PROPERTY OF
WORKMEN'S COMPENSATION BOARD
SALEM, OREGON

VAN NATTA'S WORKERS' COMPENSATION REPORTER

VOLUME 33

A compilation of the decisions of the Oregon Workers' Compensation Board and the opinions of the Oregon Supreme Court and Court of Appeals relating to workers' compensation law

OCTOBER-DECEMBER 1981

(With a cumulative index referring to Volumes 32 and 33)

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CONTENTS

Workers' Compensation Board Decisions	433
Court Decisions	741
Subject Index	873
Own Motion Rulings	891
Case Citations	894
Van Natta's Citations	899
ORS Citations	901
Administrative Rule Citations	902
Larson Citations	903
Claimants Index	904

MICHAEL J. KING, Claimant
Daniel Meyers, Claimant's Attorney
Peter Hansen, Defense Attorney
Order Denying Dismissal

WCB 80-07413
October 2, 1981

The employer has moved to dismiss claimant's request for Board review on the grounds that it was not timely filed and there was not timely service of copies on the adverse parties.

Our records reflect that the request for review was mailed on the 29th day after the entry of the Referee's order. As explained in Barbara Rupp, WCB Case No. 80-01803 (March 4, 1981), postmark controls.

As also explained in Barbara Rupp, service of copies of a request for Board review on the adverse parties is not a jurisdictional requirement.

The motion to dismiss is denied.

IT IS SO ORDERED.

RUSSELL G. BARIL, Claimant
Mike Ratliff, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant

WCB 80-04580
October 5, 1981

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee McSwain's order which affirmed the denial of claimant's aggravation claim.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated March 19, 1981 is affirmed.

ARLEY J. BEESON, Claimant
J. Gary McClain, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant

WCB 80-08228
October 5, 1981

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Menashe's order which awarded claimant 192° for 60% unscheduled permanent partial disability for his low back condition. Claimant contends that due to loss of earning capacity from the injury, he is entitled to 320° permanent partial disability.

ORDER

The Referee's order dated April 10, 1981 is affirmed.

ELMER BOOCK, Claimant
Coons & Hall, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney
Own Motion Order Referring for Consolidated Hearing

Own Motion 81-01515
October 5, 1981

Claimant sustained a compensable injury on February 13, 1975. On February 12, 1981 claimant requested a hearing on a claim for aggravation of this injury. This case is presently pending before the Hearings Division (WCB Case No. 81-01515). Because claimant's aggravation rights expired on January 23, 1981, it is questioned whether the Referee has jurisdiction to rule on this claim. The claimant has asked the Board to consider this matter.

We conclude it would be in the best interests of the parties to refer the jurisdiction question to the Hearings Division to be considered with WCB Case No. 81-01515. The Referee shall take evidence on the jurisdiction issue along with the evidence on claimant's aggravation claim. At the conclusion of the hearing, if the Referee determines that he has no jurisdiction over the case, he shall cause a transcript of the proceedings to be forwarded to the Board together with his recommendation with respect to the dispostion of the own motion matter. Should the Referee conclude he does have jurisdiction, there will be no need for an Own Motion Order from the Board. He shall determine from the evidence whether claimant's current condition is an aggravation of his original industrial injury and issue an appealable Opinion and Order based on his conclusions.

Issues which the Referee should consider, in addition to any others raised by the parties, include:

(1) Whether the August 3, 1979 denial, which was not appealed by claimant, precludes filing a subsequent aggravation claim for the same condition which was the subject of the denial;

(2) Whether a report from Dr. James E. Weiss to SAIF, dated October 2, 1980 (prior to expiration of aggravation rights) constitutes a claim for aggravation under ORS 656.273(3); and

(3) If own motion relief is the only available remedy, whether the Board should reconsider a claim initially denied where the denial has become final. (See Fields v. WCB, 276 Or 805, 556 P2d 651 [1976]).

IT IS SO ORDERED.

GLORIA A. BRYANT, Claimant
James Francesconi, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 80-07906 & 80-04013
October 5, 1981

Reviewed by Board Members McCallister and Lewis.

SAIF Corporation, the insurer for Hearth Craft, seeks Board review of Referee James' order setting aside its denial of a claim for new injury and granting attorney's fees in addition to claimant's compensation for her injury. SAIF contends that claimant suffered an aggravation of her March 7, 1978 compensable injury and that FMC is responsible.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated February 12, 1981 is affirmed. Claimant's attorney is granted $400 as a reasonable attorney's fee for legal services rendered to claimant in her representation in this appeal.

ALVIN E. DALTON, Claimant
Larry Sokol, Claimant's Attorney
Eugene Buckle, Defense Attorney
Request for Review by Claimant

WCB 80-09066
October 5, 1981

Reviewed by Board Members McCallister and Lewis.

Claimant seeks Board review of Referee Menashe's order which granted him compensation equal to 30% unscheduled back disability. Claimant contends this award is inadequate.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated May 6, 1981 is affirmed.

JAN DUNCAN, Claimant
Jerome Bischoff, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 80-08463
October 5, 1981

Reviewed by Board Members McCallister and Lewis.

SAIF Corporation seeks Board review of Referee Baker's order approving claimant's July 1980 claim for low back injury and imposing a penalty of 25% of the time loss compensation which was not paid pending SAIF's denial.

SAIF contends that claimant's back pain started in Los Angeles where she lived for two months before returning to work as a checker for Sherm's Supermarket where she worked for about a month before allegedly straining her back lifting watermelons from shopping carts. Relying upon a July 22 chart note by Dr. Foster, SAIF argues that claimant gave a history of two months of back pain when she first saw the doctor, rather than two days of pain as claimant testified at the hearing. We note that the controversial chart note also contains a comment that claimant hurt her back "while lifting out of baskets" on the job, and that the Referee found claimant to be a credible witness.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated February 25, 1981 is affirmed. Claimant's attorney is granted $400 as a reasonable attorney's fee for services rendered in this appeal.

NOTICE TO ALL PARTIES: This order is final unless, within 30 days after the date of mailing of copies of this order to the parties, one of the parties appeals to the Court of Appeals for judicial review as provided by ORS 656.298.

ALICE EDMONDS, Claimant
Samuel Imperati, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant

WCB 80-05142
October 5, 1981

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Gemmell's order affirming SAIF's denial of an aggravation claim allegedly arising from claimant's compensable September 1977 injury. The Referee also ordered interim compensation from January 14, 1980 to May 30, 1980 when the claim was denied, and a 15% penalty for SAIF's failure to either deny the claim or to pay benefits within 14 days from the date of the claim.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated March 19, 1981 is affirmed.

JAMES A. FARLEY, Claimant
Peter Hansen, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 80-06984
October 5, 1981

Reviewed by Board Members McCallister and Lewis.

The SAIF Corporation seeks Board review of Referee Leahy's order remanding as compensable claimant's claim for injuries sustained on May 15, 1980 when claimant drove a three-wheeled motorcycle off the rooftop at a construction site where he worked as a roofer assistant. SAIF contends that at the time of the accident claimant was not engaged in the furtherance of his employer's business but was on a personal mission or folly of his own in driving the ATV (all terrain vehicle) at excessive speeds around the rooftop.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated February 23, 1981 is affirmed. Claimant's attorney is granted $350 as a reasonable attorney's fee for legal services rendered in this appeal.

HAL D. LANDRUM, Claimant
David Vinson, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant

WCB 80-06372
October 5, 1981

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Mannix's order awarding 30% unscheduled permanent partial disability for his 1976 compensable injury in lieu of all prior awards. Claimant contends that the award is inadequate.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated February 27, 1981 is affirmed.

FRED McKINNON, Claimant
Rolf Olson, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 80-02502 & 79-07856
October 5, 1981

Reviewed by Board Members McCallister and Lewis.

The SAIF Corporation seeks Board review of Referee Pferdner's order which ordered SAIF to pay claimant in a lump sum $7,791.43 which the Referee found to have been improperly withheld from the claimant's 80% unscheduled permanent partial disability award.

The Board affirms and adopts the well written order of the Referee.

ORDER

The Referee's order dated April 15, 1981 is affirmed. Claimant's attorney is awarded $250 for his services at this Board review, payable by the SAIF Corporation.

LEROY G. PRISK, Claimant
J. Michael Starr, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 80-06330
October 5, 1981

Reviewed by Board Members McCallister and Lewis.

The SAIF Corporation seeks Board review of that portion of Referee Mannix's order which awarded claimant 144° for 45% unscheduled permanent partial disability.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated March 19, 1981 is affirmed. Claimant's attorney is awarded $400 for his services at this Board review, payable by the SAIF Corporation.

JERRY STRONG, Claimant
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant

WCB 80-06787
October 5, 1981

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Neal's order which granted him compensation equal to 32° for 10% unscheduled low back disability. Claimant contends this award is inadequate.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated March 11, 1981 is affirmed.

The Beneficiaries of
PAUL HARRIS, Deceased, Claimant
James O'Neal, Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Beneficiaries

WCB 80-03228
October 6, 1981

Reviewed by Board Members McCallister and Lewis.

The beneficiaries of the claimant seek Board review of Referee Braverman's order which affirmed the SAIF Corporation's denial of claimant's claim.

The Board affirms and adopts the order of the Referee with the following additional comments:

Claimant cited Johnston v. Georgia-Pacific Corp., 35 Or App 231 (1978) in her brief. The court in Johnston held that the common-law wife of a deceased worker can recover benefits under ORS 656.204 when the claimant has established by clear and convincing evidence that a valid common-law marriage existed. Thus, ORS 656.226 was found not to be the exclusive provision for benefits for common-law spouses.

However, claimant failed to show that a valid common-law marriage existed under the laws of any other state. (Oregon does not recognize common-law marriages.) Claimant's domicile during the time of cohabitation was Olympia, Washington. The state of Washington does not recognize common-law marriages; thus, claimant could not have shown a valid common-law marriage that would entitle her to benefits under ORS 656.204.

ORDER

The Referee's order dated January 23, 1981 is affirmed.

TERRY A. MUIR, Claimant
Robert Thorbeck, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 80-00554
October 6, 1981

Reviewed by Board Members McCallister and Lewis.

SAIF Corporation seeks Board review of Referee Nichols' order approving and remanding as compensable claimant's claim for a worsened shoulder condition caused by his work activities as a sheetrocker. SAIF contends that claimant has failed to prove that the work activities contributed to the worsening in any more than a de minimus way, or that the worsened condition arose out of and in the scope of his employment.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated April 13, 1981 is affirmed. Claimant's attorney is granted $400 as a reasonable attorney's fee for legal services rendered in this appeal.

WAYNE D. MILLER, Claimant
Pozzi, Wilson et al, Claimant's Attorneys
Schwabe, Williamson, et al, Defense Attorneys
Order Vacating Order on Review

WCB 78-05139
October 7, 1981

The Workers' Compensation Board issued an order in the above matter on September 25, 1981, but failed to serve all parties. In an attempt to rectify the problem, we realized that the order needed clarifying. Therefore, as of this date we are hereby vacating the Board's order of September 25, 1981 and issuing a corrected order.

IT IS SO ORDERED.

WAYNE D. MILLER, Claimant
John Stone, Claimant's Attorney
Roger Luedtke, Defense Attorney
Request for Review by Employer

WCB 78-05139
October 7, 1981

Reviewed by Board Members Barnes and McCallister.

The employer seeks Board review of Referee Wolff's order which remanded claimant's aggravation claim to it for acceptance and payment of compensation to which claimant was entitled commencing August 2, 1979 and until closed pursuant to ORS 656.268. The sole issue before the Board is the compensability of claimant's aggravation claim.

Claimant sustained a compensable injury to his left knee on July 12, 1973. His prior awards total 60° for 40% loss of the left leg. It is claimant's burden of proof to show that his condition resulting from the compensable injury has worsened since the last arrangement or award of compensation, September 8, 1975.

Claimant's testimony at the hearing included several conditions which he indicated became problems after the last closure. These included flare-ups of swelling and pain, locking of the knee, stiffness, popping, giving way and a gait change. On cross-examination by the carrier's attorney, claimant admitted that all these conditions but one (the stiffness) were problems ever since the 1973 injury occurred. The early medical reports also support this testimony, including a finding that claimant was suffering from stiffness in the knee shortly after the injury. The most claimant could say at the hearing was that his symptomatology had gotten worse since September 1975. Claimant has been granted an award for 40% loss of the leg. Based on the lay testimony alone, there is no evidence to show that he is suffering from anything more than the expected consequences of the permanent disability for which he has been compensated. The very essence of an award for permanent partial disability is the fact that a worker's industrial injury is permanently disabling.

Dr. Curtis Adams, claimant's treating physician, reported that claimant "...did not have any increased impairment from September 8, 1974 to November 1979." He later indicated claimant had had no gross clinical change between his last examination and the re-evaluation in November 1979. Claimant's attorney posed a hypothetical question to Dr. Adams in a telephone deposition. The answer to this question is what the Referee apparently used to find claimant's aggravation claim compensable. Dr. Adams was asked that if certain things were true (basically the complaints testified to at the hearing), then would claimant have difficulty working. Dr. Adams answered, "I would think that during the flare-ups, assuming the facts that you have presented, that he would be un--have difficulty working, yes." We note that claimant's attorney advised the doctor over the phone that these flare-ups occurred once a month and claimant was then laid up from three to seven days. At the hearing, claimant testified he has two to four flare-ups a year and he is laid up three to four days afterwards. Also these flare-ups occurred prior to September 1975, and there is no evidence that they have worsened or increased. Claimant continues to be quite active on his small ranch, working a couple of hours before taking a rest. He continues to fish and hunt when he wants.

Claimant has failed to prove that his condition has worsened. He did not even see Dr. Adams until November 1979. If he needs treatment, that can be handled under the provisions of ORS 656.245, although Dr. Adams said there is nothing he can do for claimant. The denial, dated September 10, 1979 should be affirmed.

