aside the employer's denial of this claim and remanded the claim to it for processing and payment of all compensation due claimant by law and awarded claimant's attorney a fee. The employer contends that claimant suffered intervening injuries which relieved it of responsibility for claimant's current condition.

Claimant, on April 5, 1977, while employed by this employer, was injured when while trying to pry a log with a peavy, the log rolled back striking claimant knocking him down against the trunyons. Claimant was taken to the hospital and his injury was diagnosed as a contusion of the left flank. Claimant missed approximately a week of work and then left employment with this employer. Claimant stated that after his original injury his back would occasionally flare up with minor back pain.

In December 1977, claimant went to Dr. Bylund complaining of increasing back pain. Dr. Bylund reported that immediately after his original injury, claimant had had a little tingling in his left leg, but had none since that time. Claimant had sought treatment from Dr. Bylund because he was having difficulty sleeping in a trailer. Dr. Bylund suggested claimant use a firm mattress and prescribed some Soma Compound for his use.

In early January 1978, Dr. Bylund reported claimant still was complaining of back pain. He felt that claimant might have bilateral spondylosis or some type of other low back disturbance. He prescribed a back brace for claimant.

On February 1, 1978, Dr. Carter reported that claimant was complaining of constant numbness in his left leg, a tingling sensation with intermittent severe cold sensation in the left leg, night pain which was aching in character and interupted his sleep and pain in the mid-back and upper lumbar region of the back. Dr. Carter felt claimant had

unilateral spondylosis with sclerosis of the opposite pars interarticularis.

Claimant testified that approximately three weeks after his initial injury he had began working for a Mr. Corriea who operated High Line Logging. Sometime in May 1978, claimant was operating a skidder when a load of logs struck a stump, causing the skidder the turn over.

On May 17, 1978, claimant returned to Dr. Carter. He advised Dr. Carter that approximately a week prior to his seeing the doctor he had rolled the skidder and in so doing he felt that he had twisted or strained his back which caused an increase in his back pain. Claimant reported that he had recurrent back pain which had been worse recently. Dr. Carter diagnosed increased mechanical low back pain related to a unilateral spondylosis. Dr. Carter felt that the claimant's pain was directly related to a new accident and was not specifically a continuation of claimant's original industrial injury. Claimant indicated that he missed a few days from work because of this incident.

Claimant returned to Dr. Carter indicating that on August 28, 1978, while working on a car for his boss, Mr. Corriea, he had bent over and attempted to lift a heavy car part and developed pain in his low back. Dr. Carter felt that this condition was probably directly related to a "new accident" and not specifically a continuation of the original industrial injury.

Dr. Franklin, in February 1978, found that claimant had a normal neurological examination with a history that was only slightly reminiscent of mild lumbosacral radiculopathy with numbness, which at times extends into the L5, S1 distribution of the left leg. He noted claimant's family had a history of severe anxiety and he felt that part of claimant's problem was related to this.

On November 29, 1978, the Workers' Compensation insurance carrier for this employer denied responsibility for this claim based on the fact that claimant's current condition did not arise out of or in the course of his employment with this employer.

In August 1979, Dr. Carter, in response to written questions from the employer's attorney, indicated that the skidder accident contributed to claimant's increased pain and disability. He also indicated that in terms of medical probability, claimant may have had increased pain as a result of the original accident but in terms of probability "more probable with a new incident". Dr. Carter made this response to the question asking if what he found on his examination in May of 1978 was an inevitable consequence of the original industrial accident and if it would have occurred regardless of the skidder accident.

Claimant and his wife testified that he had continuing low back pain of varying intensity with left leg pain, tingling and numbness after his April 1977 injury. They indicated that this pain gradually worsened to the point causing him to seek medical help. Claimant stated that he missed work because of this in late 1977. Claimant denied being injured in the skidder incident. He said he was not bounced about the inside of the cab of the vehicle and did not strike any part of the cab's interior. He said he did notice an increase of pain immediately after the incident and lasting approximately four to five days. Claimant did not feel that this pain was greater than that he had experienced on other occasions after his original injury. He indicated that after four or five days the pain level returned to his pre-existing level. Claimant also denied any incident lifting a car part and injuring his back.

The Referee, after reviewing all the evidence, concluded that claimant's current condition was related to his original injury. Therefore, the Referee set aside the denial of the employer and remanded the claim back to it for processing and payment of all compensation due claimant and awarded claimant's attorney a fee.

The Board, after de novo review, reverses the Referee's order. The Referee cited the case of Weller v. Union Carbide, 288 Or 27, _____ P2d _____ (1979), as support for his decision that no new injury occurred. The Board does not find that the Weller case is applicable to this case. The Weller case involves an aggravation of an occupational disease. This case involves the question of whether claimant suffered a new injury or an aggravation and, therefore, the Weller case is not relevant.

The Board finds that the law which controls in this case is set forth in the case of Smith v. Ed's Pancake House, 27 Or App 361, 556 P2d 158 (1976). The evidence, in the Board's opinion, indicates that claimant had suffered three distinct injuries. The April 1977 injury was the responsibility of this employer. However, subsequent to this injury, claimant suffered two additional injuries to his back. The Board finds that these injuries contributed independently to the injury and are the responsibility of claimant's employer High Line Logging. The Board arrives at this conclusion applying the last injurious exposure rule as set forth in the Smith case. The Board also relies upon the opinion of Dr. Carter who indicates that after the May 1978 injury and August 1978 injury that he saw claimant and indicated that he felt these were new injuries and were not related to claimant's April 1977 injury. The Board finds that the denial of this employer should have been affirmed. Therefore, the Board reverses the Referee's order and orders that the denial of this employer be reinstated and affirmed.

ORDER

The Referee's order, dated December 13, 1979, is reversed in its entirety.

The denial of Echo Lumber Company, entered by its insurance carrier, dated November 29, 1978, is reinstated and affirmed.

WCB CASE NO. 78-431 September 17, 1980

NORMAN ANLAUF, CLAIMANT
Malagon & Yates, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

This case is before the Board on the SAIF Corporation's (SAIF) request it review an order entered by the Presiding Referee granting claimant's attorney a fee of $5,500.00. SAIF contends this award of attorney fees is excessive.

The Board refuses to review this case. The sole issue raised by SAIF is the amount of attorney fees awarded by the Presiding Referee. ORS 656.388(2) provides that, "If an attorney and the referee or board cannot agree upon the amount of the fee, each forthwith shall submit a written statement of the services rendered to the presiding judge of the circuit court in the county in which the claimant resides. The judge shall . . . . determine the amount of such fee". The Board cannot review this issue. The proper forum to resolve this issue is the circuit court of the county in which claimant resides. Therefore, the Board denies SAIF's request it review this case.

ORDER

The SAIF Corporation's request for Board review is dismissed.

WCB CASE NO. 77-6519 September 17, 1980

ADRIAN T. BOYCE, CLAIMANT
Bloom, Ruben, Marandas, Berg, Sly & Barnett, Claimant's Attys.
McMenamin, Joseph, Herrell & Paulson, Employer's Attys.
Order On Remand

The Board, in its December 12, 1978 Order on Review, reduced the award of 60° for 40% loss of use of claimant's left hand granted by the Referee to 22.5° for 15% loss of use of his left hand, the amount granted by the Determination Order. The Court of Appeals, in an opinion filed February 5, 1980, reversed the Board and indicated it concurred with the findings of the Referee that claimant should be awarded 60° for 40% loss of use of his left hand.

In a judgment and mandate, dated March 21, 1980, the Court of Appeals remanded this case to the Board for further proceedings consistent with its earlier decision and opinion. In an amended judgment and mandate, dated April 21, 1980, the Court reversed and remanded this case to the Board to consider an award of attorney fees and the method of payment and for further proceedings pursuant to law and its earlier decision and opinion in this case.

The Board, after reviewing this case with the guidance provided by the Court of Appeals, reverses its December 12, 1978 order and reinstates the Referee's order, dated June 2, 1978, and affirms it. Claimant's attorney is entitled to a fee equal to 25% of the increased compensation granted by this order.

IT IS SO ORDERED.

CLAIM NO. 03 74 1314 September 17, 1980

PATTY CHRISTY, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On July 1, 1980, claimant requested this claim be reopened under the Board's own motion jurisdiction. Claimant had suffered a compensable injury to her left knee on April 20, 1974 and her aggravation rights have expired. Claimant indicated she has had continuing problems with her knee.

In August 1980, Dr. McKay reported claimant had undergone surgery in June 1979 to advance this patellar tendon

and a patellar shaving. He related the need for this surgery to claimant's 1974 injury.

Dr. Tejano, also in August 1980, reported claimant had not undergone an arthrogram or arthroscopy of her knee prior to surgery to rule out a torn medial meniscus. Claimant had been hospitalized on July 2, 1980 and an arthrogram revealed a torn medial meniscus of the left knee, which was subsequently surgically repaired. Dr. Tejano felt, based on claimant's history, he could not rule out that this condition was related to claimant's original injury.

The insurer, in September 1980, advised the Board it agreed claimant's need for the surgery in July 1980 was related to claimant's 1974 injury.

The Board, after reviewing the material in the file, concludes this claim should be reopened effective the date claimant was hospitalized for the July 14, 1980 surgery for payment of compensation and other benefits provided for by law until closed pursuant to ORS 656.278.

IT IS SO ORDERED.

WCB CASE NO. 79-683 September 17, 1980

JEFFREY DEBNAM, CLAIMANT
Jerry Gastineau, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

This case is before the Board on claimant's and the SAIF Corporation's (SAIF) request that the Board review the Referee's order which granted claimant an additional 10% unscheduled disability for the vascular problems and resultant functional problems stemming from the injury of August 3, 1977 and granted claimant's attorney a fee. Claimant contends this award of compensation was not sufficient. SAIF contends the award of compensation was excessive.

The Board finds the Referee correctly set forth the facts in her order.

The Board, after de novo review, reverses the Referee's order. The medical evidence in this case does not support the award of additional compensation granted by the Referee. The Board does not find the medical evidence to be persuasive that claimant is disabled from performing the jobs he has previously done. The Board finds the Determination Order correctly compensated claimant for any loss of wage earning capacity he suffered due to this incident. Therefore, the

Board reverses the Referee's order in its entirety, reinstates and affirms the December 29, 1978 Determination Order.