ORDER

The Referee's order dated October 28, 1980 is modified. The denial dated September 10, 1979 is hereby reinstated. That portion of the Referee's order which granted Defendant's Motion for Dismissal and denied claimant's requests for other relief is affirmed.

LARRY BANGS, Claimant
David Vandenberg, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 80-537
October 9, 1981

Reviewed by Board Members McCallister and Lewis.

SAIF seeks Board review of Referee Igarashi's order which set asided its denial of claimant's arthritic condition and awarded 25% (37.5°) loss of the right leg; 15% (22.5°) loss of the left leg; 10% (19.2°) loss of the left arm; 10% (19.2°) loss of right arm, and 10% (32°) unscheduled permanent partial disability due to his rheumatoid arthritic condition. SAIF contends that there is no objective medical evidence to substantiate any permanent partial disability award.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated March 10, 1981 is affirmed.

The claimant's attorney is granted, as and for reasonable attorney fee $350, for prevailing at Board review.

WILLIAM L. CAFFEY, Claimant
Michael Stebbins, Claimant's Attorney
Paul Roess, Defense Attorney
Request for Review by Claimant

WCB 80-07258
October 9, 1981

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Seifert's order awarding 35% unscheduled low back disability for claimant's 1976 compensable injury. Claimant contends that the award is inadequate in view of the Referee's finding that claimant suffers a moderately severe low back impairment as well as a moderate emotional disturbance with reactive depression as a result of his injuries.

The Board, after de novo review, adopts the Referee's findings of fact. We reach a different conclusion, however, concerning the extent of claimant's disabilities. Application of the department's rules, enacted in 1980 as guidelines for rating the extent of permanent disability, indicates that the claimant is entitled to an award of 55% unscheduled permanent partial disability for loss of earning capacity.

ORDER

The Referee's order dated February 23, 1981 is modified. Claimant is awarded 55% unscheduled disability for his low back and psychological injuries, in lieu of compensation previously awarded. Claimant's attorney is awarded 25% of the increased compensation as a reasonable attorney fee.

Philip S. Carpenter, Claimant
Peter Hansen, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Delbert Brenneman, Defense Attorney
Request for Review by Claimant

WCB 80-03900 & 80-04190
October 9, 1981

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Pferdner's first and second orders which affirmed Montgomery Ward's denial of aggravation (WCB Case No. 80-03900) and SAIF's denial of new injury (WCB Case No. 80-04190) for claimant's back condition.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated October 22, 1980 is affirmed.

HOWARD S. CARTER, Claimant
David Edstrom, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 80-10965 & 80-09402
October 9, 1981

Reviewed by Board Members McCallister and Lewis.

The SAIF Corporation seeks Board review of that portion of Referee Mongrain's order which reversed its September 26, 1980 denial of a low back injury of August 8, 1980. SAIF contends "that there was no proof by competent, reasoned medical evidence of any injury, accident or occupational disease arising out of or in the course of employment."

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated March 12, 1981 is affirmed. Claimant's attorney is awarded $400 for his services at this Board review, payable by the SAIF Corporation.

JAMES CLARK, Claimant
Dan O'Leary, Claimant's Attorney
Norm Cole, SAIF, Defense Attorney
Marcus Ward, Attorney
Request for Review by SAIF

WCB 79-09346
October 9, 1981

Reviewed by Board Members McCallister and Lewis.

The SAIF Corporation seeks Board review of Referee Nichols' order which declared the Determination Order of June 22, 1979 null and void and found the denial issued October 17, 1977 moot. Claimant cross requests review of the Referee's order contending that the Determination Order of June 22, 1979 should have been clearly reversed and claimant should have received continuous time loss from October 17, 1979, that the denial was improper when issued entitling claimant to penalties and attorneys fees for SAIF's unreasonable resistance to the payment of compensation beginning October 17, 1979 rather than only for the period December 26, 1979 through February 19, 1980. In addition claimant contends entitlement to penalties and attorneys fees for SAIF's May 23, 1980 unreasonable denial of claimant's request of January 8, 1980 reopening of his claim.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated November 13, 1980 is affirmed. Claimant's attorney is granted the sum of $300 for his services at this Board review, payable by the SAIF Corporation.

CHARLES E. COOPER, Claimant
John Eads, Attorney
Request for Review by SAIF

WCB 80-08230 & 80-07744
October 9, 1981

Reviewed by the Board en banc.

The claimant seeks Board review of Referee Danner's order and amended order which (1) affirmed the Determination Order (WCB Case No. 80-07744) and (2) set aside the SAIF Corporation's denial of claimant's aggravation claim, awarded temporary total disability and, pursuant to OAR 436-83-525, determined that claimant had sustained no permanent disability beyond that previously awarded (consolidated WCB Case No. 80-08230).

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated March 5, 1981 and amended order dated March 31, 1981 are affirmed.

SHIRLEY L. GIVENS, Claimant
Thomas Caruso, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant

WCB 80-06162
October 9, 1981

Reviewed by Board Members McCallister and Lewis.

Claimant seeks Board review of Referee Braverman's order which affirmed the SAIF Corporation's denial, dated June 30, 1980, and found no penalties were indicated. Claimant contends her claim is compensable.

Claimant experienced back pain on March 26, 1980 immediately following a twisting incident at work. There is no dispute that the claimed incident actually occurred. The issue is compensability; did this twisting incident cause claimant's present condition or aggravate her pre-existing condition? Claimant's back problems started in 1971. Since then she has suffered several flare-ups with and without apparent precipitating causes. A laminectomy was done several years ago. Claimant's most recent flare-up, prior to the March 1980 incident, was in January 1980. She was off work approximately a week due to that episode, which was not attributable to any specific incident.

In affirming SAIF's denial the Referee relied on Dr. Stephen Stolzberg's opinion contained in his June 20, 1980 report. This report indicated claimant had an acute and chronic back strain which was the result of her obesity and of marked disc degeneration. Based on this statement, he concluded claimant's injury of March 1980 did not cause a worsening of her underlying condition.

After de novo review of the evidence, we are more persuaded by Dr. Manley and would reverse the Referee's order. Dr. Manley, an orthopedic surgeon, examined claimant between May 1980 and at least August 1980 when he performed a fusion of L5-S1. Dr. Manley indicated in July 1980 that claimant's pre-existing condition was aggravated by her industrial injury. He found she had severe degenerative osteoarthritis of the lumbosacral level which had been little problem until the March 1980 incident. Due to the severity of her problem, he performed the fusion in August 1980. Because claimant was fairly free of problems before the industrial injury, he felt that incident was responsible for her current condition.

Contrary to the Referee's opinion, we do not find this to be in disagreement with Dr. Stolzberg's report of June 20, 1980. Dr. Stolzberg merely indicated claimant's back problems were due to her extreme obesity and the underlying disc degeneration. He failed to offer an opinion on whether the March 1980 incident caused this back condition to worsen. Also significant, is that claimant saw Dr. Stolzberg, a neurologist, only once and this was prior to the surgery and testing done by Dr. Manley. We conclude that Dr. Manley's opinions should be given more weight; accordingly, claimant has proven by a preponderance of the evidence that the incident of March 26 caused a worsening of her underlying condition, and the claim is compensable under the criteria of Weller v. Union Carbide Corp., 288 Or 27, 35 (1979). Compare Richard A. Davidson, WCB Case No. 80-1007 (Feb. 23, 1981).

Inasmuch as claimant's brief on review states that "[t]he only issue on this appeal is whether SAIF's denial of claimant's claim should be overturned," we affirm the Referee's conclusion on the penalty issue.

ORDER

The Referee's order dated February 19, 1981 is modified. Claimant's claim for an injury sustained on March 26, 1980 is hereby remanded to the SAIF Corporation for acceptance and payment of compensation to which claimant is entitled. The request for penalties continues to be denied.

Claimant's attorney is granted $1,250 as a reasonable attorney's fee for his services before the Board and the Hearings Division, payable by the SAIF Corporation.

GWENDOLYN HENDERSON, Claimant — WCB 80-171
Galton, Popick & Scott, Claimant's Attorneys — October 9, 1981
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

Reviewed by Board Members McCallister and Lewis.

SAIF seeks Board review of that portion of Referee Fink's order which awarded claimant 5% (16°) unscheduled permanent partial disability for low back disability. SAIF contends that claimant has not demonstrated a loss of earning capacity.

The Board Affirms and adopts the order of the Referee.

ORDER

The Referee's order dated February 27, 1981 is affirmed.

The claimant's attorney is granted, as and for reasonable attorney fees, the sum of $350, for prevailing at Board review.

WILLIAM E. HOPSON, Claimant — WCB 77-05580 & 78-06309
Allen Murphy, Claimant's Attorney — October 9, 1981
Richard Lang, Attorney
Order on Remand

On judicial review by an Opinion filed July 13, 1981, the Court of Appeals reversed the Board's Order on Review dated November 14, 1980 and remanded this claim for proceedings;

The Board having now received the Court's Judgment and Mandated issued September 17, 1981;

This claim is remanded to the Hearings Division of the Workers' Compensation Board for further proceedings consistent with the ruling of the Court of Appeals.

IT IS SO ORDERED.

FREDERICK E. MERIDETH, Claimant
David Hittle, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Order on Reconsideration

WCB 81-00781
October 9, 1981

Claimant has moved the Board for reconsideration of its Order Denying Remand to the Referee issued September 18, 1981.

The Board has reconsidered its previous Order based upon claimant's submission of September 25, 1981. The Board's original Order shall stand. Robert A. Barnett, WCB Case Nos. 79-07210 and 79-11012, Order Denying Remand, June 25, 1981.

ORDER

On reconsideration, claimant's Request for Remand is denied.

HERB OLIVE, Claimant
Richard O. Nesting, Claimant's Attorney
Eugene Buckle, Defense Attorney
Request for Review by Claimant

WCB 78-9336
October 9, 1981

Reviewed by Board Members McCallister and Lewis.

Claimant seeks Board review of that portion of Referee Williams' order which affirmed a Determination Order awarding temporary total disability only and found claimant's psychiatric condition not a result of a compensable injury.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated June 23, 1980, which was republished July 25, 1980 is affirmed.

DONNIE SMITH, Claimant
Merrill Schneider, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant

WCB 79-09325
October 9, 1981

Reviewed by Board Members McCallister and Barnes.

The claimant seeks Board review of Referee Mongrain's order affirming a July 20, 1979 Determination Order which granted 10% unscheduled disability for claimant's low back injury of September 13, 1978. Claimant contends that his disability far exceeds the award.

Claimant improperly attempts to submit with his brief new medical evidence obtained after the November 5, 1980 hearing. This evidence has not been considered by the Board.

While working as a sandblaster, claimant injured his low back. Eleven different doctors, including three at Orthopaedic Consultants, have diagnosed claimant's back injury as a lumbar strain; several doctors suspect either a herniated or protruding disc; one diagnosed nerve root compression. At least three of claimant's earlier treating physicians recommended myelographic studies and possible surgery if a large disc could be identified. Claimant consistently resisted surgical treatment.

Claimant's resistance has not been limited to surgery but included repeated failures to keep medical appointments scheduled by the insurer and failure to respond to inquiries from vocational rehabilitation services to which he had been referred by Field Services. The Referee stated claimant's credibility and motivation are subject to question.

After receiving either treatment or consultation from six separate doctors, claimant began seeing Dr. William Duff, an orthopedist at The Bone and Joint Clinic in March of 1979, who reported his impression that claimant had a chronic lumbosacral sprain of moderate degree. He prescribed a back brace and physical therapy. When Orthopaedic Consultants examined the claimant in April of 1979, they diagnosed lumbar strain and mild sciatica, noting that claimant was not yet stationary, and recommending evaluation and treatment at the Callahan Center. Dr. Field, the medical examiner at Callahan, reported his impression of a lumbosacral strain with a possible herniated disc.

By June of 1979, claimant's condition had stabilized to the point where Dr. Duff did not think further treatment would be beneficial, reporting:

> "This man has a moderate level of continuing disability that I think makes unsuitable for return to occupations requiring heavy lifting and bending, and he will certainly need help with job placement services or possibly retraining to be able to get back into useful employment."

Williams Job Search, Inc., to whom claimant had been sent by Field Services, reported on unsuccessful efforts in September to reach claimant. Claimant's home telephone had been disconnected, no response was received to letters, and no one was at home at the time of a September 19 visit. Concluding that claimant preferred not to work, they closed their file in October.

In May 1980 Field Services referred claimant again, this time to Professional Rehabilitation Services for job assessment and an employability study. At the time of testing, at his home on May 13, 1980, claimant reported he had suffered heavy depression due to pain and financial difficulties. His mathematical and reading skills tested out at the fifth grade level. When claimant subsequently failed to respond to letters concerning job placement services, Professional Rehabilitation Service closed their file.

Claimant has an eighth grade education with math and reading skills at the fifth grade level. He has been limited to light work and has few marketable job skills. His work experience has been primarily heavy physical work to which he cannot return. Claimant's need for vocational rehabilitation and job-retraining is clear. It would appear, however, that before any effort at vocational rehabilitation will be very meaningful or productive, claimant needs psychological counseling as suggested two years ago by the Callahan Center. Counseling might also help claimant overcome his apparent fear of the diagnostic medical procedures which have been repeatedly recommended.

Claimant suffers a moderate physical impairment as the result of his injury. Based upon that extent of physical impairment, claimant's age, education, work experience and the relevant standards in OAR 436-65-600, et seq, the Board concludes that claimant is entitled to an award of 25% unscheduled permanent partial disability for his low back.

ORDER

The Referee's order dated January 23, 1981 is modified. Claimant is awarded 25% unscheduled permanent partial disability. Claimant's attorney is allowed an attorney fee equal to 25% of the additional award.