ORDER

The Referee's order, dated November 15, 1979, is reversed in its entirety.

The December 29, 1978 Determination Order is reinstated and affirmed.

WCB CASE NO. 76-6467 September 17, 1980

EARL HUTCHESON, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary, Claimant's Attys.
Schwabe, Williamson, Wyatt, Moore & Roberts, Employer's Attys.
Order On Remand

On June 1, 1977, the Referee entered an Opinion and Order which affirmed the carrier's denial of claimant's claim for an occupational disease. On January 31, 1978, the Board reversed the Referee and remanded claimant's claim to the carrier for acceptance and payment of compensation to which he was entitled. The Court of Appeals reversed the Board finding that claimant failed to establish that his work originally caused or materially worsened his condition. The Supreme Court, after a thorough review of this case, finds that the Referee and the Court of Appeals should be reversed. It referred the case back to the Board with instructions that the Board affirm its order entered on January 31, 1978. This order is in accordance with that directive.

ORDER

The Order on Review, entered on January 31, 1978, is hereby affirmed and reinstated.

WCB CASE NO. 79-7663 September 17, 1980

DALE E. IRELAND, CLAIMANT
Bloom, Ruben, Marandas & Sly,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF
Cross-appeal by Claimant

This case is before the Board on the SAIF Corporation's (SAIF) and claimant's request that the Board review the Referee's order which affirmed SAIF's denial of claimant's cervical condition and reversed its denial of claimant's aggravation claim. SAIF contends claimant failed to prove by a preponderance of the evidence his condition has materially worsened since the last award or arrangement of compensation pursuant to ORS 656.273. Claimant contends in his cross-appeal that SAIF's denial of his cervical condition was incorrect and should be set aside. The Board finds the Referee correctly set forth the facts in his order.

The Board, after de novo review, modifies the Referee's order. The Board concurs with the Referee that claimant failed to prove his cervical problems were a compensable consequence of his low back injury and affirms SAIF's denial of that condition.

The Board does not find claimant has proven an aggravation claim. His injury has been diagnosed as a low back strain. The last award or arrangement of compensation made in this case was the March 12, 1979 stipulation which granted claimant a permanent partial disability award. In June 1979, Dr. McIlvaine reported claimant had continuing back pain and related claimant's condition to his original injury. Dr. McIlvaine indicated claimant could return to his regular employment and felt claimant would have no permanent impairment. Temporary total disability was paid for the time claimant lost from work.

Dr. Noall, who had examined claimant in 1978, in July 1979, reported claimant had never been pain-free in his lumbar spine area and felt claimant's current symptoms in the low back represented a temporary increase in claimant's pain related to a chronic lumbosacral strain. This pain was described as "waxing and waning" over a several month period of time. Dr. Noall recommended claimant resume an exercise program.

In August 1979, Dr. McIlvaine reported claimant's condition had improved. He felt any connected impairment would be minimal.

ORS 656.273 requires that if the evidence as a whole shows a worsening of the claimant's condition the claim for

aggravation shall be allowed. The evidence in this case does not indicate claimant's condition has worsened. Drs. McIlvaine and Noall do not indicate claimant's condition has worsened nor is there any medical treatment recommended. Only claimant indicates he feels his condition has worsened. Based on the record in this case, the Board finds claimant has failed to prove by a preponderance of the evidence his aggravation claim. Therefore, the Board orders that that portion of the Referee's order which set aside SAIF's denial of claimant's aggravation claim and remanded it to the SAIF be reversed and the denial be reinstated and affirmed.

ORDER

The Referee's order, dated February 27, 1980, is modified.

That portion of the Referee's order which set aside the SAIF Corporation's denial and ordered it to accept claimant's aggravation claim and provide to him the benefits provided for by law and granted claimant's attorney a fee of $500 is reversed.

The SAIF Corporation's denial of claimant's aggravation claim, dated August 19, 1979, is reinstated and affirmed.

The remainder of the Referee's order is affirmed.

WCB CASE NO. 79-5913 September 17, 1980

ALEX LOPEZ, CLAIMANT
Grant, Ferguson & Carter,
Claimant's Attys.
Keith D. Skelton, Employer's Atty.
Request for Review by Employer

This case is before the Board on the employer's request that it review the Referee's order which granted claimant an award of compensation for permanent and total disability and awarded claimant's attorney a fee. The employer contends claimant is not permanently and totally disabled.

The Board finds the Referee correctly recited the facts in his order.

The Board, after de novo review, modifies the Referee's order. The preponderance of the medical evidence is that claimant has mildly moderate to moderate impairment because of this injury. The Board finds the medical evidence by itself does not establish that claimant is permanently and totally disabled. Therefore, the Board must consider other factors to determine claimant's loss of wage earning capacity.

Claimant has a third grade education and is functionally illiterate. He has worked as a farm laborer and as a laborer in a lumber mill. Claimant is unable to return to these types of work.

Since this injury claimant has obtained some part-time jobs. However, claimant has not sought regular full-time employment. Nor has he sought vocational rehabilitation or job placement services. The Board finds claimant has failed to establish he has willingly sought regular gainful employment or that he has made reasonable efforts to obtain such employment as required by ORS 656.206(3). The Board finds claimant has failed to prove he is permanently and totally disabled and the Referee's order in that regard is reversed.

However, after reviewing all the evidence, the Board finds claimant has lost more of wage earning capacity than that for which he was compensated by the Determination Order. Considering all the evidence in this case, the Board concludes claimant has lost 50% of his wage earning capacity. Therefore, claimant is granted an award of compensation equal to 160° for 50% for his neck injury. This is in lieu of any previous unscheduled disability award for this injury.

ORDER

The Referee's order, dated February 28, 1980, is modified.

The Referee's award of compensation for permanent total disability effective January 24, 1980 is reversed.

Claimant is hereby granted an award equal to 160° for 50% unscheduled neck disability. This award is in lieu of any previous awards for unscheduled disability claimant has been granted for this injury.

The remainder of the Referee's order is affirmed.

CLAIM NO. B104 C 325882 September 17, 1980

FRANCIS M. VASBINDER, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

On February 8, 1977, the Board ordered this claim reopened effective the date claimant entered the hospital for surgery on his right leg that had been recommended by Dr. Schachner. Claimant had suffered a compensable right leg injury on July 31, 1967 and his aggravation rights have expired.

On June 19, 1977, claimant was hospitalized and on June 20, 1977 Dr. Schachner performed a high tibial osteotomy. Claimant continued to have difficulty with his knee and on January 31, 1979 underwent a fusion of the right knee. Dr. Schachner had, on November 13, 1979, reported claimant's condition was stationary. Claimant has not returned to work.

The Fireman's Fund, on August 12, 1980, requested a determination of claimant's disability. It had paid temporary total disability compensation to claimant up to that date. The Evaluation Division of the Workers' Compensation Department, on September 3, 1980, recommended claimant be granted additional temporary total disability from June 19, 1977 through August 12, 1980 and additional permanent partial disability equal to 30° for 20% loss of function of the right leg.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted compensation for temporary total disability from June 19, 1977 through August 12, 1980 and compensation equal to 30° for 20% loss of function of the right leg. These awards are in addition to any previous awards claimant has been granted for this injury, although the evidence indicates that most of the temporary total disability compensation has already been paid to claimant.

WCB CASE NO. 79-6086 September 17, 1980

MARY E. WOLDEIT, CLAIMANT
Galton, Popick & Scott, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF
Cross-appeal by Claimant

This case is before the Board on the SAIF Corporation's (SAIF) and claimant's request that the Board review the Referee's order which found: (1) SAIF had not timely paid temporary total disability compensation; (2) assessed a penalty and attorney fee for the late payment of temporary total disability; (3) approved SAIF's June 14, 1979 denial; and (4) dismissed claimant's request for hearing. SAIF had moved prior to the hearing that claimant's request for hearing be dismissed because claimant had indicated in writing she did not wish to proceed with the hearing. SAIF contends the Referee lacked jurisdiction to conduct the hearing. Claimant's attorney contends SAIF's denial should be set aside.

The Board, after de novo review, finds SAIF's motion to dismiss should have been granted. ORS 656.283(2) states that a request for "hearing may be made by any writing, signed by or on behalf of the party and including his address, requesting the hearing, stating that a hearing is desired, and mailed to the board". Claimant had retained an attorney in this case to represent her. She indicated she advised her attorney she did not wish a hearing.

On November 20, 1979, in a letter addressed to the Referee, signed by clamant, with her address under her signature, claimant advised the Referee she did not wish to have a hearing. The Board finds that claimant withdrew her request for hearing in this case. Since ORS 656.283(2) sets forth the requirement that must be met to request a hearing, it follows that to withdraw a request for the hearing the same requirements would apply. The Board concludes in this case claimant withdrew her request for hearing. Therefore, the Referee did not have jurisdiction to conduct the hearing and the Board reverses his order and grants SAIF's motion. Based on this finding, the Board does not reach the other issue raised.

ORDER

The Referee's order, dated January 25, 1980, is reversed.

The SAIF Corporation's motion to dismiss is granted.

CLAIM NO. C 350034 September 18, 1980

GERALD D. HAKOLA, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On September 2, 1980, the SAIF Corporation (SAIF) forwarded to the Board various information involving this claimant. SAIF advised the Board claimant's aggravation rights had expired and it would not oppose an Own Motion Order reopening this claim for temporary total disability compensation which it had already paid in Claim No. D 428104. SAIF requested the Board also issue a "closing order" because claimant's condition was again stationary.

On January 25, 1972, claimant injured his back. Dr. Kiest, on December 11, 1979, reported claimant had had "an acute exacerbation of his back difficulty without intervening history." Dr. Kiest indicated claimant's condition had worsened since November 1979 and requested the claim be

reopened. Claimant stopped working on December 8, 1979. Dr. Kiest recommended physical therapy and medication for claimant.

Claimant received physical therapy treatment and was released for work as of June 7, 1980 by Dr. Kiest. Claimant returned to work as a barber on a part-time basis. Dr. Kiest related claimant's back problem to his "old" injury. He felt claimant would have to change jobs, have surgery on his back or "put up" with his present condition. Dr. Kiest reported claimant was medically stationary as of April 21, 1980, but was not vocationally stationary.

In July 1980, the Orthopaedic Consultants opined claimant's condition was medically stationary. They felt the claim could be closed. It was their opinion claimant could continue to perform his same occupation with limitations or perform some other occupation. Vocational assistance was not recommended. They rated the impairment of claimant's back as minimal due to this injury.

The Board, after reviewing the evidence submitted to it, orders this claim reopened effective December 8, 1979 for payment of compensation and other benefits provided for by law. The Board finds claimant's condition was medically stationary as of April 21, 1980 and orders this claim closed as of that date. The Board finds claimant is entitled to additional compensation equal to 32° for 10% unscheduled disability for this incident.

ORDER

Claimant is hereby granted compensation for temporary total disability from December 8, 1979 through April 21, 1980; less time worked and compensation equal to 32° for 10% unscheduled back disability resulting from his January 25, 1972 injury. These awards are in addition to any previous awards claimant has been granted for this injury.

CLAIM NO. BC 374097 September 18, 1980

ROBERTA F. CALVIN HENDERSON, CLAIMANT
SAIF, Legal Services, Defense Atty.
Amended Own Motion Determination

An Amended Own Motion Determination was issued by the Board on September 15, 1980. An error in the order has been brought to the attention of the Board and should be corrected. In the first paragraph, line four, "96° for 30%" should be changed to read "64° for 20%". The remainder of the order should be affirmed.

IT IS SO ORDERED.

WCB CASE NO. 78-9577 September 18, 1980

CLIFFORD P. JONES, CLAIMANT
Velure, Heysell & Pocock, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Claimant seeks Board review of the Referee's order which approved the motion to dismiss and denied claimant's requested relief.

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 March 13, 1980, is affirmed.

Board Member Lewis dissents as follows:

I would reverse the order of the Referee and find claimant has appeal rights still running from the Determination Order on Reconsideration.

Claimant was granted an award of 65% in April 1976 and drew compensation from this award for a short time and then his claim was reopened. The claim was finally closed again by a Second Determination Order, dated March 29, 1978, which only granted claimant compensation for further temporary total disability. Claimant requested a lump sum payment from the balance of the award granted by the April 1976 Determination Order. Approval of the lump sum payment was made on April 11, 1978. Around the same time that claimant requested a lump sum payment he also asked for reconsideration of the March 29, 1978 Second Determination Order.

The Administrative Determination Order on Reconsideration, dated May 18, 1978, affirmed the March 1978 Determination Order but granted claimant one year appeal rights.

I feel claimant did lose his right to appeal the March 1978 Determination Order by requesting and receiving a lump sum payment but I find claimant is entitled to appeal the Administrative Determination Order on Reconsideration of May 18, 1978.

CLAIM NO. 425 September 18, 1980

ARCHIE F. KEPHART, CLAIMANT
Starr & Vinson, Claimant's Attys.
Cheney & Kelley, Employer's Attys.
Amended Own Motion Order

On September 4, 1980, the Board issued an Own Motion Order granting claimant temporary total disability compensation from the date he was hospitalized for surgery in July 1979 until the claim was closed pursuant to ORS 656.278 and awarded claimant's attorney a fee equal to 25% of the increased compensation granted by that order not to exceed $750.

The employer, on September 5, 1980, pointed out claimant did not undergo surgery in July 1979. It contended the issue of temporary total disability compensation was not litigated and questioned the Board's award of an attorney fee. The employer requested the Board modify its order. Claimant's attorney responded contending the Board's order was correct in all respects.

The Board, after reviewing this file, amends its order. Claimant did not undergo any surgery in 1979. At the hearing, claimant contended he was entitled to temporary total disability compensation from July 1979 to approximately October 15, 1979. Claimant had been hospitalized on July 11, 1979 for diagnostic testing. Dr. Smith reported claimant's condition on August 15, 1979 was again medically stationary. Based on this evidence, the Board modifies its earlier order and orders this claim reopened July 11, 1979. The Board finds claimant's condition was again medically stationary on April 15, 1979. Therefore, claimant is entitled to an award of additional temporary total disability compensation from July 11, 1979 through August 15, 1979. Further, the Board modifies its award of attorney fees in this case and grants claimant's attorney a fee equal to 25% of the additional temporary total disability compensation granted by this order, not to exceed $250.

ORDER

The Board's Own Motion Order, dated September 4, 1980, is modified.

The order portion of that order is set aside.

Claimant is hereby granted an award of additional temporary total disability compensation from July 11, 1979 through August 15, 1979.

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 $250.

WCB CASE NO. 78-4992 September 18, 1980

LESTER E. SHOLES, CLAIMANT
Carney, Probst & Cornelius,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

This case is before the Board on claimant's request the Board review the Referee's order which affirmed the Determination Order award of compensation equal to 64° for 20% unscheduled disability for his low back injury. Claimant contends he is permanently and totally disabled or his disability exceeds the 20% unscheduled disability granted by the Determination Order. The Board finds the facts as recited by the Referee in his order are correct.

The Board, after de novo review, modifies the Referee's order. Claimant is now 59 years old and has an eighth grade education. He has worked as a truck driver, gas-engine repairman, heavy equipment operator, building maintenance man, welder, and at various jobs in the steel industry from clean-up work to order filling and operating steel cutting machinery.

The medical evidence indicates claimant's impairment was rated from mild to moderate and he was precluded from his regular occupation. Limitations placed on him physically were no heavy lifting. All of claimant's past work experiences have involved manual labor. Claimant does lack motivation for retraining or a return to work. The Board finds claimant is not permanently and totally disabled.

Considering all the other relevant factors, including claimant's age, education, prior work experience, and motivation, the Board finds claimant's loss of wage earning capacity is greater than that for which he has been compensated. The Board finds claimant is entitled to an award of compensation equal to 128° for 40% unscheduled disability for this back injury. This award is in lieu of all previous awards of unscheduled disability for this injury.

ORDER

The Referee's order, dated January 29, 1980, is modified.

Claimant is hereby granted compensation equal to 128° for 40% unscheduled disability for his back injury. This award is in lieu of previous awards of unscheduled disability for this injury.

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. 79-2182 September 19, 1980

DANIEL W. BEAVERS, CLAIMANT
Schwabe, Williamson, Wyatt, Moore
& Roberts, Claimant's Attys.
Lang, Klein, Wolf, Smith, Griffith
& Hallmark, Employer's Attys.
Request for Review by the SAIF
Cross-appeal by Claimant

The SAIF Corporation seeks Board review of the Referee order which found it responsible for claimant's claims of aggravation for the period January 1979 and November 1979. Time loss, penalties and attorney's fees were assessed against SAIF. EBI's denial was affirmed and that portion of the claim was dismissed. Claimant cross-appeals, contending he is entitled to penalties and attorney's fees for the unreasonable denial of April 1979 and November 1979.

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 January 28, 1980, is affirmed.

Claimant's attorney is hereby granted as a reasonable attorney's fee a sum equal to $350, payable by the SAIF Corporation.

Board Member McCallister dissents as follows:

I would modify the Referee's order.

Claimant's original injury occurred on December 9, 1974 and he was found medically stationary in November 1975 and his claim was closed January 2, 1976. From February 2, 1976 through February 8, 1979 clamant lost no time from work because of this injury. On April 1, 1976, EBI became the employer's workers' compensation carrier.

On February 9, 1979, claimant was put on the glue machine in much heavier work than he had been doing as a leadman. On that date, claimant was forced to seek medical care for low back pain. SAIF, the carrier at the time of the December 1974 injury, voluntarily paid claimant compensation for temporary total disability from February 9 through March 23 even though claimant was off work only from February 9 through March 12.

On April 13, 1979, the Fund denied claimant's claim for aggravation. On July 5, 1979, EBI denied claimant's claim for a new injury.

Claimant returned to work on March 13, 1979 and missed no further time from work until November 12, 1979.

On August 8, 1979, the Compliance Division issued a .307 order designating SAIF as the paying agent for the claimed February 1979 injury. However, as of the .307 order's issuance, there was no time loss due or owing.

When claimant returned to work on March 13 he was again given the leadman job and continued performing this work until November 1979. Claimant was then placed on a job sawing shake panels to make gazebos and holding a skil saw up in the air brought on back problems again and claimant sought medical care.

On November 30, 1979 SAIF denied any compensability.

It is my finding that there is no compensation for temporary total disability due or payable by the Fund pursuant to the .307 order. I further find that the .307 order issued in August 1979 is not applicable to the November 1979 injury and SAIF timely denied the claim. EBI issued no denial and paid no beneifts.

I find the Referee's ordering penalties and attorney fees against the Fund was in error as claimant missed no time from work from March 13, 1979 through November 11, 1979.

I do find claimant's work incidents of February 1979 and November 12, 1979 are aggravations of his original injury of December 1974 and SAIF is responsible for payment of benefits as required by law.

CLAIM NO. C 174885. September 19, 1980

DOWEL DICKINSON, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On September 16, 1980, the SAIF Corporation (SAIF) forwarded to the Board various medical reports concerning this claim. SAIF indicated claimant's aggravation rights had expired and it was referring this claim to the Board for consideration under the Board's own motion jurisdiction.

Dr. Thrasher, on August 19, 1980, removed a Smith-Peterson nail which had been used in the treatment of

claimant's original injury. SAIF advised the Board it did not oppose an Own Motion Order reopening this claim.

The Board, based on the information submitted to it, finds the evidence sufficient to warrant the reopening of the claim effective the date claimant was hospitalized for his August 19, 1980 surgery for payment of compensation and benefits provided for by law until closed pursuant to ORS 656.278.

IT IS SO ORDERED.

WCB CASE NO. 78-7527 September 19, 1980

GERALD C. FREEMAN, CLAIMANT
Galton, Popick & Scott, Claimant's Attys.
Lang, Klein, Wolf, Smith, Griffith & Hallmark, Employer's Attys.
Order

The Board had referred claimant's request that the Board reopen the claim for his 1969 injury to the Hearings Division to be consolidated with a pending case on a denial of a new injury. The Referee was ordered to determine if claimant's current condition presented an aggravation of his 1969 injury or was due to a new injury.