ANNA STOCKTON, Claimant
Steven Yates, Claimant's Attorney
Richard Lang, Defense Attorney
Request for Review by Claimant

WCB 77-03805
October 9, 1981

Reviewed by Board Members Barnes and McCallister.

The claimant seeks Board review of Referee Braverman's order which found claimant's hysterical blindness was compensable but that she was not entitled to an award of permanent partial disability as her "loss" was not permanent. Claimant contends this second finding is incorrect.

The Board affirms and adopts that portion of the Referee's order finding to the contrary.

The employer cross-requests review of that portion of Referee Braverman's order which ordered the employer to pay claimant's attorney a fee of $500. No basis for an employer-paid attorney fee is stated in the Referee's order or apparent in the record. In defense of that order, claimant's brief on Board review relies solely on a stipulation of the parties which provides in part:

> "Claimant's attorney shall receive 25% of the amount payable hereunder, including 25% of any amount made payable by an Order entered by the Referee in the issue before him..."

The first part of this ambiguous sentence, down to the word "hereunder," involved a fee payable from an increase in claimant's compensation to which the parties stipulated. That fee has been paid. The balance of the sentence is no support for the employer-paid attorney fee ordered by the Referee for two reasons. First, although admittedly ambiguous, it appears that the more likely intent was to provide for a worker-paid fee rather than an employer-paid fee. Second, and more significantly, no "amount [was] made payable" by the Referee's order. No entitlement to medical services was in issue. Claimant was working and thus no entitlement to temporary total disability benefits was in issue. And the Referee's order expressly stated "claimant is not entitled to an award of permanent partial disability." The only tendered defense of the Referee's award of employer-paid attorney fees cannot be sustained.

ORDER

The Referee's order dated April 13, 1981 is modified to eliminate the requirement of an employer-paid attorney fee of $500 and in all other respects is affirmed.

ROYCE VIBBERT, Claimant
D. Keith Swanson, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 80-10689
October 9, 1981

Reviewed by Board Members McCallister and Lewis.

SAIF seeks Board review of Referee Seifert's order which set aside its denial of compensability for claimant's back condition. SAIF contends claimant had an off-the-job injury and therefore the injury is not compensable. We affirm the Referee's order.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated February 3, 1981 is affirmed.

Claimant's attorney is granted, as and for reasonable attorney fees, the sum of $450, for prevailing at the Board review.

LAFAYETTE WALKER, Claimant
James Francesconi, Claimant's Attorney
Roger Warren, Defense Attorney
Mary Danford, Defense Attorney
Request for Review by Claimant

WCB 80-08746 & 80-09568
October 9, 1981

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of that portion of Referee Pferdner's order which found no penalties or attorney fees. Claimant contends that the employer should have requested an order pursuant to ORS 656.307 and because it did not do so, claimant should be awarded penalties and attorney fees.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated December 2, 1980 is affirmed.

BETTY WASSON, Claimant
Richard T. Kropp, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 80-6341
October 9, 1981

Reviewed by Board Members McCallister and Lewis.

SAIF seeks Board review of Referee Danner's order which awarded claimant permanent total disability. SAIF contends that claimant is able to secure gainful employment or if claimant is permanently totally disabled there is no causal connection between claimant's condition and the compensable injury.

The Board affirms and adopts the Referee's order.

ORDER

The Referee's order dated November 17, 1980 is affirmed. Claimant's attorney is granted the sum of $500 as a reasonable attorney fee for services rendered in connection with this Board review, payable by the SAIF corporation.

DAVID REED, Claimant
Rolf Olson, Claimant's Attorney
Don Howe, Defense Attorney
Order of Abatement

WCB 79-9063
October 14, 1981

On September 25, 1981, claimant's attorney requested the Board reconsider its September 18, 1981 Order on Review and grant him an attorney's fee for his services at Board review. The Board concludes, because of the special circumstances in this case, that it would be best to abate the Order on Review until such time as it can give careful consideration of the issue raised by claimant's attorney. Therefore, the September 18, 1981 Order on Review is hereby abated

IT IS SO ORDERED.

JOSEPH ALBERT, Claimant
Douglas Hess, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant

WCB 79-09720
October 16, 1981

Reviewed by Board Members Barnes and Lewis.

Claimant seeks Board review of Referee Neal's Amended Order on Remand which affirmed SAIF's denial of a claim for aggravation by reason of a scheduled injury allegedly spreading to an unscheduled area of the body and which order provided that SAIF pay time loss benefits from September 12, 1979 through September 18, 1979, but that no penalties or attorney fees be paid under ORS 656.268.

We affirm and adopt the Referee's findings with the following additional comments. Where an unscheduled area of the body is allegedly affected as a result of a scheduled injury, entitlement to an award for unscheduled disability depends upon satisfying the test established in Woodman v. Georgia Pacific, 289 Or 551 (1980). The three-pronged Woodman test is that: (1) Claimant must suffer an independent disability to an unscheduled part of the body; (2) the resulting unscheduled disability must not be ushc that it is an intrinsic result such that its failure to occur would be a surprise, but at a minimum, must be a common or probable result before compensation will lie; and (3) these criteria must be applied to the general population of working men and women as a whole, not to the individual in order to determine whether unscheduled disability was included as a necessary consequence of a scheduled loss.

Dr. Frank Trostel diagnosed a probable epicondylitis of the right elbow and a worsening of claimant's underlying condition involving the right shoulder and upper back. He testified that the worsened condition is a normal progression of claimant's initial injury. From this testimony, it cannot be said that claimant's alleged worsening was independent or had met the minimum standard under the second-prong of the Woodman test.

Dr. Thomas Gritzka who had treated claimant following his initial injury reported on his September 1979 reexamination:

> "I feel that this patient is essentially unchanged since I last saw him. I do not feel that he has any greater disability than he had when he was here in 1977, although my estimation of this patient's ability to work considering his educational deficit and other problems, differs from that of the Court of Appeals, apparently. I do not feel that Mr. Albert could be said to have an 'aggravation' or 'substantial worsening' since I last saw him in 1977, but do feel that he could be made more comfortable with palliative physical therapy."

We are not convinced, by our review of the medical evidence, that claimant has suffered a worsening of his condition. Even if it had been established that claimant suffered a worsened condition, however, the Woodman test has not been met.

We conclude, therefore, that claimant is not entitled to an award of unscheduled disability arising from his scheduled injury to his wrist or to additional scheduled compensation on the basis of the medical evidence.

ORDER

The Referee's Amended Order on Remand dated April 28, 1981 is affirmed.

RANDALL BEA, Claimant
Norman Lindstedt, Claimant's Attorney
Ridgway Foley, Jr., Defense Attorney
Request for Review by Employer

WCB 80-04658
October 16, 1981

Reviewed by Board Members McCallister and Lewis.

The employer seeks Board review of Referee Ail's order awarding 20% unscheduled mid and low back disability as a result of claimant's compensable motor vehicle accident of June 15, 1979. The employer contends that the award is excessive in view of claimant's poor motivation and his treating physician's changed opinion of the extent of physical impairment. Claimant contends that the award us inadequate.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated March 20, 1981 is affirmed. Claimant is awarded $400 as a reasonable attorney's fee for his services at this Board review, payable by the employer/carrier.

WILANA M. BLAYLOCK, Claimant
Merten & Saltveit, Claimant's Attorneys
Lang, Klein et al, Defense Attorneys
Request for Review by Employer/Carrier

WCB 80-8050
October 16, 1981

Reviewed by Board Members McCallister and Lewis.

The employer/carrier seeks Board review of Referee James' order which set aside its denial of claimant's low back aggravation. Employer/carrier contends an intervening injury was responsible and that denial was not unreasonable.

The Board affirms and adopts the Referee's order.

ORDER

The Referee's order dated February 10, 1981 is affirmed. Claimant's attorney is granted the sum of $450 as a reasonable attorney fee for services rendered in connection with this Board review, payable by the EBI Companies.

JAMES CABA, Claimant
Gary Peterson, Claimant's Attorney
Daryll Klein, Defense Attorney
Request for Review by Employer

WCB 80-00970
October 16, 1981

Reviewed by Board Members Barnes and Lewis.

The employer seeks Board review of Referee Neal's order which found claimant permanently and totally disabled.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated November 10, 1980 is affirmed. Claimant's attorney is awarded $100 for his services at this Board review, payable by the employer/carrier.

DAVID CRAVEN, Claimant
Benton Flaxel, Claimant's Attorney
Paul Roess, Defense Attorney
Request for Review by Claimant

WCB 80-07259
October 16, 1981

Reviewed by Board Members Barnes and Lewis.

The claimant seeks Board review of Referee Nichols' order which granted claimant an additional 16° for a total of 48° (15%) unscheduled permanent partial disability for his back condition. Claimant contends his disability is in the 30% to 35% range.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated April 28, 1981 is affirmed.

KATHERINE ESTEP, Claimant
Peter Hansen, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant

WCB 80-08146
October 16, 1981

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of the Referee's order which affirmed the August 26, 1980 Determination Order which awarded no additional permanent disability compensation above the 65% she had already received. Claimant contends she is permanently and totally disabled.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated April 17, 1981 is affirmed.

COLLEEN J. GOURDE, Claimant
Pozzi, Wilson et al, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 80-7710
October 16, 1981

Reviewed by Board Members McCallister and Lewis.

SAIF seeks Board review of Referee Mongrain's order which reversedits denial of compensation for claimant's psychiatric condition. SAIF contends that claimant's off-the-job exposure is the cause of claimant's hysterical reaction.

The Board affirms and adopts the Referee's order.

ORDER

The Referee's order dated January 15, 1981 is affirmed. Claimant's attorney is granted the sum of $400 as a reasonable attorney fee for services rendered in connection with this Board review, payable by the SAIF Corporation.

RALPH GRAHAM, Claimant
Keith Swanson, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant

WCB 80-01645
October 16, 1981

Reviewed by Board Members Barnes and Lewis.

Claimant seeks Board review of Referee Knapp's order which upheld SAIF's denial of claimant's aggravation claim for his ankle condition.

The Board affirms and adopts the Referee's order.

ORDER

The Referee's order dated April 28, 1981 is affirmed.

DAVID HINES, Claimant
Mike Dye, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 79-7957
October 16, 1981

Reviewed by Board Members McCallister and Lewis.

SAIF seeks Board review of Referee Braverman's order which set aside its denial of compensability for claimant's thoracic outlet syndrome. SAIF contends there is no relationship between claimant's thoracic condition and his industrial injury.

The Board affirms and adopts the Referee's order.

ORDER

The Referee's order dated November 17, 1980 is affirmed.

CHARLES JENKINS, Claimant
Richard Condon, Claimant's Attorney
Noreen Saltveit, Defense Attorney
Request for Review by Employer/Carrier

WCB 80-07221
October 16, 1981

Reviewed by Board Members McCallister and Lewis.

The employer/carrier seeks Board review of Referee Mulder's order which remanded claimant's claim for a groin injury to it for acceptance and payment as required. The employer/carrier contends claimant's condition is an aggravation of an earlier, non-compensable back condition.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated March 10, 1981 is affirmed. Claimant's attorney is granted $250 for his services at this Board review, payable by the employer/carrier.

ROBERT L. KIRKWOOD, Claimant
Jan Baisch, Claimant's Attorney
Paul Bocci, Defense Attorney
Request for Review by Employer

WCB 80-02080
October 16, 1981

Reviewed by Board Members Barnes and Lewis.

The employer seeks Board review of Referee Gemmell's order which remanded the claim to the employer for payment of medical services, imposed a 25% penalty on those medical services and granted claimant's attorney $1,000 in fees. The employer contends that claimant failed to prove his claim pursuant to ORS 656.273 or ORS 656.245, that penalties and attorney fees should be reversed and that the attorney fee granted by the Referee is excessive.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated February 20, 1981 is affirmed. Claimant's attorney is awarded $750 as a reasonable fee for services rendered in connection with this Board review, payable by the employer/carrier.

RONALD F. KITTLE, Claimant
C.H. Seagraves, Jr., Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant

WCB 81-01439 & 81-01440
October 16, 1981

Reviewed by Board Members Barnes and Lewis.

The claimant seeks Board review of that portion of Referee Braverman's order which affirmed the denial of claimant's aggravation claim.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated May 7, 1981 is affirmed.

LARRY LONG, Claimant
Jeffrey Mutnick, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant

WCB 80-06326
October 16, 1981

Reviewed by Board Members Barnes and Lewis.

The claimant seeks Board review of Referee Ail's order which awarded claimant 240° unscheduled disability resulting from injury to his low back along with eligibility for vocational assistance. Claimant contends he is permanently and totally disabled.

The Board affirms and adopts the Referee's order.

ORDER

The Referee's order dated April 24, 1981 is affirmed.

JOSEPH MANLEY, Claimant
David Lipton, Claimant's Attorney
John Klor, Defense Attorney
Request for Review by Claimant

WCB 80-09593
October 16, 1981

Reviewed by Board Members Barnes and Lewis.

Claimant seeks Board review of Referee Williams' order which affirmed the denial of claimant's aggravation claim and denied entitlement to interim compensation. Claimant is also requesting penalties and attorney fees for the carrier's unreasonable refusal and/or delay in paying compensation following the request to re-open this claim.

The Board affirms and adopts the Referee's order.

ORDER

The Referee's order dated March 3, 1981 is affirmed.

JOHN L. MOORE, Claimant
Robert Grant, Claimant's Attorney
R. Kenney Roberts, Defense Attorney
Request for Review by Claimant

WCB 79-02417
October 16, 1981

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee McCullough's Order on Reconsideration which affirmed the employer/insurer's denial of compensation for claimant's lung conditions. Claimant contends his work environment caused or substantially contributed to claimant's lung conditions.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated January 15, 1981 is affirmed.