A hearing was held and the Referee found claimant's current condition represented an aggravation of the 1969 injury. The SAIF Corporation (SAIF) is the responsible carrier for the 1969 injury. SAIF appealed the Referee's Opinion and Order.

The Referee recommended the Board exercise its own motion jurisdiction and reopen the claim for the 1969 injury.

In this case, the Board will withhold issuing an Own Motion Order until it can review the record developed at the hearing and the contentions of the parties regarding SAIF's request for review. The Board feels it would be unjust to issue an Own Motion Order and then review the issues raised by SAIF. The Board's ruling in the other case will resolve the own motion case as well. Therefore, the Board will not issue an Own Motion Order until it has reviewed the other case (WCB Case No. 78-7527).

IT IS SO ORDERED.

WCB CASE NO. 78-730 September 19, 1980

LINDA LEE HARRY, CLAIMANT
Evelyn Scott Ferris, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order

On September 5, 1980, claimant, by and through her attorney, requested the Board remand this claim to the Referee for the presentation by claimant of further testimony which was not available at the time of the hearing. An affidavit of claimant's attorney and a medical report from Dr. Rea were attached to her request.

The Board, after reviewing claimant's motion, her attorney's affidavit, and Dr. Rea's report, denies her request. There is no explanation of what new evidence claimant contends should be considered by the Referee. Further, no mention is made of why this new evidence was not available at the time of the hearing.

Claimant also contends she is now able to travel to Oregon to be examined by the employer's doctors and was not able to do so prior to the hearing. The employer's doctors all indicated that without being able to examine claimant they could not make a positive diagnosis. This information was available to claimant prior to the hearing. Claimant proceeded to the hearing where the Referee affirmed the employer's denial of her occupational disease claim. The Board does not feel that in such case claimant is entitled obtain additional evidence after failing to obtain a decision in her favor and relitigate the same issue again. Therefore, the Board denies claimant's request.

ORDER

Claimant's September 5, 1980 request that the Board remand this case to the Referee for the presentation by claimant of further testimony and evidence is denied.

CLAIM NO. C 435832 September 19, 1980

ROBERT E. KENNEDY, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On September 11, 1980, the SAIF Corporation (SAIF) forwarded to the Board various information in this claim. SAIF indicated claimant had originally sustained a compensable injury on April 13, 1973 and his aggravation rights

had expired. SAIF referred this claim to the Board to consider it under the Board's own motion jurisdiction. SAIF indicated it opposed an Own Motion Order reopening this claim since there was no indication claimant's condition had worsened since the last arrangement of compensation.

The medical reports indicate claimant has continuing back pain. The Orthopaedic Consultants and Dr. Becker do not report claimant's condition has worsened. The Orthopaedic Consultants, in August 1980, reported claimant was stationary and claimant would from time to time need "symptomatic treatments to the low back".

The Board, after reviewing the material in this claim, does not find the evidence warrants reopening of this claim under the Board's own motion jurisdiction at this time. Therefore, the Board denies reopening of this claim under its own motion jurisdiction.

IT IS SO ORDERED.

CLAIM NO. A 42 CC 146562 September 19, 198(

VIOLA H. MAGDEN (STERN), CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

On March 23, 1972, claimant suffered a compensable injury to her right shoulder. This claim was initially closed by an August 14, 1973 Determination Order. Claimant's aggravation rights have expired. Claimant previously has received awards of 15% unscheduled disability for her right shoulder and 15% scheduled disability for loss of function of the right arm.

Dr. Waldram, on January 29, 1979, performed a lateral epicondylar release on the right. He related the need for this surgery to claimant's original injury. The employer voluntarily reopened this claim in April 1980. On March 10, 1980, Dr. Waldram performed additional surgery on claimant's right elbow. Dr. Waldram released claimant to return to work on April 28, 1980. He felt claimant had minimal permanent disability because of her inability to perform heavy lifting from a flexed to extended position and local tenderness over the operative site. He released claimant for regular work on May 14, 1980. The employer paid temporary total disability through May 13, 1980 to claimant.

On July 30, 1980, a request that a determination of claimant's disability was made. The Evaluation Division of the Workers' Compensation Department, on September 9, 1980,

recommended an award of additional temporary total disability from January 28, 1980 through May 14, 1980, less time worked and no additional permanent partial disability award.

The Board concurs with this recommendation.

ORDER

The claimant is hereby granted compensation for temporary total disability from January 29, 1980 through May 14, 1980, less time worked. The record indicates that this award has already been paid to claimant.

CLAIM NO. HC 420014 September 19, 1980

RICHARD L. WILSON, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

This claim was reopened on April 21, 1980 effective the date claimant was hospitalized by Dr. Wilson in July 1979 under the Board's own motion jurisdiction. Claimant's attorney was granted a fee out of any additional temporary total disability compensation not to exceed $750.

In May 1980, Dr. Wilson reported claimant had been hospitalized on July 2, 1979 and a cervical laminectomy had been performed the following day. A neurofibroma was found. Claimant returned to work on September 23, 1979. Dr. Wilson felt claimant's condition was again medically stationary at the end of September 1979. He rated claimant's permanent impairment at 5% and felt claimant could perform his regular job.

On June 13, 1980, the SAIF Corporation requested a determination of claimant's disability. The Evaluation Division of the Workers' Compensation Department on September 10, 1980 recommended claimant be granted additional temporary total disability compensation from July 2, 1979 through September 23, 1979 and not be granted any additional permanent partial disability.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted compensation for temporary total disability from July 2, 1979 through September 23, 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 its Own Motion Order, dated April 21, 1980.

CLAIM NO. A 734855 September 19, 1980

HOWARD MANSAKER, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

The SAIF Corporation (SAIF), on September 8, 1980, advised the Board claimant had undergone a "neurolysis, ulnar nerve, anterior ttransfer, right elbow". Dr. Smith felt the need for this surgery was related to claimant's May 31, 1959 wrist, elbow and back injury. SAIF indicated claimant's aggravation rights in this claim had expired and it would not oppose an Own Motion Order reopening this claim for the August 19, 1980 surgery.

The Board, after reviewing the evidence submitted to it, finds the claim should be reopened effective the date claimant was was hospitalized for the August 19, 1980 surgery for payment of compensation and other benefits provided for by law until closed pursuant to ORS 656.278.

IT IS SO ORDERED.

WCB CASE NO. 79-10,698 September 22, 1980
WCB CASE NO. 80-296

DAVID BARTELL, CLAIMANT
Garry L. Reynolds, Claimant's Atty.
Lang, Klein, Wolf, Smith, Griffith & Hallmark, Employer's Attys.
Order

Employee Benefits Insurance (EBI) requested the Board review an order issued on August 11, 1980 by the Presiding Referee which granted claimant's motion to set aside an order of dismissal in WCB Case No. 79-10,698 and substituted it for the SAIF Corporation. No appeal rights were attached

to this order. The Presiding Referee, in a letter dated August 15, 1980, indicated his opinion in WCB Case No. 79-10,698 rendered moot a motion to dismiss WCB Case No. 80-296. EBI contends that these matters should not be argued before the Board until the entire matter has come to a conclusion in the Hearings Division on claimant's request for hearing regarding the extent of disability.

The Board finds EBI's request for review to be premature. The Presiding Referee's order is not a final order. Winters v. Gunies, 128 Or 214, 264, P 359 (1928) and Mendenhall v. SAIF, 16 Or App 136, 517 P2d 136 (1974). The Board lacks jurisdiction to review this matter at this time. Therefore, the Board dismisses EBI's request for review.

IT IS SO ORDERED.

CLAIM NO. UNKNOWN September 22, 1980

DONALD D. FAST, SR., CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On August 5, 1980, claimant, by and through his attorney, requested the Board reopen this claim for his September 19, 1972 injury to both of his knees under its own motion jurisdiction. Claimant's aggravation rights have expired. Claimant indicated he was off work from June 13, 1980 through July 30, 1980.

Dr. Raymond Case, in August 1980, reported claimant had continued to experience difficulty with his right knee. On July 2, 1980, Dr. Case performed an arthroscopy and removed the patella from claimant's right knee. He related the need for this treatment to claimant's original injury.

The insurance carrier advised the Board it did not oppose an Own Motion Order reopening this claim.

The Board orders this claim reopened effective June 13, 1980 for payment of compensation and other benefits provided for by law until closed pursuant to ORS 656.278. Claimant's attorney is entitled to an attorney fee equal to 25% of the increased compensation granted by this order payable out of said compensation as paid, not to exceed $250.

IT IS SO ORDERED.

CLAIM NO. C 363657 September 22, 1980

ERNEST F. GAGE, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

The SAIF Corporation (SAIF), on September 9, 1980, forwarded various medical reports to the Board. On July 31, 1980, claimant underwent a left tarsal ligament section. The need for this surgery was related to claimant's April 10, 1972 injury for which this claim was established. SAIF indicated claimant's aggravation rights in this claim had expired and it would not oppose an Own Motion Order reopening this claim for the July 31, 1980 surgery.

The Board, after reviewing the evidence submitted to it, finds this claim should be reopened effective the date claimant was hospitalized for the July 31, 1980 surgery for payment of compensation and other benefits provided for by law until closed pursuant to ORS 656.278.

IT IS SO ORDERED.

CLAIM NO. 21C100369 September 22, 1980

ALDINE KEITH, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary, Claimant's Attys.
Black, Kendall, Tremaine, Boothe & Higgins, Employer's Attys.
Own Motion Order

On August 26, 1980, claimant, by and through his attorney, requested the Board reconsider its Own Motion Order denying claimant's request it reopen this claim under its own motion jurisdiction. Dr. Leveque and the Orthopaedic Consultants felt claimant should be referred to the Pain Clinic. The Board, after reviewing the evidence in this claim, did not find it warranted reopening of the claim. The Board ordered that claimant be treated at the Pain Clinic pursuant to the provisions of ORS 656.245.

The Board, after reviewing claimant's petition and the evidence in this claim, modifies its August 26, 1980 order. The Board orders this claim be reopened for payment of compensation and other benefits provided for by law if and when claimant enters an in-patient treatment program at the Pain Clinic. Upon completion of this Pain Clinic program this claim shall be closed pursuant to ORS 656.278. Claimant's attorney is entitled to an attorney's fee equal to 25% of the increased compensation for temporary total disability, payable out of said compensation as paid, not to exceed $400.