ROBERT MULLEN, Claimant
W.D. Bates, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant

WCB 80-04692
October 16, 1981

Reviewed by Board Members Barnes and Lewis.

The claimant seeks Board review of Referee McSwain's order which upheld the March 24, 1980 denial and denied his request for penalties and attorney fees.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated March 20, 1981 is affirmed.

DONALD S. PARTIN, Claimant
Michael Strooband, Claimant's Attorney
Brian Pocock, Defense Attorney

WCB 80-01798
October 16, 1981
Request for Review by Claimant

Reviewed by Board Members Barnes and Lewis.

The claimant seeks Board review of that portion of Referee Darron's order which awarded claimant an increase of 60% (192°) unscheduled permanent partial disability, totalling 80% (256°) unscheduled permanent partial disability for his low back condition. Claimant contends he is permanently and totally disabled.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated January 19, 1981 is affirmed.

JOHN H. PATTON, Claimant
William Blitz, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-05357
October 16, 1981
Request for Review by Claimant

Reviewed by Board Members Barnes and Lewis.

The claimant seeks Board review of Referee Nichols' order which affirmed the SAIF Corporation's denial of claimant's claim for myocardial infarction as a result of an electric shock with resultant psychological condition.

The Board affirms and adopts the Referee's order.

ORDER

The Referee's order dated February 10, 1981 is affirmed.

JERRY PETERSON, Claimant
Gary Allen, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-09429
October 16, 1981
Request for Review by Claimant

Reviewed by Board Members Barnes and Lewis.

Claimant seeks Board review of Referee McCullough's order which affirmed SAIF's denial of responsibility for medical services.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated April 23, 1981 is affirmed.

PAMELA REHBERG, Claimant
Mike Stebbins, Claimant's Attorney
Paul Roess, Defense Attorney

WCB 79-00835
October 16, 1981
Request for Review by SAIF

Reviewed by Board Members Barnes and Lewis.

The SAIF Corporation seeks Board review of Referee Braverman's order which set aside its denial of claimant's aggravation claim. SAIF contends that claimant has not proven a compensable aggravation of her spinal fusion.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated April 6, 1981 is affirmed. Claimant's attorney is awarded $600 for his services at this Board review, payable by the SAIF Corporation.

WALTER R. RICHMOND, Claimant's Attorney
Gary Jensen, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-01520
October 16, 1981
Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of the Referee's order which affirmed the SAIF Corporation's denial of claimant's claim.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated December 12, 1980 is affirmed.

LAURA RINI, Claimant
Charles Paulson, Claimant's Attorney
Donald Hull, Defense Attorney

WCB 80-06603
October 16, 1981
Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Leahy's order which affirmed a Determination Order which awarded claimant temporary total disability and no permanent partial disability. Claimant contends she was not medically stationary or, that if she was properly found to be medically stationary, she is entitled to an award of permanent partial disability.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated February 13, 1981 is affirmed.

RAYFORD SIMS, Claimant
Richard Sly, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-06552
October 16, 1981
Request for Review by Claimant

Reviewed by Board Members Barnes and Lewis.

The claimant seeks Board review of Referee James' order which granted him compensation equal to 112° for 35% unscheduled back disability. Claimant contends this award is inadequate.

The Board, after de novo review, concurs with the findings reached by the Referee. However, we come to a different conclusion based on the same evidence. We conclude claimant is entitled to an award equal to 160° for 50% unscheduled disability due to an injury sustained on December 12, 1978.

ORDER

The Referee's order dated April 20, 1981 is modified. Claimant is hereby granted compensation equal to 160° for 50% unscheduled back disability. This award is in lieu of, not in addition to, that granted by the Referee. Claimant's attorney is awarded 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 $2,000.

RAY C. ARMSTRONG, Claimant
Dan O'Leary, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-01476
October 19, 1981
Interim Order

On September 18, 1981 the Board issued an order denying claimant's request to remand to the Referee to consider additional evidence. Claimant has pointed out that there is an ambiguity in the law about whether a Board order denying remand is appealable, and requested the Board reconsider the possibility of remand at the time of Board review so that all issues could be resolved in a single, clearly appealable order. The request is reasonable and will be granted. The Board will reconsider the possibility of remand at the time of Board review.

IT IS SO ORDERED.

GAYLORD ALLISON, Claimant
Gary Allen, Claimant's Attorney
Brian Pocock, Defense Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-06116 & 80-06880
October 21, 1981
Request for Review by SAIF

Reviewed by Board Members McCallister and Lewis.

The SAIF Corporation seeks Board review of that portion of Referee Foster's order which remanded claimant's aggravation claim to it for acceptance and the payment of compensation as provided by law.

Claimant fell down some stairs January 3, 1979 while employed at Fairview Hospital and Training Center, insured by SAIF. Dr. Warner diagnosed the injury as cervical thoracic lumbar strain with a bruise on the left side of the forehead. The low back injury persisted. The claimant changed jobs and in May 1980 while employed by Mallorie's Dairy his condition worsened, he claimed.

> "Began working on about May 2, 1980 and began having bad back pain and headaches about May 5, 1980. Progressively got worse until I could not work any longer and had to stop May 17, 1980. My work was heavy."

Mallorie's Dairy was insured by Mission Insurance Group, Inc. Claimant signed the first report of injury or occupational disease May 23, 1980. Mission denied the claim July 3, 1980. Mission paid no interim compensation.

Claimant submitted a claim for aggravation to SAIF contending the May 1980 conditions were related to injuries at Fairview. SAIF neither accepted nor denied the claim and, like Mission, did not pay interim compensation.

Claimant requested a hearing protesting both the Mission and the SAIF denials and requesting penalties and attorney fees for the carriers' failures to properly process the claims.

The case was heard November 26, 1980. The Referee ordered SAIF to accept the claim as an aggravation of conditions which had developed from the January 3, 1979 injury at Fairview. We agree and affirm the Referee's order. We are persuaded that the weight of the medical evidence, particularly the opinions of the Orthopaedic Consultants and Dr. Poulson, support compensability of the aggravation claim.

ORDER

The Referee's order dated December 15, 1980 is affirmed. Claimant's attorney waived the filing of a brief on this appeal and is, therefore, not entitled to an attorney fee.

DIANNA BEEMER, Claimant	WCB 80-01872
Richard Kropp, Claimant's Attorney	October 21, 1981
Brian Pocock, Defense Attorney	Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Danner's order which affirmed the employer/carrier's denial of compensation for claimant's low back condition. Claimant contends that the Referee's findings of credibility were in error and that the preponderance of medical evidence proves compensability.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated March 26, 1981 is affirmed.

LOYD BURKENBINE, Claimant
David Hytowitz, Claimant's Attorney
Dennis VavRosky, Defense Attorney

WCB 80-06028
October 21, 1981
Request for Review by Employer/Carrier
Cross-Request by Claimant

Reviewed by Board Members McCallister and Lewis.

The employer/carrier seeks Board review of that portion of Referee Leahy's order which awarded claimant 64° for 20% unscheduled permanent partial disability for claimant's right shoulder disability. Employer/carrier contends that no loss of earning capacity has been proven, and that if it has the award is excessive. Claimant cross-appeals contending that the award is insufficient, that temporary total disability, penalties and attorney fees should be awarded and that the attorney fee awarded by the Referee is insufficient. We affirm.

The Board adopts the facts set forth in the Referee's order and emphasizes the following. This appears to be a case where claimant has an asymptomatic pre-existing condition, is injured on the job, then begins to have symptoms thereafter. The employer/carrier correctly stated that three physicians reported that the job related injury temporarily aggravated claimant's underlying condition and that any additional symptoms would be from the pre-existing condition. However, the same three physicians failed to note that claimant was asymptomatic before the injury and remained symptomatic after the strain resolved. Additionally the same three doctors did note that claimant should not return to his previous occupation. Finally, claimant's ten-pound lifting restriction was never cancelled. Claimant's shoulder rotation impairment was termed as slight. We find claimant has a minimal impairment of the right shoulder.

Claimant contends that temporary total disability, penalties and attorney fees are in order. We find that due to the conflicting medical reports that the employer/carrier's denial was not unreasonable. Additionally, we find that temporary total disability and temporary partial disability were both properly awarded by the Determination Order.

Finally, claimant's attorney requests increased attorney fees. The Board notes that $500 is an appropriate fee and that the agreement with claimant for 25% of his increased compensation would quite adequately compensate claimant's attorney. Therefore we will not alter the attorney's fees.

Claimant has minimal impairment. When claimant's impairment is combined with the social/vocational factors stated in the Referee's order, we find claimant has lost 20% of his earning capacity.

ORDER

The Referee's order dated February 24, 1981 is affirmed. Claimant's attorney is awarded $450 as a reasonable attorney fee for his services at this Board review, payable by the employer/carrier.

COLLEEN M. COOPER, Claimant
Jeffrey Mutnick, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-07966
October 21, 1981
Request for Review by Claimant

Reviewed by the Board en banc.

The claimant seeks Board review of Referee Braverman's order which affirmed the SAIF Corporation's denial of her claim for left shoulder and neck pain and headache.

We concur with the conclusion reached by the Referee. Claimant and the employer both argue that claimant's claim can best be determined using the rationale in Weller v. Union Carbide, 288 Or 27 (1979). Dr. Rinehart, claimant's treating physician, stated on July 8, 1980 that "[t]he history of her disability strongly suggests that her employment aggravated a preexsting and previously non-disabling musculoskeletal dysfunction involving her neck and left shoulder." There is significant contrary evidence. But accepting that Dr. Rinehart has established that claimant had an underlying condition which was "aggravated" by her work activities, under Weller, claimant must also show that her work activities caused a worsening of this underlying disease. This she has failed to do. The most that claimant has shown is that her work activities caused an increase in symptomatology. We do not find that the answers presented by Dr. Rinehart to questions propounded or proposed by SAIF in a February 18, 1981 letter are sufficient to show that claimant's underlying condition has worsened.

With respect to the issue of penalties, we concur with the findings and conclusion of the Referee.

ORDER

The Referee's order dated March 18, 1981 is affirmed.

JOHN E. DYKE, Claimant
Ann Morgenstern, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-10073
October 21, 1981
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 request for review now having been withdrawn,

IT IS THEREFORE ORDERED that the request for review now pending before the Board is hereby dismissed on the ground that claimant's claim has been reopened; this dismissal is without prejudice to the claimant raising any issue following claim closure, including duration of entitlement to temporary total disability.

JON ELLIS, Claimant
Steven Yates, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-04076
October 21, 1981
Request for Review by Claimant

Reviewed by Board Members Barnes and Lewis.

Claimant seeks Board review of that portion of Referee Mannix's order which awarded him 5% unscheduled permanent partial disability because of his back disability. Claimant contends he is precluded from heavy and moderate work and, therefore, the award is insufficient. We do not find claimant's work preclusion to be as great as he contends, but nevertheless agree the Referee's award is insufficient.

The Board adopts the facts as set forth in the Referee's well written order. In applying the standards governing rating of disability contained in OAR 436-65-600, et seq, to those facts, we find claimant's award should be increased to 10% unscheduled permanent partial disability.

ORDER

The Referee's order dated March 31, 1981 is modified. Claimant is awarded 32° for 10% unscheduled permanent partial disability in lieu of the Referee's award. Claimant's attorney is allowed 25% of the increase granted by this order as a reasonable attorney fee.

ROGER JUSTROM, Claimant
Samuel Hall, Jr., Claimant's Attorney
Paul Roess, Defense Attorney

WCB 80-00914
October 21, 1981
Request for Review by SAIF

Reviewed by Board Members McCallister and Lewis.

The SAIF Corporation seeks Board review of Referee Baker's order which granted claimant compensation for permanent total disability.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated April 16, 1981 is affirmed. Claimant's attorney is awarded $600 for his services at this Board review, payable by the SAIF Corporation.

KATHLEEN MARTINDALE, Claimant
Gary Allen, Claimant's Attorney
George Goodman, Defense Attorney

WCB 80-03532
October 21, 1981
Request for Review by Employer
Cross Request by Claimant

Reviewed by Board Members Barnes and McCallister.

The claimant and the employer both seek Board review of Referee Braverman's order which found that, pursuant to ORS 656.245, claimant was entitled to all chiropractic care except manipulation. Claimant requests that the Board modify the Referee's order and allow her all chiropractic treatment; the employer asks that its denial of this care be affirmed.

There is no dispute that the chiropractic care claimant is receiving from Dr. Isselmann is related to her January 4, 1979 industrial injury. The employer questions the reasonableness of, and the necessity for, these treatments.

Several factors lead us to conclude that claimant has persuasively proven her case. The medical opinion is split evenly between two chiropractors and two medical doctors. Although the medical doctors, predictably, do not sanction chriropractic treatment, they do indicate that claimant should continue home traction and exercise. It is evident that claimant is in need of some type of continuing care to maintain her condition. We find Dr. Isselmann's and Dr. Schmidt's reports persuasive that the chiropractic treatment is both necessary and beneficial to claimant. Claimant very credibly testified (even the employer stated she was totally credible) that the treatment is helping her and making it possible for her to continue to work on a fairly regular basis. We conclude claimant is entitled to whatever chiropractic care her treating chiropractor indicates is reasonable and necessary, subject to one qualification.

The employer asks that, should we conclude claimant is entitled to chiropractic treatment, this treatment be limited under the provisions in OAR 436-69-320(2). This rule provides that: "More than sixteen (16) office visits in the first month, twelve (12) in the second month, eight (8) in the third month and four (4) a month in the next three months unless clearly justified by reports." Under this rule, it will be claimant's burden to show justification for any treatments in excess of two a month.

ORDER

The Referee's order dated March 12, 1981 is modified. The denial dated April 17, 1980 is set aside. Claimant is entitled to chiropractic care to be provided pursuant to ORS 656.245 and OAR 436-69-320(2). Claimant's attorney is awarded $300 as a reasonable attorney fee for further prevailing on the employer's denial on Board review, to be paid by the employer.

WILLIAM W. McKENNEY, Claimant
Karen Fink, Claimant's Attorney
John Klor, Defense Attorney

WCB 80-11397, 80-11444 & 80-1533
October 21, 1981
Order of Remand

The Board has ruled that the Referee erred in excluding the deposition of Dr. Geist on the grounds that if was not submitted in a timely fashion.

SAIF and claimant, by and through their respective counsels, have elected to have this claim remanded to the Referee for further consideration in light of the Board's ruling; accordingly,

This claim is remanded to the Hearings Division for further proceedings.

IT IS SO ORDERED.

BETTY OLSON, Claimant
James Francesconi, Claimant's Attorney
Ridgway Foley, Jr., Defense Attorney

WCB 80-08901
October 21, 1981
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.

ROBERT J. PARKINSON, Claimant
Tamblin & Bush, Claimant's Attorneys
Galton, Popick & Scott, Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-1802
October 21, 1981
Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

Claimant seeks Board review of Referee St. Martin's order which affirmed SAIF's denial for additional medical services and affirmed a Determination Order mailed March 16, 1981 which awarded temporary total disability. Claimant contends that SAIF unreasonably denied a request for a myelogram or, in the alternative, that claimant should be awarded permanent partial disability.

The Board affirms and adopts the Referee's order.

ORDER

The Referee's order dated May 14, 1981 is affirmed.

JACK W. PETERSON, Claimant
Brian Welch, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-07937
October 21, 1981
Request for Review by SAIF

Reviewed by Board Members McCallister and Lewis.

The SAIF Corporation seeks Board review of Referee Pferdner's order which set aside its denial of responsibility for claimant's left knee condition. SAIF contends that due to the Referee's findings of credibility, there is insufficient competent evidence for claimant to carry the burden of proof. We agree and therefore reverse the Referee's order.

Claimant contends that he had a gradual onset of left knee symptoms as a result of "constant standing, kneeling, squatting on concrete and steel grid floors and steps up and down press" while working as a pressman. In April 1980, Dr. North, treating physician, reported swelling and pain in claimant's left knee and diagnosed degenerative joint disease with genu varum with a probable medial meniscus tear. Dr. North performed surgery on claimant's knee May 6, 1980. Dr. Pasquesi, who examined claimant at SAIF's request, reported in July 1980 that "this is probably an occupational disease rather than a specific injury."

SAIF denied responsibility for claimant's left knee condition August 19, 1980 because "information in the file indicates this condition to be the result of an incident which occurred at your home a couple of years ago." In 1978, claimant fell off a ladder at home while painting. That fact would not be significant were it not for the following:

May 15, 1980 claimant wrote his health care insurer about the left knee problem: "However, in trying to recall the exact nature of the injury to my knee, I am quite sure this injury did not occur in the course of my employment." In the same letter claimant states he had had problems with his knee ever since. The Referee found the claimant not credible but did accept claimant's description of his work activity.

The Referee found the medical evidence of a degenerative knee condition considered in the light of claimant's work activity sufficient to establish compensability. We disagree.

In Evelyn LaBella, WCB 79-08172 (April 1981), the Board concluded "a doctor repeating a worker's story does not add anything to the worker's story in the sense of being any medical verification of that story." We find this a like case. There is also no evidence that any of claimant's physicians knew of the off-the-job incident. Therefore, claimant has not shown causation and has failed to carry his burden of proof. Claimant's left knee condition is not compensable.

ORDER

The Referee's order dated March 12, 1981 is reversed. It is ordered that SAIF's denial of responsibility for claimant's left knee condition is affirmed.

DWIGHT C. PRATT, Claimant
Joseph McNaught, Claimant's Attorney
John Klor, Defense Attorney

WCB 80-11302
October 21, 1981
Order Denying Dismissal

A motion to dismiss the claimant's request for review was received by the Board on the grounds that the request was untimely filed.

The Referee's Opinion and Order was dated August 18, 1981, and the 30 days for filing a request for review expired September 17, 1981. The Request for Review was certified and postmarked September 17, 1981, and therefore is considered timely. This case will be entered on the docket and reviewed as requested.

The Employer's Motion for Dismissal of Claimant's Request for Review in this matter is denied.

IT IS SO ORDERED.

WILLIAM C. SAIN, Claimant
Wade Bettis, Jr., Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-10383
October 21, 1981
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.

GLENN R. STOSE, Claimant
Richard Sly, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-08176
October 21, 1981
Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Gemmel's order which affirmed the Determination Order's award of 10% unscheduled permanent partial disability for his low back condition. Claimant contends the award should be 30%.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated May 11, 1981 is affirmed.

RAYMOND BRYANT, Claimant
Donald Wilson, Claimant's Attorney
Frank Langfitt III, Defense Attorney

WCB 79-08083
October 23, 1981
Request for Review by Employer

Reviewed by Board Members McCallister and Lewis.

The employer, through its insurer Argonaut Insurance Company, seeks Board review of Referee Neal's order reversing the July 24, 1979 denial of compensability of claimant's two myocardial infarctions suffered on May 15, 1979 and on June 9, 1979.

The issue on appeal is compensability. Again raised on appeal by the employer is the further issue of whether the second heart attack was properly before the Referee. The insurer alleges that no formal claim was ever filed for the second heart attack. We accept the Referee's reasoning that the issue of compensability for the second heart attack was properly before her since the insurer had, prior to its denial, received Kaiser's June 20, 1979 medical report indicating that claimant's June hospitalization when the second heart attack occurred was related to his May 1979 work injury. We interpret the insurer's denial of claimant's "present heart condition" to include that second myocardial infarction.

On the issue of compensability, the Referee found, and we agree, that claimant's work activities of May 15, 1979 contributed both legally and medically to claimant's first heart attack which in turn materially contributed to his second heart attack.

ORDER

The Referee's order dated February 25, 1981 is affirmed. Claimant's attorney is awarded $500 as a reasonable fee for his services at this Board review, payable by the employer/carrier.

THOMAS CLARK, Claimant
Samuel J. Imperati, Claimant's Attorney
R. Kenney Roberts, Defense Attorney
Marcus K. Ward, Defense Attorney

WCB 80-8771
October 23, 1981
Request for Review by SAIF

Reviewed by Board Members McCallister and Lewis.

SAIF seeks Board review of Referee Mulder's order which set aside its denial of claimant's aggravation claim.

On November 6, 1978 while employed by Warm Springs Forest Products the claimant injured his low back. The claim was accepted in behalf of the employer by its carrier SAIF. On June 19, 1979, while employed by Brooks-Scanlon, the claimant was lifting a steel plate and experienced an acute onset of low back pain. Brooks-Scanlon is self-insured and its claim agent is Fred S. James. Claimant filed a new injury claim with Fred S. James and an aggravation claim with SAIF, both carriers denied compensability. Later both carriers stipulated that the claimant's condition is compensable but both continued to deny responsibility.

The Referee found SAIF responsible saying "I conclude that the 1979 incident was an aggravation of the Warm Springs injury, and therefore the responsibility of SAIF. The weight of the medical evidence clearly establishes an aggravation. There is no medical evidence to the contrary..."

We agree even though the description of the onset of symptoms June 19, 1979 strongly implies a "new injury" occurred. Assuming, but not agreeing, the June 19, 1979 incident was a "new injury", SAIF did not produce sufficient medical proof to persuade the Referee and has failed to persuade us.

The Board affirms and adopts the Referee's order.

ORDER

The Referee's order dated April 2, 1981 is affirmed. Claimant's attorney is awarded the sum of $250 as a reasonable attorney fee for services rendered in connection with this Board review, payable by the SAIF Corporation.

JOANN COEN, Claimant
Cash R. Perrine, Claimant's Attorney
Brian Pocock, Defense Attorney

WCB 80-8622
October 23, 1981
Request for Review by Employer

Reviewed by Board Members McCallister and Lewis.

The employer/insurer seeks Board review of that portion of Referee McCullough's order which awarded claimant 25% scheduled loss of the left leg for her knee condition. Employer/insurer contends the award is excessive.

Claimant's attorney did not file a brief, so no attorney fee will be awarded.

The Board affirms and adopts the Referee's order.

ORDER

The Referee's order dated February 19, 1981 is affirmed.

JAMES R. CONNOR, Claimant
Galton, Popick & Scott, Attorneys

Own Motion 81-0097M
October 23, 1981
Reconsidered Own Motion Determination

The Board's own motion determination dated August 31, 1981 did not increase claimant's permanent partial disability award. Claimant had moved for reconsideration, noting that: (1) Dr. Wells has expressed the opinion that claimant has "moderate" physical impairment; and (2) contending that moderate disability "denotes 40-60 percent."

The relevant standards for rating physical impairment do not depend upon adjectives, but rather depend on objective findings of loss of flexion and extension. See OAR 436-65-550(1) which provides in part:

> "(a) For the complete loss of knee flexion, a maximum of 53% loss of the knee is allowed.
>
> "(b) For the complete loss of knee extension to 50%, 27% loss of the leg is allowed, or a proportion thereof for a loss of extension to less than 50%. For the loss of knee extension beyond 50%, 90% loss of the leg is allowed."

There is no information presently before the Board that documents that under these standards claimant's loss of use is greater than previously allowed.

There is, however, an additional standard that we previously overlooked. OAR 438-65-555(6)(c) provides in part: "Resection of a lateral or medial meniscus, with good results, represents a minimum of 5% loss of the leg." Claimant had such a surgical procedure after we ordered own motion reopening. So as far as we are aware, the results were good. Consistent with the administrative rule, claimant is awarded an additional 7.5° for 5% additional loss use of his right leg.

Claimant's attorney is allowed 25% of the increased compensation awarded by this order as and for a reasonable attorney fee.

IT IS SO ORDERED.

ROBERT A. PARKER, Claimant
Milo Pope, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-00711
October 23, 1981
Order of Abatement

A Request for Reconsideration of the Board's Order on Review dated September 24, 1981 has been received from the SAIF Corporation in the above-entitled matter.

In order to give the Board time to fully consider this request, that Order is abated. SAIF is hereby granted ten days to submit its argument to the Board, and claimant's attorney is granted ten days from receipt of SAIF's argument to submit his argument to the Board.

IT IS SO ORDERED.

EDWARD J. RICHARDS, Claimant
Peter O. Hansen, Claimant's Attorney
Paul L. Roess, Defense Attorney

WCB 79-6016
October 23, 1981
Request for Review by SAIF

Reviewed by Board Members McCallister and Lewis.

The SAIF Corporation seeks Board review of Referee Wolff's order which awarded claimant 50% unscheduled permanent disability. SAIF contends the award is "grossly excessive." The claimant cross appeals contending SAIF refused to pay permanent partial disability awarded by a Determination Order dated August 11, 1978.

The Board affirms and adopts the Referee's order.

ORDER

The Referee's order dated December 15, 1980 is affirmed. Claimant's attorney is awarded the sum of $450 as a reasonable attorney fee for services rendered in connection with this Board review, payable by the SAIF Corporation.

WILLIAM G. ROWE, Claimant
David Vandenberg, Jr., Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-00665
October 23, 1981
Request for Review by SAIF

Reviewed by Board Members McCallister and Lewis.

The SAIF Corporation seeks Board review of Referee Wolff's order which awarded claimant 80° for 25% unscheduled permanent partial disability for his low back condition. SAIF contends that the award is excessive. We agree and therefore modify the Referee's order.

The Board concludes from the medical evidence, pertinent social/vocational factors and similar cases that claimant has lost 15% of his earning capacity.

ORDER

The Referee's order dated March 10, 1981 is modified. It is ordered that claimant be awarded 48° for 15% unscheduled permanent partial disability. This award is in lieu of all previous awards. The remainder of the Referee's order is affirmed.

LEROY R. SCHLECHT, Claimant
Jan Thomas Baisch, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 79-06304
October 23, 1981
Order of Abatement

A Request for Reconsideration of the Board's Third Party Distribution Order dated September 24, 1981 has been received from the SAIF Corporation in the above-entitled matter.

In order to give the Board time to fully consider this request, that Order is abated. SAIF is hereby granted ten days to submit its argument to the Board, and claimant's attorney is granted ten days from receipt of SAIF's argument to submit his argument to the Board.

IT IS SO ORDERED.

FRANK SETNESS, Claimant
Noreen Saltveit, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-01049
October 23, 1981
Request for Review by SAIF

Reviewed by Board Members McCallister and Lewis.

The SAIF Corporation seeks Board review of Referee Mongrain's order which set aside its denial of responsibility for claimant's psychological condition. SAIF contends that it is not responsible for the psychological condition, and in the alternative it is not responsible for payment of the psychological treatment since Field Services Division referred claimant for vocational services and the psychological treatment is inextricably related to that vocational referral.

We affirm the Referee's order with the additional comment that SAIF's theory regarding responsibility for the cost of the psychological treatment may be applicable in some cases; it is not in this case.

ORDER

The Referee's order dated April 28, 1981 is affirmed. Claimant's attorney is awarded $400 for her services at this Board review, payable by the SAIF Corporation.

DARRELL L. SMITH, Claimant
Evohl Malagon, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-06871
October 23, 1981
Request for Review by SAIF

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Johnson's order which affirmed the SAIF Corporation's denials of June 18, 1980 and September 4, 1980 for claimant's right leg, back, neck, arms, eye and psychiatric conditions and awarded claimant 20% loss of the left leg. Claimant contends that the conditions denied are compensably related to the accepted injury, and that he is permanently and totally disabled, or, if not, that the award given is insufficient.

The Board affirms and adopts the order of the Referee.