IT IS SO ORDERED.

CLAIM NO. C 230858 September 22, 1980

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

On August 25, 1980, claimant requested this claim for his February 12, 1970 injury be reopened. Claimant stated he had been ordered to stay home from June 3, 1980 through July 20, 1980 by Dr. Leavitt due to swelling in his leg. Dr. Leavitt reported claimant was off work from July 3, 1980 through July 17, 1980.

The SAIF Corporation forwarded various medical information to the Board. It indicated claimant's aggravation rights had expired and it would not oppose an Own Motion Order reopening this claim for temporary total disability compensation from July 3, 1980 through July 17, 1980.

The Board, after reviewing the evidence in this file, finds this claim should be reopened for payment of temporary total disability compensation for the period of July 3, 1980 through July 17, 1980.

IT IS SO ORDERED.

WCB CASE NO. 80-1464 September 22, 1980

WILLIAM D. VAIN, CLAIMANT
Flaxel, Todd & Nylander, Claimant's Attys.
Schwabe, Williamson, Wyatt, Moore & Roberts, Employer's Attys.
Order

On August 28, 1980, the employer in this case moved the Board to reopen the record and review additional medical information relating to this claim on appeal or in the alternative to remand this case to the Referee for his reconsideration of his Opinion and Order based on this newly discovered evidence. The evidence consists of various medical reports of Dr. Joseph Morris and other doctors, reports from a Maryland police department, and a letter from the Maryland Public Defender's Office. The employer contends this information was made available only after its "reasonable and persistent efforts".

The Board, after reviewing the employer's motion, affidavit of its attorney and the offered reports, denies the employer's motion. The Board will not consider the new evidence submitted by the employer or remand this case to the Referee. The Board finds that this evidence could have been discovered and produced with reasonable diligence at the time of the hearing.

ORDER

The employer's motion, dated August 28, 1980, is denied.

WCB CASE NO. 79-9601 September 24, 1980

JIM D. DYER, CLAIMANT
Richardson, Murphy, Nelson & Lawrence, Claimant's Attys.
Cheney & Kelley, Employer's Attys.
Order of Dismissal

This matter came before the Board upon receipt of a request for review from the employer. The Board has now signed a Stipulation and Order of Dismissal which settles all issues before it.

IT IS THEREFORE ORDERED that the request for review now pending before the Board is hereby dismissed.

WCB CASE NO. 78-4018 September 24, 1980
WCB CASE NO. 77-7564

GERALD HAWKE, CLAIMANT
Malagon & Yates, Claimant's Attys.
Lang, Klein, Wolf, Smith, Griffith & Hallmark, Employer's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Treplex

Treplex, Inc. and its insurance company, EBI Companies, seek Board review of the Referee's order which found that the parties were unable to reach an "approvable disposition" in this case and the case would be reset for hearing in due course.

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 January 4, 1980, is affirmed.

GERALD HAWKE, Claimant) INTERIM ORDER

INTRODUCTION

This matter was commenced on October 4, 1979, in Eugene, Oregon, before Peter W. McSwain, Referee. The claimant was represented by his attorney, Mr. Steven C. Yates. One employer, Treplex, Inc., is insured by EBI Companies, and they were represented by Mr. John L. Klor. Another employer, Shur-Way Construction, is insured by the State Accident Insurance Fund, and they were represented by Mr. W. D. Bates, Jr. Prior to commencement of proceedings of record, all three counsel discussed the intention of the parties to settle the matter without the need for a hearing. The settlement contemplated was that the claimant settle his claim against EBI Companies on a disputed claim basis for the sum of $4,500.00, and that the claimant settle his claim against the Fund on a disputed claim basis for the sum of $1,000.00. The claimant's attorney indicated a desire to contact his client, though he was sure his client would agree to the settlement proposed. There arose discussion as to whether or not claimant's medical bills had been paid, whereupon the Fund's attorney consulted his file on this matter. During this time there was a phone call for the claimant's attorney. While the claimant's attorney was discovering by telephone that a legal assistant in his office had been authorized by the claimant to accept the settlement, the Fund's attorney expressed hesitation about entering the settlement and, upon consulting his file further, withdrew his offer to settle. It was discovered that the Fund had been designated as a paying agent under ORS 656.230(7). Based on the monies paid out previously as a paying agent, the Fund's attorney thought it no longer wise to settle as intended. The matter was continued and written arguments were filed, ending on December 4, 1979.

ISSUES

The claimant and EBI contend that the Fund should be compelled to enter into the intended settlement as recited above, stating that the parties acted in reliance on the settlement.

WCB CASE NO. 79-1775 September 24, 1980

ANTHONY LANDRISCINA, CLAIMANT
Pozzi, Wilson, Atchison, Kahn
& O'Leary, Cliamant's Attys.
Lang, Klein, Wolf, Smith, Griffith
& Hallmark, Employer's Attys.
Request for Review by Employer

This case is before the Board on the employer's request that it review the Referee's order which found claimant had not waived his right to a hearing and found claimant was permanently and totally disabled.

The Board finds that the facts recited by the Referee in his Opinion and Order are correct and adopts them as its own.

The Board, after de novo review, reverses the Referee's order.

On November 3, 1978, a Determination Order granted claimant an award of 35% unscheduled disability. On November 25, 1978, claimant applied for a lump sum payment of that award which was approved by the Workers' Compensation Department on December 19, 1978.

At the same time as claimant requested an application for lump sum payment he requested the Evaluation Division to reconsider the Determination Order's award.

After receiving the lump sum award claimant changed his mind and wrote a personal check to the carrier in the amount of the lump sum. The carrier wouldn't accept the check and returned it.

The Board reverses the Referee's order pursuant to ORS 656.304 which states in part:

> " . . . that the right of hearing on any award shall be waived by acceptance of a lump sum award by a claimant where such sump sum award was granted on his own application under ORS 656.230".

Based on this finding we do not reach the merits.

ORDER

The Referee's order, dated December 27, 1979, is reversed in its entirety.

Chairman Wilson dissents as follows:

The Opinion and Order of the Referee should be affirmed and adopted by the Workers' Compensation Board and I would so order.

WCB CASE NO. 79-10,399 September 24, 1980

MICHAEL R. MURRAY, CLAIMANT
Gary Allen, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order

The attached Stipulation has been presented to the Board and is hereby approved. The SAIF Corporation's request for review is hereby dismissed.

WCB CASE NO. 79-10,399 September 4, 1980

MICHAEL R. MURRAY, CLAIMANT
Gary D. Allen, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Stipulation

IT IS HEREBY SRIPULATED AND AGREED by and between the abovenamed claimant, acting by and through his attorney, Gary D. Allen, and SAIF Corporation (SAIF), acting by and through Lawrence J. Hall of it's attorneys, that SAIF's Request for Review of the Opinion and Order of April 30, 1980, may be disposed of by an order of the Worker's Compensation Board ordering that the Opinion and Order of April 30, 1980, herein shall be construed as limited to the issue of the correct period for temporary total disability compensation, and shall not operate as, nor have the legal effect of deciding the issues of the compensability of claimant's headache, neck and shoulder problems; and that any subsequent partial denial of such condition or conditions shall not be barred as res judicata by said Opinion and Order herein; nor shall either party be bound with respect to said issues; and

FURTHER ORDERING that SAIF shall pay and claimant's attorney, Gary D. Allen, shall accept $75 as a reasonable attorney fee for his time spent relative to this Request for Review.

The parties hereby petition the Board to so order.

CLAIM NO. C 192037 September 24, 1980

MITCHELL ROSE, CLAIMANT
Samuel A. Hall, Jr., Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On January 17, 1980, claimant, by and through his attorney, requested this claim for his May 9, 1969 back injury be reopened under the Board's own motion jurisdiction. Claimant was hospitalized in October 1979 because of continuing back pain. The Board, in November 1979, denied a request to reopen this claim.

In May 1980, Dr. Bettinski reported claimant was having continuous back pain and requiring significant amounts of medication to control it. He felt it would be necessary to increase the amount of medication in the future. Dr. Bettinski felt claimant should be referred to the Pain Clinic for evaluation.

The SAIF Corporation (SAIF), on August 25, 1980, advised the Northwest Pain Center it authorized claimant's admission to its program for such treatment as deemed necessary.

SAIF, on September 5, 1980, advised the Board it opposed the reopening of this claim under the Board's own motion jurisdiction. It felt the Pain Clinic treatment could be provided under ORS 656.245. It noted claimant had been admitted to the Pain Clinic on September 2, 1980.

The Board, after reviewing the material in this file, finds this claim should be reopened effective September 2, 1980, the date claimant was admitted to the Pain Clinic, for payment of compensation and other benefits provided for by law until closed pursuant to ORS 656.278. Claimant's attorney is entitled to a reasonable attorney's fee equal to 25% of the increased compensation for temporary total disability granted by this order, not to exceed $250.

IT IS SO ORDERED.

WCB CASE NO. 80-5519 September 24, 1980

EILA WRIGHT, CLAIMANT
Pozzi, Wilson, Atchison, Kahn
& O'Leary, Claimant's Attys.
Black, Kendall, Tremaine, Boothe
& Higgins, Employer's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On August 19, 1980, claimant, by and through her attorney, requested the Board reopen this claim for her 1971 neck injury under its own motion jurisdiction. Claimant's aggravation rights have expired.

In 1971, Dr. Campagna had diagnosed nerve root compression at C7 on the right. This was caused by a protruded cervical disc.

Dr. Tahir, in September 1979, reported claimant continued to have neck pain with radiation into the upper right extremity. A myelogram had been done in July 1978 which revealed an "extremely minimal" defect at the C5-C6 level on the right side. Dr. Tahir felt this defect was consistent with a diagnosis of cervical spondylosis C5-C6 on the right side. He felt this was a continuation of the 1971 condition.

In early May 1980, the Orthopaedic Consultants diagnosed cervical spondylosis with C7 radiculopathy on the right. They felt claimant's present complaints were related to the 1971 problem.

Dr. Campagna, however, reported claimant's current condition was due to degenerative disc disease and not to her 1971 injury.

A hearing is currently pending (WCB Case No. 80-5519) to determine whether claimant's present condition is a result of a subsequent injury of April 5, 1979. Claimant requested that if the Board felt a hearing should be held on this own motion case, it be set to be held in tandem with the other case.

On September 16, 1980, the SAIF Corporation advised the Board it opposed an Own Motion Order reopening this claim. It indicated claimant had undergone an anterior spinal decompression on May 28, 1980. It felt the need for this surgery was not due to claimant's 1971 injury, but because of her pre-existing degenerative disc disease.

The Board, after reviewing the material submitted to it, finds it would be in the best interest of the parties if this claim were referred to the Hearings Division to be set in tandem with WCB Case No. 80-5519. The Referee shall determine if claimant's current condition is related to her

1971 injury and represents a worsening thereof since the last award or arrangement of compensation in this claim or is due to other causes. The Referee shall issue an appealable order in WCB Case No. 80-5519. Further, the Referee, upon the completion of the hearing, shall cause a transcript of the proceedings to be prepared and forwarded to the Board, along with the other evidence introduced at the hearing and a recommendation in the own motion case.

IT IS SO ORDERED.

CLAIM NO. C 456617 September 26, 1980

DANIEL R. BEAN, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

On August 4, 1973, claimant sustained an injury to his right ankle and foot. This claim was closed by a Determination Order, dated September 26, 1976, which awarded temporary total disability compensation and compensation equal to 15% of the right foot. Claimant's aggravation rights have expired.

Claimant was hospitalized on March 9, 1980 in preparation for March 10, 1980 surgery for excision of the fifth metatarsal head, syndaclylization of the fourth and fifth toes of the right foot. Dr. Teal found claimant medically stationary as of April 29, 1980 and reported claimant was able to walk more "comfortably".

On July 21, 1980, the SAIF Corporation requested a determination order in this case. It had voluntarily reopened this claim as of March 9, 1980. The Evaluation Division of the Workers' Compensation Department recommended this claim be closed with an additional award of temporary total disability compensation from March 9, 1980 through April 29, 1980 and additional compensation equal to 5% scheduled disability of the right foot.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted compensation for temporary total disability from March 9, 1980 through April 29, 1980 and compensation equal to 5% loss of the right foot. These awards are in addition to any previous awards claimant has been granted for his 1973 industrial injury. The record indicates that all of the temporary total disability compensation has been paid out.

WCB CASE NO. 79-7548 September 26, 1980

VERNA L. BECK, CLAIMANT
Welch, Bruun & Green, Claimant's Attys.
Schwabe, Williamson, Wyatt, Moore & Roberts, Employer's Attys.
Request for Review by Employer

This case is before the Board on the employer's request the Board review those portions of the Referee's order which: (1) set aside the February 21, 1980 Determination Order, (2) remanded this claim to the employer for payment of benefits from January 4, 1980 until closure, (3) ordered the employer to pay for the medical services provided for by Drs. Conley and Orofino, (4) assessed a penalty equal to 15% of the temporary total disability due from May 17, 1979 through September 20, 1979; and (5) awarded claimant's attorney a fee.

In June 1976, claimant suffered a back injury in California and Dr. Conley performed a laminectomy and disc excision surgery on claimant. She recovered and moved to Oregon.

She began work for this employer as a bus driver in early 1978. On July 12, 1978, claimant again injured her back. Claimant had two injuries: the first when she attempted to straighten a mirror, she twisted, injuring her back and striking her left knee on the fare box, and the second when she rear-ended a van with the bus she was driving. Initially claimant was treated conservatively by Dr. Butler.

In August 1978, Dr. Kloos diagnosed claimant as having a subacute low back strain. He did not rule out a herniated disc.

In September 1978, Dr. Butler reported claimant had undergone a myelogram which revealed a large defect at the L4-5 level on the right side. On September 29, 1978, Dr. Butler performed a L4-5 laminectomy and disc excision on the right side with L5 decompression of the nerve root. Claimant continued to have difficulty and on October 17, 1978 Dr. Butler performed a decompression of the L5 nerve root and upper portion of the S1 nerve root with neurolysis, hemilaminectomy of the L5 lamina. Claimant continued to have low back pain after surgery.

On November 25, 1978, Dr. Butler reported claimant's subjective pain was inconsistent with the physical findings and were mostly on a functional basis.

Claimant tried acupuncture and hypnosis without much relief.

On April 12, 1979, Dr. Ebert reported an EMG of the right leg was normal. He urged claimant to lose weight. Claimant was 5'7" and 200 pounds.

The Orthopaedic Consultants, in April 1979, felt claimant's condition was stationary. They felt claimant would be unable to return to work as a bus driver, but could perform light work. It was their opinion claimant's low back impairment due to this injury was mildly moderate.

On May 16, 1979, Dr. Butler concurred with the Orthopaedic Consultants.

Claimant moved to California and began treating with Dr. Conley on June 4, 1979. Dr. Conley, in July 1979, felt claimant needed to be referred to Dr. Orofino for orthopedic consultation.

A Determination Order dated June 8, 1979, initially closed this claim. It granted claimant an award of temporary total disability from July 20, 1978 through May 16, 1979, less time worked, and compensation equal to 64° for 20% unscheduled disability.

On August 8, 1979, Dr. Orofino reported claimant was "suffering from a temporary total disability for her usual occupation as a bus driver." Dr. Conley, on August 9, 1980, indicated claimant was not stationary and needed additional medical treatment. Claimant underwent a bone scan which was interpreted as indicating an intervertebral disc infection. Dr. Orofino concurred with this diagnosis.

On September 27, 1979, Dr. Butler reported claimant returned to Oregon and on September 21, 1979 he examined her. She was complaining of severe low back pain with some radiation into her right lower extremity. He also felt claimant had disc space infection based on new x-rays and related it to claimant's surgery. It was his opinion claimant's condition had worsened since May 1979 and she was temporarily and totally disabled.

Dr. Butler, in October 1979, reported he felt claimant would receive adequate and competent medical care in Oregon. He indicated claimant was totally disabled from working from the time of her surgery and still was unable to work.

Claimant returned to California in November 1979. She felt the warmer weather helped her back condition.

In December 1979, Dr. Butler opined it was not medically required that claimant live in California. It was his opinion adequate medical care and treatment were available to claimant in Oregon. Dr. Butler, on January 3, 1980, again saw claimant and felt she was "symptom free enough" to

engage in some type of employment. He felt claimant's condition was again stationary and she was not in need of care. He rated claimant's impairment as 25% of the whole body.

Dr. Conley, in late January 1980, reported claimant still was diabled from work. He felt claimant needed further medical observation and some palliative care.

A Second Determination Order, dated February 21, 1980, awarded claimant additional temporary total disability compensation from September 21, 1979 through January 3, 1980 and additional compensation equal to 16° for 5% unscheduled didsability for her low back injury.

Claimant's attorney, on August 29, 1979, advised the employer's representative claimant had not received temporary total disability compensation since May 24, 1979. The employer's representative indicated it was withholding reopening of the claim until it received a report from Dr. Butler. On November 1, 1979, claimant was paid temporary total disability compensation from May 17, 1979 through September 20, 1979. Claimant was advised on November 15, 1979 the employer could not accept responsibility for the treatment claimant was receiving in California.

The Board, after de novo review, reverses those portions of the Referee's order it was asked to review. The Board concurs with the Referee that the employer, in denying payment of Dr. Conley's bill, was not unreasonable.

Because of this finding, the Board reverses the Referee's award of attorney's fees out of additional temporary total disability compensation and out of the additional permanent partial disability.

The Rivers case cited by the employer does not stand for the principal that the employer is not responsible for payment for medical services of all out-of-state physicians. In that case the Court of Appeals approved the insurance carrier's denial of treatment by a chiropractor. However, in that case the carrier indicated it would pay for treatment provided by a medical doctor. The carrier contended it could control the choice of the specific doctor or specialty that would provide the care. In this case, Dr. Conley had been treating claimant for a number of months and had submitted reports to the employer's representative. No objection was made to this treatment until November 1979. The Board finds that the employer is responsible for payment for the medical services performed by Dr. Conley. However, the Board does not find the employer's acts were unreasonable and, therefore, no penalties and attorney's fees are awarded. There is no evidence claimant failed to receive medical care and treatment or otherwise suffered due to the employer's actions.

ORDER

The Referee's order, dated April 10, 1980, is modified. Paragraphs 1, 3, 4 and 5 of the Referee's order are reversed in their entirety.

The employer is ordered to pay for all the medical services provided by Dr. Conley and Dr. Orofino to claimant in the State of California related to her injury.

The Determination Order, dated February 21, 1980, is reinstated and affirmed.

WCB CASE NO. 79-7331 September 26, 1980

DAVID A. BOYINGTON, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary, Claimant's Attys.
Lang, Klein, Wolf, Smith, Griffith & Hallmark, Employer's Attys.
Request for Review by Claimant

This case is before the Workers' Compensation Board on claimant's request that the Board review the Referee's order which affirmed a Determination Order of August 7, 1979. That Determination Order granted claimant an award of temporary total disability compensation, but did not grant claimant any award of permanent partial disability compensation. Claimant contends that he does have permanent partial disability due to this injury. The Board finds that the facts recited by the Referee in his order are correct.

The Board, after de novo review, reaches the same conclusion reached by the Referee, but for a different reason. The Referee, in his order, emphasized the fact that claimant had failed to attend a program at the Callahan Center. Dr. Chuinard felt that claimant should undergo a period of supervised rehabilitation consisting of back exercises and generalized muscle toning. He suggested this be done at the Callahan Center. Dr. Chuinard also indicated that it might be necessary for the claimant to refrain from heavy work which would put a strain on the upper extremities of the dorsal area of his back. However, he felt that any determination in regards to this should be deferred until claimant's muscle tone was restored. However, later he reported claimant did not need any retraining. Dr. Chuinard felt it would help claimant if he could be placed in a job that would be lighter in nature until he became "habituated" to his work activity. Dr. Chuinard felt that claimant would not have any permanent disability. It was Dr. Chuinard's opinion that claimant's condition would improve rapidly if he underwent a

period of supervised treatment. Claimant was following an exercise program on his own and reported he felt "improved" and had less pain in his back. The alternative for this supervised treatment was for claimant to seek lighter work in an effort to restore his motion and to strengthen his back.