Claimant requested Board review in March. Six months later, in September, claimant moved to remand to the Referee on the ground of "newly discovered evidence." The motion states no reason why the allegedly newly discovered evidence could not, with reasonable diligence, have been obtained before the produced at the hearing by claimant's attorney. Indeed, the first sentence of the "new evidence"--a letter from a doctor to claimant's attorney--states: "You inquired of an occupational disease." To the very limited extent that inquiry was relevant to the issues considered at the time of the hearing, claimant's attorney offers no explanation of why the inquiry was not made as part of the process of preparing for the hearing. The motion to remand is not well taken under the standards of Robert A. Barnett, WCB Case No. 79-11012 (June 26, 1981), and is denied.

ORDER

The Referee's order dated February 12, 1981 is affirmed.

THOMAS ALDRICH, Claimant
Rolf Olson, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-01339
October 30, 1981
Request for Review by SAIF

Reviewed by Board Members Barnes and Lewis.

The SAIF Corporation seeks Board review of Referee Seifert's order which remanded claimant's claim to it for acceptance and payment of compensation to which he was entitled.

The Board affirms and adopts the Referee's order.

ORDER

The Referee's order dated March 24, 1981 is affirmed. The claimant's attorney is awarded $400 as reasonable attorney fees for services at this Board review, payable by the SAIF Corporation.

WILLIAM H. AMMON, Claimant
W.D. Bates, Jr., Claimant's Attorney
J.W. McCracken, Jr., Defense Attorney

WCB 80-05566
October 30, 1981
Request for Review by Claimant

Reviewed by Board Members Barnes and McCallister.

The claimant seeks Board review of Referee Wolff's order which affirmed the employer/carrier's denial of an aggravation claim.

The claimant compensably injured his low back in February 1976. The claim was closed with a 10% unscheduled disability award for residuals of the injury including a laminectomy. In April 1980 claimant was at home cleaning leaves out of the gutters of his house. He was standing on a garbage can (about four feet high), lost his balance and had to jump to the ground. He landed on his feet, and the impact jarred his back. Following this incident his back condition worsened, and he sought treatment from Dr. Carter, an orthopedist. He filed an aggravation claim which the carrier denied.

The Referee states:

> "The fact that the injury in 1980 produced severer conditions than it would have had claimant not had the weakened back, due to the 1976 compensable job injury, cannot and should not be used, even under liberal rules of interpretation of the Workers' Compensation Laws, to place responsibility upon carrier. The award in 1976 (Ex. 13) compensated claimant for his permanent disability that resulted from the job injury. That weakened back was one of the compensable items. Any disability that claimant now has is the result of the home injury of April 10, 1980. This is not a progressive worsening situation. The evidence points to the sole conclusion that there was no progressive worsening. A new trauma produced new disability. Carrier is not responsible for that misfortune."

We agree with the Referee. Dr. Carter, claimant's treating physician, reported May 19, 1980 that, "There is no doubt that according to the history the patient gave me that the fall from the scaffold (sic) contributed significantly to his current condition. That would, I guess, constitute a second injury." No other medical report addresses this issue.

In Grable v. Weyerhaeuser, 291 Or 387, 401 (1981), the Court stated:

> "We hold that an employer is required to pay worker's compensation benefits for worsening of a worker's condition where the worsening is the result of both a compensable on-the-job back injury and a subsequent off-the-job injury to the same part of the body if the worker establishes that the on-the-job injury is a material contributing cause of the worsened condition."

Dr. Carter stated the April 10, 1980 incident, not the 1976 compensable injury, contributed significantly to claimant's condition. We conclude that claimant has failed to establish that the compensable on-the-job injury of February 1976 was a material contributing cause of his worsened condition.

ORDER

The Referee's order dated April 1, 1981 is affirmed.

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

WCB 79-06095
October 30, 1981
Order on Reconsideration

Claimant's petition for reconsideration raises two issues: (1) Did the Board err in its analysis of the penalty issue in our June 15, 1981 Order on Review; and (2) is claimant entitled to an award of attorney fees on Board review under ORS 656.382(1) and/or ORS 656.382(2).

I

Throughout this proceeding, claimant has sought penalties because of the employer's failure to initiate payment of interim compensation within 14 days in violation of ORS 656.262(4) and failure to accept or deny within 60 days in violation of ORS 656.262(5). These separate issues require more precise analysis than they received in our prior Order on Review.

A. Interim Compensation

The claim was submitted to the employer's carrier on May 2, 1979. The carrier initiated payment of temporary total disability on June 4, 1979, retroactive to May 3, 1979. Thus the first payment of interim compensation was about nineteen days late. Our prior Order on Review said the carrier "substantially complied with its statutory duties" and concluded no penalty was appropriate.

The controlling statutory standard is unreasonable delay or refusal to pay compensation. ORS 656.262(8). While "substantial compliance" could be understood to mean that the carrier's conduct was reasonable, we now conclude that this line of reasoning is potentially misleading.

Definition of what constitutes reasonable and unreasonable carrier conduct is primarily this Board's responsibility. McPherson v. Employment Division, 285 Or 541 (1979). This is also true of many other general statutory standards; for example, the worker's burden to show "good cause" for a delayed hearing request, ORS 656.319, and the employer's burden to show prejudice from a delayed claim, ORS 656.265.

As for delay in initiating payment of interim compensation, we cannot improve on the standard of Williams v. SAIF, 31 Or App 1301, 1305 (1977): "We look to the length of the delay and the cause or justification for it." Delay of a day or two is too inconsequential to justify any penalty, i.e., is not unreasonable. Any greater delay in initiating payment of interim compensation shall result in a penalty being imposed unless the carrier offers a cogent excuse. The greater the delay and the weaker the excuse, the larger the penalty will be.

We adhere to the analysis in our prior Order on Review: The "up to 25 percent" language of ORS 656.262(8) means the Legislature wanted the punishment to fit the crime. We believe guidance is possible in that endeavor. In Williams, supra, the court imposed a 15% penalty when payment was made 25 days late and there was no explanation for the tardiness. We follow this guideline. Unexplained delay of up to 25 days will result in a penalty of up to 15%.

This case involves unexplained delay of 19 days in initiating payment of interim compensation. Our Order on Review will be amended on reconsideration to impose a 15% penalty of those amounts of temporary total disability that were not timely paid.

B. Tardy Denial

The employer has 60 days in which to accept or deny a claim. ORS 656.262(5). Failure to comply with this deadline brings different considerations into play than apply under ORS 656.262(4) for late time loss payments. See Williams v. Burns International Security, 36 Or App 769, 778 (1978).

Where time loss payments are being made during the period of time that the denial is overdue, it is possible there is no actual harm to the claimant. The obligation to pay temporary total disability compensation until denial, even for what proves to be a noncompensable claim, is, in itself, in the nature of a penalty which provides an incentive to process claims expeditiously.

But at some point, despite the claimant's continued receipt of temporary total disability compensation, another consideration arises: The right of the worker and all other interested parties to know whether the claim is going to be accepted or denied. It is only when this right-to-know interest is violated that an express penalty should be imposed in addition to the de facto penalty of continued time loss payments. Stated differently, a tardy denial is not unreasonable within the meaning of ORS 656.262(8) if time loss is paid until denial unless the denial is so delayed as to violate the worker's right-to-know interest. See Henry v. SAIF, 36 Or App 91, 96 (1978).

Length of delay is, again, one variable. We can presume that shorter delays do not harm the right-to-know interest and longer delays do harm it. In order to be parallel with the Williams guideline we have adopted above in connection with tardy payment of temporary total disability, we will presume that a denial is up to 25 days late does no violence to the right-to-know interest, i.e., is not unreasonable, and a denial that is more than 25 days late does violence to the right-to-know interest, i.e., is unreasonable. It is thus the worker's burden to prove prejudice when the denial is up to 25 days late and time loss is being paid in the interim, and it is the employer's burden to prove lack of prejudice when the denial is over 25 days late.

This case involved a denial issued ten days late. During all of that time, claimant was paid interim compensation. There is no real contention or showing that this delay caused claimant any prejudice. Under these circumstances, no penalty will be imposed on account of the tardy denial.

II

We turn to the question of carrier-paid attorney fees. Claimant seems to argue that if we impose any penalty for delayed payment of temporary total disability, as we have concluded to do, that we must also impose an attorney fee under ORS 656.382(1). Claimant forcefully argues he is entitled to attorney fees on Board review pursuant to ORS 656.382(2).

A. Attorney Fees for Resistance

ORS 656.382(1) provides:

> "If a direct responsibility employer or the State Accident Insurance Fund Corporation refuses to pay compensation due under an order of a referee, board or court, or otherwise unreasonably resists the payment of compensation, the employer or corporation shall pay to the claimant or his attorney a reasonable attorney's fee as provided in subsection (2) of this section. To the extent a contributing employer has caused the corporation to be charged such fees, such employer may be charged with those fees."

This statute must be considered in conjunction with ORS 656.262(8) which 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.

The issue is: When a penalty is imposed under ORS 656.262(8), must a carrier-paid attorney fee also be imposed under ORS 656.382(1); or, instead, is it discretionary whether an attorney fee will also be imposed. The statutes do not yield an answer upon dissection. ORS 656.262(8) says that when there is a refusal to pay or delay in paying compensation, the employer "shall" pay any attorney fees which "may" be assessed under ORS 656.382. The latter statute completes the circularity by providing that when there is unreasonable resistance to payment of compensation, the employer "shall" pay claimant's reasonable attorney fees.

Phrases can be found throughout the appellate court decisions that point in different directions on whether ORS 656.382(1) fees are mandatory or discretionary; however, it does not appear that the appellate courts have ever confronted this mandatory versus discretionary distinction directly. For example, footnote 1 in Korter v. EBI Companies, Inc., 46 Or App 43, 53 (1980), seems to say that an ORS 656.382(1) award of attorney fees is mandatory following a finding that the carrier unreasonably deviated from its statutory duties. The actual appellate results in Francoeur v. SAIF, 20 Or App 604 (1975), and Perdue v. SAIF, 53 Or App 117 (1981), point the other way; in both, the court affirmed awards of ORS 656.262(8) penalties but declined to impose additional ORS 656.382(1) attorney fees.

We conclude the statutes and case law leave sufficient room to adopt the following approach:

(1) In cases in which there is an unreasonable refusal to pay compensation (which is a rather small minority of the cases), an ORS 656.382(1) separate award of carrier-paid attorney fees is mandatory. In such cases the claimant has had to secure legal representation to obtain that which was his due and which was unreasonably withheld. The carrier must thus pay for claimant's legal representation.

(2) In cases in which there is an unreasonable delay in paying compensation (which accounts for the vast majority of the cases), an ORS 656.382(1) separate award of carrier-paid attorney fees is discretionary. In such cases the claimant has received that which was his due, albeit untimely. In this context, carrier-paid attorney fees are not for essential legal representation but only an indirect penalty for the carrier's inadequate claims processing. The discretion to impose ORS 656.382(1) attorney fees should be guided by this purpose of such fees.

(3) Discretion should be further guided as follows: If delayed payment of compensation is the sole or principal issue, ORS 656.382(1) fees should generally be assessed. If delayed payment of compensation is a secondary or minor issue and the claimant's attorney is otherwise reasonably compensated by fees awarded on the principal issue(s), ORS 656.382(1) fees should generally not be assessed.

Applying these principles in this case, we find: (1) This is a delay, not a refusal case and thus fees are discretionary; (2) the delay issue was secondary to a compensability issue for which claimant's attorney was reasonably compensated by the Referee's award of an $800 carrier-paid attorney fee; and (3) no indirect penalty in the form of attorney fees is appropriate on these facts in addition to the direct ORS 656.262(8) penalty we are imposing on reconsideration.

B. Fees on Board Review

The request for Board review was initiated by the employer. The principal issue briefed by the parties was the compensability of claimant's claim. We affirmed the Referee's finding of compensability. On the secondary issue of penalties, as modified by this Order on Reconsideration, we reduced the Referee's award. ORS 656.382(2) requires the employer to pay claimant's attorney a reasonable fee on Board review when review is sought by the employer and the "board...finds that the compensation award to a claimant should not be disallowed or reduced." (Emphasis added.) The question is whether under this statute the Board's reduction of a penalty is a reduction of compensation.

Both the statutes and case law are inconclusive. ORS 656.005(9) defines compensation as "all benefits, including medical services, provided for a compensable injury" pursuant to ORS Chapter 656. (Emphasis added.) On the one hand, what those of us in the compensation system call penalties as a shorthand are not called penalties in the statute; rather, ORS 656.262(8) refers to "an additional amount up to 25% of the amounts [of compensation] then due;" the word penalty does not appear in the statute. The Court of Appeals once noted this in stating: "The Circuit Court was correct...in reversing the Board's award of additional compensation as a penalty." Smith v. Amalgamated Sugar Co., 25 Or App 243, 249 (1976). This would suggest that a "penalty" is a benefit, i.e., increased compensation, provided pursuant to ORS Chapter 656. On the other hand, penalties are available even when the injury is found to be not compensable. Jones v. Emanuel Hospital, 280 Or 147 (1977).

Williams v. Burns International Security, supra, holds that burial expenses are not necessarily a form of compensation for all purposes, but the court's discussion does not illuminate the present question of whether penalties are a form of compensation. Perhaps the most useful guidance comes from Korter v. EBI Companies, Inc., supra. Although Korter does not discuss whether penalties are compensation, it appears to hold that a claimant who partially prevails on Board review is not entitled to a carrier-paid attorney fee under ORS 656.382(2). That is the situation here--claimant partially prevailed by defending the Referee's finding of compensability but did not wholly prevail because of the Board's reduction of the penalty.