Claimant has the burden of proving he is suffering from permanent disability as a result of his injury. The Board finds that claimant has failed to establishe by a preponderance of the evidence that he has any permanent partial disability due to this injury. The medical evidence in this case does not support claimant's contention. The evidence indicates that claimant has been able to return to full-time work and carry on his educational activities. The Board finds that the record as developed in this case does not establish claimant has any permanent partial disability due to this injury. Therefore, the Board affirms the Referee's order.

ORDER

The Referee's order, dated March 11, 1980, is affirmed.

WCB CASE NO. 78-7019

THEODORE BRYSON, CLAIMANT
Malagon & Yates, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

This case is before the Board on the SAIF Corporation's (SAIF) request that the Board review the Referee's order entered in this case. SAIF contends: (1) claimant failed to establish any worsening of his underlying condition; (2) claimant is not entitled to temporary total disability earlier than March 2, 1980 since he failed to put the subject employer, or SAIF, on notice of any medically verified inability to work due to aggravation of his condition; (3) the employer, or SAIF, had no notice or knowledge supported by medical evidence that claimant may have suffered a worsening of his condition until March 1980, and SAIF's denial in September 1979 was timely and, therefore, no penalties should be assessed against it; and (4) the award of attorney's fees made by the Referee should be reversed or, in the alternative, reduced. The Board finds that the facts as recited by the Referee in his order are correct.

The Board, after de novo review, modifies the Referee's order. While it is true that Dr. Hardt, in an undated report, opined that claimant's condition had been "exacerbated" as of September 3, 1978 and opined that the claim should be reopened as of that date, there was no indication when this report was forwarded to the employer or SAIF.

On September 7, 1979, claimant's attorney filed a request for hearing-aggravation. This was later amended by another request for hearing in May 1979. At the time the first request for hearing was submitted, no medical evidence or reports were submitted with it to verify claimant's condition had worsened and/or his inability to work. The SAIF denied claimant's aggravation claim on September 24, 1979.

Dr. Smith, on March 2, 1980, reported that claimant had a lumbar herniated disc at the L5-S1 level on the left which was causing him continuing back and lower extremity pain. It should be noted that this condition had been diagnosed earlier. Dr. Smith felt that claimant's condition had worsened and that claimant was now desiring treatment for this condition. Dr. Smith felt this claim should be reopened and that this claimant should undergo surgery to resolve this condition.

The Board finds that Dr. Smith's March 2, 1980 report is the first valid claim for aggravation. SAIF should have reopened upon receipt of this report; however, it failed to do so. The Board assesses a penalty of 25% of the compensation from March 2, 1980 to the date of the hearing, March 19, 1980, for SAIF's failure to reopen this claim.

The Board concludes that the evidence does establish that claimant has proven that his condition has worsened since his last award or arrangement of compensation in this case and affirms the Referee's finding claimant had proven his aggravation claim.

The Board finds that the attorney fees granted by the Referee in this case were excessive. The record in this case is not complicated and a hearing was not lengthy. Therefore, the Board would modify the Referee's award of attorney fees by reducing the fees awarded to claimant's attorney at the hearing level to the sum of $900.

Further, the Board would affirm the remainder of the Referee's order and grant claimant's attorney a fee of $300 at the Board level.

ORDER

The Referee's order, dated March 25, 1980, is modified.

It is hereby ordered that claimant's aggravation claim is remanded to SAIF Corporation for acceptance and reopening effective March 2, 1980 for payment of all compensation and benefits pursuant to law until the claim is closed pursuant to ORS 656.268.

It is further ordered that claimant is granted a sum equal to 25% of all temporary total disability compensation payable from March 2, 1980 through March 19, 1980 for the SAIF Corporation's unreasonable refusal to pay temporary total disability compensation. It is further ordered that claimant's attorney is awarded as and for a reasonable attorney's fee for his efforts at the hearings level the sum of $900 payable in addition to and not out of any compensation or other benefits claimant was granted by the Referee's order. It is further ordered that claimant is granted the sum of $300 as and for a reasonable attorney's fee at the Board level.

The remainder of the Referee's order is affirmed.

WCB CASE NO. 78-7405 September 26, 1980
WCB CASE NO. 78-9173

ROBERT DeGRAFF, CLAIMANT
Olson, Hittle, Gardner & Evans, Claimant's Attys.
Roger R. Warren, Employer's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

This case is before the Board on the SAIF Corporation's (SAIF) request the Board review the Referee's order which set aside its denial of claimant's aggravation claim, remanded it to SAIF for acceptance, approved the Disputed Claim Settlement between Employers Insurance of Wausau (Wausau) and claimant and granted claimant's attorney a fee. SAIF contends the Disputed Claim Settlement should be set aside and claimant suffered a new injury. The Board finds the Referee correctly set forth the facts in his order.

The Board, after de novo review, reverses the Referee's order in its entirety. SAIF denied responsibility for claimant's current condition on September 21, 1978 because it felt his condition was related to a new injury. On November 3, 1978 Wausau denied responsibility for claimant's current condition alleging claimant's current condition was due to the earlier injury. It then requested an Order Designating Paying Agent pursuant to ORS 656.307, which was issued on November 16, 1978 designating SAIF as the paying agent. Wausau, on December 17, 1979, amended its denial and advised claimant it was unable to accept claimant's claim based on the fact it did not appear claimant's condition was aggravated or arose out of and in the course of employment either by accident or occupational disease within the meaning

of the Workers' Compensation law. In early January 1980, Wausau and claimant entered into a Disputed Claim Settlement settling claimant's request for a hearing with regard to the alleged new injury claim and dismissed his request for hearing with prejudice.

The Board finds this settlement is invalid. Wausau requested and obtained the .307 order which designated SAIF as the paying agent until such time as a responsible party had been determined. At that time it had denied responsibility for claimant's current condition alleging it was due to an aggravation of his 1975 injury. It had made no denial of compensability. The Board finds the .307 order established the relationship between the two insurance carriers and claimant until a hearing had been held. The Board feels to allow one of the carriers to settle its portion of the claim prior to the hearing would be unjust. Such an act could result in either the claimant or the other insurance carrier being placed at a disadvantage. The .307 order establishes the relationship between the carriers and claimant until a hearing is held and an Opinion and Order issued which determines which of the carriers is responsible. The Board finds that any settlements entered into by one carrier and a claimant settling the issue of responsibility for claimant's condition between them, after a .307 order has been issued is invalid. Therefore, the Board reverses the Referee's decision approving the Disputed Claim Settlement.

Based on this finding and the evidence in this case, the Board finds the preponderance of the evidence establishes claimant suffered a new injury and not an aggravation of his 1975 injury. Drs. Pasquesi and Coletti both opine claimant suffered a new injury while shoveling asphalt in July 1978. Further, the evidence indicates claimant's symptoms were different after the July 1978 injury than they had been after the January 1975 injury. The Board reverses the Referee's order setting aside SAIF's denial and remanding claimant's aggravation claim to it for acceptance and payment of benefits and awarding claimant's attorney a fee. The Board reverses the Referee's affirmance of Wausau's denial on November 3, 1979 and sets it aside.

The Board orders claimant's claim for a new injury be remanded to Wausau for acceptance and payment of compensation provided for by law until closed pursuant to ORS 656.268. Wausau is ordered to reinburse SAIF for such sums it has expended pursuant to the .307 order and the Referee's order. The attorney fee awarded by the Referee is approved and shall be paid by Wausau.

ORDER

The Referee's order, dated February 28, 1980, is reversed in its entirety.

SAIF Corporation's denial of September 21, 1978 is reinstated and affirmed.

The Disputed Claim Settlement, dated January 10, 1980, is invalid.

Employers Insurance of Wausau's denial of November 3, 1978 is set aside and claimant's claim for a new injury on or about July 6, 1978 is remanded to it for acceptance and payment of benefits provided for by law until closed pursuant to ORS 656.268.

Employers Insurance of Wausau is further ordered to reimburse the SAIF Corporation for sums it expended pursuant to the .307 order and the Referee's order.

It is further ordered that Employers Insurance of Wausau pay claimant's attorney the sum of $1,200 as a reasonable attorney's fee for the work performed at the hearing level in this case. Claimant's attorney is also entitled to an attorney's fee for his services at Board review equal to $200, payable by Employers Insurance of Wausau.

WCB CASE NO. 78-7410 September 26, 1980

DOROTHY M. GAFFNEY, CLAIMANT
Cash R. Perrine, Claimant's Atty.
Lang, Klein, Wolf, Smith, Griffith & Hallmark, Employer's Attys.
Request for Review by Employer

This case is before the Board on the employer's request that the Board review the Referee's order which granted claimant additional temporary total disability compensation from April 5, 1978 to May 10, 1978 and from June 17, 1978 to August 1, 1978 and granted an award of compensation equal to 45° for 30% loss of use of the right forearm. The Board finds the Referee correctly recited the facts in his order.

The Board, after de novo review, modifies the Referee's order. The Board concurs with the Referee's awarding of additional temporary total disability compensation, but finds the award of permanent partial disability to be excessive.

Claimant continues to have difficulty with her right wrist in performing activities such as typing and driving and avoids other activities requiring use of the wrist. Claimant is now working as a real estate salesperson which places different physical requirements on her and reduces her wrist symptoms. Claimant indicated she has continuing

low grade pain with the use of her wrist which limits her lifting heavy skillets, prolonged typing, lifting of objects and other "small activities". Dr. Smith, the only doctor to rate claimant's loss of function only, found a slight loss of the range of motion of the wrist with discomfort at the extremes, discomfort over the radial aspect of the wrist, and a slight amount of swelling. The test to be applied in determining the extent of disability in claimant's wrist is the loss of function. Inability to work at a particular job due to physical limitation can be considered in making this determination. Based on all the evidence in this case, the Board concludes claimant is entitled to an award of compensation equal to 22.5° for 15% scheduled disability representing the loss of function of her wrist due to this injury. Accordingly, the Referee's order is modified.

ORDER

The Referee's order, dated January 23, 1980, is modified.

The Referee's award of compensation equal to 45° for 30% permanent partial disability for loss of function of claimant's right wrist is modified.

Claimant is hereby awarded compensation equal to 22.5° for 15% scheduled disability representing the loss of function claimant has experienced due to this injury to her right wrist.

The remainder of the Referee's order is affirmed.

WCB CASE NO. 78-6097 September 26, 1980

LOWELL A. HANSON, CLAIMANT
Anderson, Fulton, Lavis & Van Thiel,
Claimant's Attys.
Jerry McCallister, Employer's Atty.
Request for Review by Employer

The employer seeks Board review of the Referee's order which remanded claimant's aggravation claim to it for acceptance and payment of compensation.

The Board, after de novo review, affirms and adopts the findings of fact and most of the conclusion of the Referee as set out in his Opinion and Order, a copy of which is attached hereto and, by this reference, is made a part hereof.

However, one part of the Referee's "Order" portion should be deleted. The award of an attorney fee equal to 25% up to $750 of any increased permanent partial disability compensation

claimant may receive by a subsequent Determination Order is incorrect. Claimant's attorney is entitled to a fee only for the work he did in getting the denial reversed. If, at some future time, he is responsible for getting claimant an increased award, he will be entitled to a fee at that time.

ORDER

The order of the Referee, dated August 30, 1979, is modified.

That portion of the order which granted an attorney fee equal to 25% of any increased award granted by a subsequent Determination Order up to $750 is hereby reversed.

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 $150, payable by the carrier.

WCB CASE NO. 79-569 September 26, 1980
WCB CASE NO. 79-8386

LINDA K. JONES, CLAIMANT
Carlotta H. Sorensen, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

This case is before the Board on the SAIF Corporation's (SAIF) and claimant's request it review the Referee's order which granted claimant a total award of compensation equal to 240° for 75% unscheduled disability for her two back injuries. SAIF contends this award is excessive. Claimant contends she is permanently and totally disabled. The Board finds the Referee correctly recited the facts in his order with one exception. On page four, the Referee stated claimant had received no job offers. In fact, claimant was offered a job by the Revenue Department, but turned it down.

The Board, after de novo review, modifies the Referee's order. The Board concurs with the Referee that claimant has marketable skills and would benefit from job placement services. It also agrees with the Referee that claimant is not permanently and totally disabled. Claimant is 40 years old, has a high school education plus one and a half years of business college, emphasizing accounting. She has average intellectual abilities. Her prior work experience is varied and includes clerical work, bartending, restaurant work,

psychiatric aide and cannery work. Claimant has a real estate license. The medical evidence indicates claimant is capable of performing either light or sedentary work. Claimant turned down one job because she did not wish to work during the evening. Based on all the evidence, the Board finds claimant is entitled to an award of compensation equal to 96° for 30% unscheduled disability for her first injury and compensation equal to 48° for 15% unscheduled disability for her second injury. These awards reflect claimant's loss of wage earning capacity due to each injury and are in lieu of all previous awards.

ORDER

The Referee's order, dated March 14, 1980, is modified.

Claimant is hereby awarded compensation equal to 96° for 30% unscheduled disability for her March 15, 1978 injury and compensation equal to 48° for 15% unscheduled disability for her January 9, 1979 injury, making a total award of 45% unscheduled disability for these injuries. These awards are in lieu of any previous awards of unscheduled disability for these injuries.

The remainder of the Referee's order is affirmed.

WCB CASE NO. 78-6966 September 26, 1980

DONALD J. McDONALD, CLAIMANT
Rolf Olson, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

This case is before the Workers' Compensation Board on the SAIF Corporation's (SAIF) request that the Board review the Referee's order which found that it was responsible for claimant's low back problem, hips problem and his left eye condition. Further, the Referee ordered this claim reopened effective July 26, 1978. The Fund contends this was in error. The Board finds the Referee correctly recited the facts in his order except that it notes on page two that the Referee erred in stating a large rock struck the truck claimant was driving. The Board notes that, in fact, it was a tree or a portion of a tree that struck claimant's vehicle. Further, the Board notes that it is speculation as to what had occurred after claimant's vehicle was struck. The Referee recited certain facts which were obtained from a medical report. However, claimant was rendered unconscious as a result of this incident and, therefore, it is mere speculation as to what occurred from the time claimant's vehicle was struck until it came to a stop.

ORDER

The Referee's order, dated October 29, 1979, is modified.

The denial of visual problems, dated December 27, 1978, is affirmed.

The claims for the low back and hips condition is remanded to the SAIF Corporation for acceptance and payment of compensation effective March 12, 1979 until closed pursuant to ORS 656.268.

Claimant's attorney is granted a reasonable fee for prevailing on the denial of the low back and hips at the hearing level and also for his prevailing on the denial at Board level in the sum of $850. This is in lieu of the attorney fee granted by the Refere.

WCB CASE NO. 79-8457 September 30, 1980

LORETTA A. OWEN, CLAIMANT
Doblis, Bischoff & Murray, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

This case is before the Workers' Compensation Board on claimant's request the Board review that portion of the Referee's order which affirmed the SAIF Corporation's (SAIF) denial of her aggravation claim. Claimant contends she met her burden of proof on this issue and her claim is compensable. The Board finds the Referee correctly recited the facts in his order.

The Board, after de novo review, affirms the Referee's order. Claimant has the burden of establishing her contention. The Board agrees with the Referee's assessment and weighing of the medical evidence in this case.

The Board, however, finds the whole issue before the Referee is moot. On October 16, 1978, SAIF denied responsibility for medical treatment for any of the prior accepted conditions after the issuance of the Determination Order. This denial was not appealed by claimant and became final. Therefore, the condition claimant contends has aggravated, is in a denied status and no right to claim aggravation of these conditions is available to the claimant.

ORDER

The Referee's order, dated December 31, 1979, is affirmed.

The Board, after de novo review, modifies the Referee's order. The Board concurs with the Referee's finding that claimant's low back problem and the problem with both of his hips is related to this incident. The medical evidence supports this contention. However, the Board does not concur with the Referee's findings that his left eye condition is compensable as a result of this incident. Dr. Wood, an ophthalmologist, felt that claimant had significantly elevated intraocular pressures and would require anti-glaucoma therapy in the very near future. He did not state this was related to claimant's on-the-job injury. Drs. Roberts and Anderson both deferred to Dr. Wood's diagnosis of claimant's eye complaints as being possible glaucoma. Dr. Klein diagnosed claimant's condition as being a pigment epithelial detachment. He did not feel there was any association between this condition and the trauma claimant suffered as a result of this injury.

However, Drs. Knox and Erkkila felt that claimant's visual problems in his left eye were related to the industrial injury. They also agreed that any visual difficulties claimant has in his right eye are non-related.

The Board finds the opinions expressed by Dr. Wood, a specialist in the field of ophthalmology, and the deferring of two other doctors to his expertise and opinion of Dr. Klein more persuasive than the opinions of Drs. Knox and Erkkila. Based on this conclusion, the Board finds that claimant's claim for his left eye condition being related to his injury was not proven. Therefore, the Board affirms SAIF's denial of this condition.

The Board further disagrees with the Referee's reopening of this claim effective July 26, 1976. That is the date that the temporary total disability compensation terminated by the August 28, 1978 Determination Order. The evidence indicates that the closure of this claim by the Determination Order was correct. After the initial closure, the Board finds that Dr. Erkkila's report of March 12, 1979, indicates that claimant's condition had worsened. Claimant was hospitalized with a diagnosis of avascular necrosis bilaterally. On March 13, 1979, Dr. Erkkila performed an operation and inserted a Bateman prosthesis on the left side. Dr. Erkkila indicated that claimant's back pain and bilateral hip pain dated back to the date of his industrial accident. The Board finds that based on this evidence the claim for claimant's hip problem should be reopened effective March 12, 1979, the date claimant was hospitalized for the surgery performed by Dr. Erkkila and not effective July 26, 1978 as ordered by the Referee.

The attorney's fee granted at the hearing on the denied claims is also modified.

CLAIM NO. C375668 September 30, 1980

VIRGINIA M. SCHMIDT, CLAIMANT
D. Keith Swanson, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant has requested the Board reconsider its May 9, 1980 Own Motion Order which denied reopening of this claim. The Board relied upon the Orthopaedic Consultants who opined the changes in claimant's condition were degenerative and not related to her May 17, 1972 injury.

On June 11, 1979, claimant underwent a complete laminectomy at L4 and L5 with decompression of left sided nerve roots and cauda equina. A myelogram had revealed a deformity of the neural canal by spondylosis. Dr. White felt claimant's spondylosis was a result of her 1972 or 1973 back injury. He felt x-rays revealed deterioration of the spine which was related to her back injury.

The Board, after considering the evidence in this case, finds it would be in the best interests of the parties if this case were remanded to the Hearings Division to schedule a hearing. The Referee shall decide if claimant's condition in June 1979 and the surgery she underwent was related to her 1972 back injury and represents a worsening thereof since the last award or arrangement of compensation in this claim. Upon the conclusion of the hearing, the Referee shall forward to the Board along with a recommendation in this case, a transcript of the proceedings and all exhibits introduced at the hearing.

IT IS SO ORDERED.

CLAIM NO. B 142666 September 30, 1980

RALPH E. SPURGEON, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

This claim was reopened by a March 31, 1978 Own Motion Order with the effective date of reopening of February 2, 1976. Claimant had began having episodes of impairment of consciousness.

On July 18, 1980, Dr. Knox reported he felt claimant's condition was medically stationary although claimant continued to experience brief attacks. He opined claimant had evidence of traumatic encephalopathy with post-traumatic seizures as well as probably a mild organic brain syndrome as a residual. Claimant also had significant nasal obstructions.

Claimant is now 46 years old. He is classified as a functional illiterate. Because of claimant's episodes of impairment of his consciousness, he should not drive vehicles, work at heights, or around moving machinery.

In August 1980, the SAIF Corporation requested a determination of claimant's disability. The Evaluation Division of the Workers' Compensation Department recommended this claim be closed and claimant be granted additional temporary total disability from February 2, 1976 through July 18, 1980, less time worked, and compensation equal to 256° for 80% unscheduled disability.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted temporary total disability compensation from February 2, 1976 through July 18, 1980, less time worked. The record indicates that most of this award has already been paid to claimant.

Claimant is also granted compensation equal to 256° for 80% unscheduled disability. This award is in lieu of, and not in addition to, all previous awards claimant has been granted for this condition.

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(2) Back

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