Unable to conclude that there is any clear answer in the statues or cases, we resolve the question presented on policy grounds. If attorney fees had to be awarded to claimant's attorney in all cases in which the employer/carrier sought Board review of a Referee's penalty award and in which the Board agreed with the employer/carrier and eliminated or reduced the penalty award, this would have a chilling effect on the employer/carrier being able to bring such an issue before the Board. We see no reason to guarantee that the claimant's attorney, as respondent, will be always awarded a appellant-paid fee regardless of the outcome at the Board level on a penalty issue or any other issue. We conclude that, to qualify for a carrier-paid attorney fee under ORS 656.382(2), the claimant's attorney must successfully defend on Board review the entire Referee's order. Claimant's attorney did not do so in this case. Our contrary conclusion in Russell Lewis, 29 Van Natta 226 (1980), is overruled.

ORDER

The Board's Order on Review dated June 15, 1981 is modified on reconsideration.

The employer's carrier at the material times, Employers Insurance Company of Wausau, shall pay to claimant 15% of those amount of temporary total disability compensation that were not timely paid as a penalty for untimely payment.

In all other respects the Board's Order on Review dated June 15, 1981 is readopted and republished.

ROY BAILEY, Claimant	WCB 78-07290
Michael Strooband, Claimant's Attorney	October 30, 1981
SAIF Corp Legal, Defense Attorney	Request for Review by SAIF

Reviewed by Board Members Barnes and Lewis.

The SAIF Corporation seeks Board review of Referee Baker's order which reversed its denial of claimant's low back condition and ordered the claim be accepted.

The Board affirms and adopts the Referee's order.

ORDER

The Referee's order dated March 31, 1981 is affirmed. The claimant's attorney is awarded $450 as reasonable attorney fees for his services at this Board review, payable by the SAIF Corporation.

CHARLES BELLMORE, Claimant
Michael Dye, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-0441
October 30, 1981
Request for Review by Claimant

Reviewed by Board Members Barnes and McCallister.

Claimant seeks Board review of Referee Seifert's order which affirmed a January 4, 1980 Determination Order which awarded temporary total disability only. Claimant contends that he suffered a permanent loss of wage earning ability.

The Board affirms and adopts the Referee's order.

ORDER

The Referee's order dated May 5, 1981 is affirmed.

JAMES E. BIRDSELL, Claimant
Jack Ofelt, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-01873
October 30, 1981
Request for Review by SAIF

Reviewed by Board Members McCallister and Lewis.

The SAIF seeks Board review of Referee Gemmell's order which granted claimant an award of 64° for 20% unscheduled disability. The SAIF contends that the award is excessive.

The Board affirms and adopts the Referee's order.

ORDER

The Referee's order dated May 8, 1981 is affirmed. Claimant's attorney is awarded the sum of $300 as a reasonable attorney fee for services rendered in connection with this Board review, payable by the SAIF Corporation.

BARRY BISHOP, Claimant
Mike Dye, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-01178
October 30, 1981
Request for Review by Claimant

Reviewed by Board Members Barnes and McCallister.

The claimant seeks Board review of Referee Braverman's order which affirmed the SAIF Corporation's denial of claimant's ulcer condition. Claimant contends this condition is compensable because it was caused by work-related stress.

Claimant had a pre-existing ulcer condition. Claimant was previously hospitalized for a bleeding ulcer in 1977. Claimant returned to work on January 2, 1980 after having been off for ten months. On January 5, 1980 claimant was hospitalized and had surgery for his ulcer on January 9, 1980.

Claimant testified that job stress resulted from a deadline imposed on his return to work by his supervisor. Claimant was also worried that his back would not hold up and that he would be replaced. Claimant's supervisor testified he did not set a deadline for claimant's return to work but remembers saying claimant needed to submit a medical status report, as was customary.

The Referee made no express finding as to credibility of the witnesses. We find no basis in the record for finding either claimant's testimony or his supervisor's testimony more convincing. In Hutcheson v. Weyerhaeuser, 288 Or 51, 55 (1979), the Court said: "The burden of proof will be satisfied...by establishing that the fact asserted is more probably true than not." Under this standard, we find claimant has failed to establish by a preponderance that his ulcer condition is the result of work-related stress.

Moreover, even assuming without deciding that claimant did experience a stressful situation at work which might have contributed to his condition, the medical evidence does not establish compensability. In discussing the relationship between environmental stress and recurrence of claimant's peptic ulcer disease in a letter report to claimant's attorney, Dr. Baemann, claimant's treating physician, reported that:

> "Typically the stressful factor occurs two weeks in advance of the actual event or complication. Many of Mr. Bishop's exacerbations seem to be related in some way to an emotional stressful environmental factor. There are some events in his history which I could not, from my records, recollect any reason why he should be under any particular stress. One of these in particular that you asked me about was his episode of bleeding starting three days after starting work as a janitor in January 1980. He had been out of work for nearly ten months apparently before that time and I would have expected this would have been, if anything, a time of emotional improvement for Barry and would not have expected this to be an emotional factor so soon after work. Possibly you are aware of other emotional factors occurring several days or weeks before this actual initiation of his employment in January as a custodian which may have precipitated possible peptic exacerbation. In general, I will have to admit that there is some stressful events surrounding many of his hospitalizations and recurrences, but each of these has to be taken further on their own merit." (emphasis added)

ORDER

The Referee's order dated November 25, 1980 is affirmed.

PATRICK J. BORZEA, Claimant
Larry Bruun, Claimant's Attorney
Frank Vizzini, Defense Attorney

WCB 80-09400
October 30, 1981
Request for Review by Claimant

Reviewed by Board Members Barnes and McCallister.

The claimant seeks Board review of Referee Leahy's order which upheld the employer's denial of his aggravation claim.

The first issue is factual. Claimant asserts that after his job duties changed and involved more lifting, his compensable back condition gradually worsened. The employer asserts that claimant reinjured his back off-work moving a waterbed. As we read the order, the Referee resolved this conflict in the evidence on credibility grounds by accepting the employer's evidence and rejecting claimant's evidence. There are simply too many inconsistencies in claimant's version for us to make a contrary credibility finding on this record.

Accepting then as a fact that claimant was injured moving a waterbed off-the-job on September 21, 1980, the second issue is legal: Is the aggravation claim compensable under the test of Grable v. Weyerhaeuser Co., 291 Or 387 (1981). The only relevant medical evidence is Dr. Ferrante's reports of October 6 and December 3, 1980. The former has few if any objective findings and fails to relate claimant's then-current condition to his original injury. The latter states that claimant's then-current condition is a direct result of his original injury.

We do not find Dr. Ferrante's December 3, 1980 report persuasive. The doctor had not examined or treated claimant after his original injury. It was not until October 1980, after the waterbed incident, that Dr. Ferrante first examined claimant. Moreover, Dr. Ferrante states that claimant did not tell him about the September waterbed incident. The doctor's conclusions were thus necessarily based only on claimant's history, and the Referee found claimant other than completely credible.

Under Grable claimant has failed to establish that the original compensable injury was a materal contributing cause of the worsening he experienced while moving a waterbed off-the-job.

ORDER

The Referee's order dated December 24, 1980 is affirmed.

EDWIN T. BOSWORTH, Claimant
Gary Hedlund, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-04714
October 30, 1981
Request for Review by SAIF

Reviewed by Board Members Barnes and McCallister.

The SAIF Corporation seeks Board review of Referee James' order which found claimant's claim to be compensable, overturning SAIF's denial.

Claimant worked in a cabinet-making operation. He asked his employer's permission to build a stereo cabinet for himself using the employer's tools, materials and scrap lumber. The employer agreed on condition that claimant pay for the lumber and that the stereo cabinet work not interfere with claimant's work for the employer.

On the date of the injury in March 1980 the employer's work stopped sometime before noon for the mid-day meal break. Claimant continued working in the shop alone, sawing a piece of wood for his stereo cabinet. While doing so, an accident occurred in which claimant lacerated several fingers, amputating one of them. If this were all there were to the case, we would reverse the Referee's finding that the injury is compensable on the ground that the injury did not occur in the course of employment. Claimant was injured while working on a purely personal project substantially on his own time rather than performing any of the assigned duties of his employment for the benefit of his employer.

There is, however, more to this case. Claimant testified that his employer allowed his personal stereo cabinet project as a "bonus" in return for claimant having managed the employer's business in the employer's absence. The employer, his wife and a SAIF investigator all gave testimony that would support the contrary conclusion that claimant had never managed the employer's business in the employer's absence. The Referee resolved this conflict in the evidence by accepting claimant's version on credibility grounds.

We conclude that this "bonus theory" transforms claimant's injury-producing activity from a purely personal project of no benefit to his employer to something that was, functionally, a negotiated element of his employment. As such, it would follow that claimant's injury did occur in the course of employment.

SAIF's argument to the contrary ultimately boils down to the contention that we should make a different credibility finding than did the Referee on the issue of whether there was a bargained for "bonus" between claimant and his employer. We are frankly somewhat skeptical of the claimant's story but find no comfortable basis in the record for a contrary credibility finding.

ORDER

The Referee's order dated November 12, 1980 is affirmed. Claimant's attorney is awarded $500 as a reasonable attorney fee for services rendered in this Board review, payable by the SAIF Corporation.

JOAN C. BOWMAN, Claimant
David Hittle, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-07302
October 30, 1981
Request for Review by SAIF

Reviewed by Board Members Barnes and Lewis.

The SAIF Corporation seeks Board review of that portion of Referee Danner's order which awarded claimant 40% (128°) unscheduled permanent partial disability for his shoulder condition. SAIF contends the award is excessive.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated March 17, 1981 is affirmed. Claimant's attorney is awarded $400 as a reasonable attorney fee for services rendered on Board review, payable by the SAIF Corporation.

WARD CADWALLADER, Claimant
Charles Seagraves, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-06749
October 30, 1981
Request for Review by SAIF

Reviewed by Board Members Barnes and McCallister.

The SAIF Corporation requests Board review of Referee Danner's order. The issue presented is compensability. SAIF contends that the Referee was in error in finding the claimant to be an Oregon worker on the date of injury as defined in ORS 656.126(1).

Claimant is a sheet rock taper residing in Rogue River, Oregon. Sometime in January 1980, the claimant had contact with Mike Crisp of Perma Wall, a dry wall subcontractor. Although occasionally engaging in jobs out of state, the majority of Perma Wall's business appears to be in Oregon, and it maintains a main office in Medford.

Following his contact with Crisp, the claimant was hired to go to Tonapah, Nevada to do a job for Crisp. It was anticipated that the job would take approximately 30 days to complete. Crisp and the claimant had some discussion concerning the possibility of claimant's being employed by Crisp to work on a job in Beaverton following his return from Tonapah. On February 23, 1980 claimant reported an injury incurred while on the job in Tonapah. Following an investigation, SAIF issued a denial. SAIF's apparent reasoning at that time was that a reciprocal agreement between Oregon and Nevada required the claimant to have performed work in Oregon <u>before</u> being sent to Nevada. SAIF assumed that the claimant was a Nevada workman since hired to work in Nevada, and thus not entitled to Oregon coverage. Although unclear from the record, it appears that this reasoning was abandoned by the time of the hearing, and rightly so. The reciprocal agreement specified that it has no application to Nevada employees of an Oregon employer.

SAIF argues in its brief, as it did at the hearing, that the evidence indicates that the claimant performed no work in Oregon and there was no definite employment in Oregon planned following claimant's return. Therefore, the reasoning goes, claimant is not entitled to coverage under ORS 656.126(1).

We disagree. We accept the Referee's analysis of 656.126(1). Before 1957 this statute provided:

> "If a workman employed to work in this state and subject to this act temporarily leaves the state incidental to such employment, he shall be entitled to the benefits of this act as though he were injured within this state." (emphasis added)

In 1957 the legislature deleted the language "to work," so that the statute now allows coverage to a "worker employed in this state" and temporarily out of the state. The statute no longer requires that the worker actually perform services in this state before he leaves for a temporary period incidental to his work. The statute also does not require the worker to perform services in this state following his return. To read the word "temporarily" in this manner would be tantamount to reading back in the language that the legislature deleted. The claimant need only be hired in Oregon and out of the state for a temporary period incidental to his employment. As noted in Kolar v. B & C Contractors, 36 Or App 65, 70 (1978):

> "The statute no longer requires the worker to be employed to work in Oregon to receive coverage for an out-of-state injury. It is sufficient if he is employed in this state." (emphasis added)

There is no question that the claimant was an Oregon worker as defined by the statute. The claimant was hired in Oregon, and the Nevada work was temporary in nature. The job was to last approximately 30 days. The claimant lived in a motel while in Nevada, and the employer paid claimant's travel and subsistence expenses. If claimant returned in time, it was at least contemplated that he would work on Crisp's Beaverton job. All this indicates the temporary nature of claimant's out-of-state job.

The Board agrees with the Referee that the employer's failure to properly report his total payroll to SAIF is not directly relevant to the issue presented. It is the statute that determines coverage, not the employer's or employee's belief that he is a covered worker. Jackson v. Tillamook Growers Co-Op, 39 Or App 247 (1979).

ORDER

The Referee's order dated December 31, 1980 is affirmed. Claimant's attorney is awarded $500 as a reasonable fee for services rendered on this Board review, payable by the SAIF Corporation.

RUTH M. CASE, Claimant
Lyle Velure, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-01141
October 30, 1981
Request for Review by Claimant

Reviewed by Board Members Barnes and McCallister.

The claimant seeks Board review of Referee Nichols' order and order on reconsideration that upheld the denial of claimant's claim that had been issued by the SAIF Corporation.

There is more than a little confusion in this record about what the issue is. The principal basis of SAIF's denial was that there had been no on-the-job injury: "We have been unable to substantiate any on-the-job accident or incident while employed by Sunrise Enterprises which could have caused this condition." There was also some mention of timely notice of injury; but as we read the record, SAIF was using the lack of any contemporaneous report of accident or injury primarily as circumstantial evidence that there was no on-the-job incident with the distant secondary issue being the timeliness of the claim. And as we read the Referee's order, she adopted SAIF's theory that claimant failed to prove an on-the-job accident with the lack of a contemporaneous report being some circumstantial support for that conclusion.

Given this understanding of the record, much of claimant's brief on Board review--argument about the timeliness of the claim--is irrelevant.

The closest claimant's brief comes to addressing the real issue is the suggestion that the Referee and Board, as fact-finders, must accept claimant's testimony that she was injured at work as true. We simply disagree with that proposition. Legitimate doubt about the accuracy or veracity of the testimony of any witness can be raised in many ways. Here, as the Referee noted, claimant visited her doctor three times for unrelated problems between the date of the alleged injury and the date she submitted an 801 form to her employer. We agree with the referee's analysis: "It makes no sense that she would see the doctor for unrelated problems but not mention her arm injury if it were bothering her as she testified."

This doubt about claimant's accuracy and veracity could have been overcome as the Referee correctly stated by evidence that tended to corroborate claimant's story. Which brings us to the most unfortunate aspect of this case. After the Referee's order was issued, in support of a motion for reconsideration, claimant's attorney submitted an affidavit from one of claimant's co-workers stating he had overheard claimant contemporaneously reporting her arm injury to their supervisor.

OAR 436-83-480(2) provides:

> "A motion to reconsider shall be served on the opposite parties by the movant and, if based on newly discovered evidence, shall state:
>
> * * *
>
> "(b) An explanation why the evidence could not reasonably have been discovered and produced at the hearing."

Claimant's attorney has yet to offer any explanation why the testimony of claimant's co-worker could not have been discovered before the hearing and produced at the hearing. All that has been contended is that claimant was unaware, until after the hearing, that her co-worker had overheard her report of injury. However, the reason clients retain and pay attorneys is to investigate the facts and marshall the evidence.

In Robert A. Barnett, WCB Case No. 79-11012 (June 26, 1981), we discussed OAR 436-83-480(2) at length and concluded that it was not intended to authorize investigation of the facts and marshalling of the evidence after the hearing when this reasonably could and should have been done before the hearing. It sadly follows from that conclusion that some parties to contested cases before this agency are going to win and lose based on the quality of their legal representation rather than based on the objective reality of their situation. Nobody can possibly be happy when that happens. But, in an agency that has received an average of over 1,000 hearing requests per month through the first nine months of this year, the alternative of allowing attorneys to prepare for hearings after they are conducted does a greater harm to a greater number of people who must then be forced to wait longer for their own hearings.

ORDER

The Referee's order dated November 3, 1980 and order on reconsideration dated December 16, 1980 are affirmed.

RICHARD CHAMBERS, Claimant
Michael Brian, Claimant's Attorney
Daryll Klein, Defense Attorney

WCB 80-05788
October 30, 1981
Request for Review by Claimant

Reviewed by Board Members Barnes and McCallister.

The claimant seeks Board review of Referee Seifert's order which denied temporary total disability from August 1, 1979 to March 18, 1980. Claimant contends he was not medically stationary. We agree and reverse the Referee's order.

Claimant compensably injured his low back August 1, 1978. The injury was superimposed on a degenerative disc condition. A Determination Order mailed September 10, 1979 awarded temporary total disability from April 16, 1979 to August 1, 1979 and 5% permanent partial disability. Claimant continued to have pain, and in March 1980 a myelogram revealed a large disc bulge in the lumbar spine. Claimant then chose to continue conservative treatment instead of surgery.

On August 1, 1979 before the Determination Order was issued, Dr. Matthews stated claimant was medically stationary but also stated: "Some gradual improvement seems likely. Full recovery continues to be a possibility." The treating physician, Dr. Saez, reported on August 13, 1979 that claimant's symptoms were still slowly resolving.

ORS 656.005(21) states: "Medically stationary means that no further material improvement would reasonably be expected from medical treatment, or the passage of time." (emphasis added) Dr. Matthews' report that claimant was medically stationary is inconsistent with his statement that "improvement seems likely." Two weeks after Dr. Matthews' report, Dr. Saez reported claimant was not stationary. Therefore, claimant should have temporary total disability as requested August 1, 1979 to March 18, 1980. We find the employer/insurer's failure to pay compensation for the period in dispute was not unreasonable. Dr. Matthews' report is sufficiently ambiguous in its contradiction to permit a reasonable interpretation that claimant was medically stationary August 1, 1979.

ORDER

The Referee's order dated November 20, 1980 is reversed. Claimant is awarded temporary total disability from August 1, 1979 to March 18, 1980. Claimant's attorney is allowed 25% of the increased compensation granted by this order, not to exceed $1,000.

BRADLEY F. CLARK, Claimant
David Hittle, Claimant's Attorney
Lang, Klein et al, Defense Attorney

WCB 80-5825
October 30, 1981
Request for Review by Claimant

Reviewed by Board Members Barnes and Lewis.

Claimant seeks Board review of Referee Ail's order which affirmed the award granted by the June 20, 1980 Determination Order. Claimant contends that he is entitled to compensation over and above the 20% he has already received.

The Board affirms and adopts the Referee's order.

ORDER

The Referee's order dated April 4, 1981 is affirmed.

MICHAEL DOLTON, Claimant
Keith D. Skelton, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 78-1509
October 30, 1981
Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

Claimant seeks Board review of that portion of Referee Danner's order which granted him compensation equal to 10% unscheduled disability and affirmed the decision of non-referral made by the Field Services Division.

The Board affirms and adopts the Referee's order.

ORDER

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

MARY B. DOUGLAS, Claimant
Gale Powell, Claimant's Attorney
Larry Dawson, Defense Attorney

WCB 80-10592
October 30, 1981
Request for Review by Claimant

Reviewed by Board Members Barnes and Lewis.

Claimant seeks Board review of Referee Nichols' order which upheld the carrier's denial of compensation.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated April 14, 1981 is affirmed.

JAMES W. DURY, Claimant
Rick McCormick, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-08233
October 30, 1981
Request for Review by SAIF

Reviewed by Board Members Barnes and McCallister.

The SAIF Corporation seeks Board review of Referee Knapp's order which awarded claimant temporary total disability at a rate based on a five day, 40 hour work week. SAIF contends that the award should have been based on a three day work week. The disagreement involves interpretation of OAR 436-54-212(2)(a) which provides:

> "Employed on call basis: Use average weekly earnings for past 26 weeks, if available, unless periods of extended gaps exist, then use no less than last 4 weeks of employment to arrive at average. For workers employed less than 4 weeks use intent at time of hire as confirmed by employer and worker."

Claimant was employed by Manpower, Inc. Manpower's business consists of furnishing temporary help to a variety of business customers on an "on call" basis. Claimant made himself available for such temporary work assignments from April 13, 1979 to June 1, 1979 and from June 19, 1979 to August 20, 1979. Claimant was then unavailable until June 11, 1980, the date of injury.

SAIF calculated claimant's temporary total disability on the basis of his work history. SAIF found that the claimant was available for work a total of 16 weeks, that he worked a total of 33 days, averaging 2.1 days per week. SAIF accordingly paid time loss based on a three day work week.

The Referee found that OAR 436-54-212(2)(a) required that claimant have worked during the past 26 weeks before the first sentence of the rule could apply. Since claimant had not worked in the past 26 weeks, the Referee applied the second sentence of the rule and found that the "intent at the time of hire" was that claimant would work a full 40 hour week and ordered time loss paid on that basis.

The Board disagrees with the Referee's interpretation and application of OAR 436-54-212(2)(a). The rule expresses an intent that temporary total disability payments be based upon a tangible work history. The Referee assumed that the rule spoke only of the 26 weeks immediately preceeding the claimant's injury. This is incorrect. The rule speaks of "average weekly earnings for past 26 weeks..." (emphasis supplied). The rule is addressed to the last 26 weeks in which a claimant is employed on an "on call" basis, not necessarily the last 26 weeks immediately preceeding the injury.

If extended gaps in the employment occur, as was the case here, the carrier must use "...no less than last four weeks of employment to arrive at average." (emphasis added) SAIF, correctly applying this portion of the rule, utilized the claimant's last 33 weeks of employment and arrived at an average of 2.1 working days per week which results in a three day per week compensation rate.

The Board also disagrees with the Referee's finding that the "intent at time of hire" was that claimant work a 40 hour week. The very essence of the employer's business is to provide help on a temporary and often sporadic basis. Claimant's past relationship with the employer indicates that he was aware of this fact and only worked when work was available. Based on the record before us, the only conclusion on the issue of intent that can be reached is that it was the employer's intent to secure as much work as possible for the claimant, and it was claimant's intent to work as many hours as the employer could secure. This is not an intent to work five days, 40 hours per week.

ORDER

The Referee's order dated March 19, 1981 which ordered that temporary total disability be computed at a rate of a five-day work week from June 11, 1980 to October 14, 1980 is reversed. Claimant is entitled to temporary total disability to be computed on the basis of a three-day work week from June 11, 1980 to October 14, 1980 less time worked. The balance of the Referee's order is affirmed.

LANCE DAVID EGGE, Claimant
Alice Goldstein, Claimant's Attorney
Michael Hoffman, Defense Attorney

WCB 79-07880
October 30, 1981
Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Foster's order which granted claimant an award of 15 degrees for 10% loss of left forearm and 6.75 degrees for 5% loss of the left foot, claimant contends he is entitled to an award also for unscheduled disability.

The Board affirms and adopts the Referee's order.

ORDER

The Referee's order dated September 15, 1980 is affirmed.

DAVID J. FRAIJO, Claimant — WCB 80-06516
Kenneth Peterson, Jr., Claimant's Attorney — October 30, 1981
Ridgway Foley, Jr., Defense Attorney — Request for Review by Employer

Reviewed by Board Members Barnes and McCallister.

The employer seeks Board review of Referee Gemmell's order which granted claimant an award of 160° for 50% unscheduled disability. The employer contends that the award is excessive and unsupported by the evidence.

We accept the Referee's recitation of the facts as our own.

We find that the weight of the medical evidence indicates claimant's physical impairment from this 1975 industrial injury is mild, but the consensus of all medical opinion of record is that he is precluded from his regular occupation as a truck driver. Also the medical evidence indicates that certain restrictions are now placed on claimant's physical capabilities. The weight of the medical evidence indicates claimant is capable of performing light work. He is 30 years of age but only has a ninth grade education and possesses low average intelligence. Based on the record before us we find the Referee's award is excessive and not comparable to other cases in which 50% unscheduled disability awards have been granted.

Consideration of the rating standards in OAR 436-65-600, et seq, produces the following:

Impairment	+10		
Age			-5
Education	+ 8		
Work Experience		-0-	
Adaptability	+ 5		
Mental Capacity		-0-	
Emotional & Psychological			-5
Labor Market	+15		
	+33		-10

Multiplying positive by negative produces 3.30. Subtract this result from the positive total to produce 29.70, or 30%.

Therefore, we conclude that claimant would be properly compensated for his loss of wage earning capacity from the residuals of this injury by an award of 30% unscheduled disability.

ORDER

The Referee's order dated February 27, 1981 and as amended by order dated March 13, 1981 is modified. Claimant is hereby awarded 96° for 30% unscheduled cervical disability. This award is in lieu of all prior awards.

CLYDE HAYES, Claimant
Daw & Robinson, Claimant's Attorney
Ridgway K. Foley, Defense Attorney

WCB 80-6369
October 30, 1981
Request for Review by Claimant

Reviewed by Board Members Barnes and Lewis.

The claimant seeks Board review of Referee Williams' order which found claimant's request for a hearing, disputing a Determination Order mailed June 18, 1979, was untimely pursuant to ORS 656.319(2).

The Board affirms and adopts the Referee's order.

ORDER

The Referee's order dated March 13, 1981 is affirmed

KENNETH L. HAYS, Claimant
David Vinson, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-08691
October 30, 1981
Request for Review by Claimant

Reviewed by Board Members Barnes and Lewis.

The claimant seeks Board review of Referee Baker's order which affirmed SAIF's denial of compensation, found claimant's claim was not untimely filed, awarded claimant interim temporary total disability and assessed a 25% penalty against SAIF for unreasonable failure to pay. No briefs were filed.

The Board affirms and adopts the Referee's order.

ORDER

The Referee's order dated April 17, 1981 is affirmed.

JULIA I. HICKS, Claimant
Brian Welch, Claimant's Attorney
Marshall Cheney, Defense Attorney

WCB 79-09110
October 30, 1981
Request for Review by Employer

Reviewed by Board Members Barnes and McCallister.

The employer seeks Board review of Referee Nichols' order that: (1) Awarded additional temporary total disability benefits; (2) granted an award of 5% scheduled disability for loss of function of claimant's right arm; and (3) granted an additional award of 20% unscheduled disability for "the problem of the right shoulder and the mental condition related thereto." We agree with the Referee's award of temporary total disability benefits. We find that claimant's entire disability is scheduled, not unscheduled, and is greater than awarded by the Referee.

Claimant suffered a crushing injury to her right arm in the area of her elbow. That injury healed with little residual physical impairment. However, as a result of her physical injury, claimant developed a psychological condition variously described as conversion hysteria, functional overlay, hand/arm/shoulder syndrome, etc. This psychological condition results in claimant experiencing pain, primarily, in her right arm but extending, according to her testimony, as far as her low back.

The Referee's award of unscheduled disability was based on this psychological condition. We agree the psychological condition is a compensable consequence of claimant's injury, but disagree that it is unscheduled. We confronted a similar issue in Joseph Needham, WCB Case No. 80-01948 (July 16, 1981):

> "The Referee properly treated the psychological component of claimant's hand injury as a scheduled injury...That psychological condition manifested itself only in relation to claimant's hand disability. There is no basis for an additional unscheduled award." See also Glazer v. SAIF, 15 Or App 574 (1970).

The same is basically true here. The evidence is unanimous that claimant's psychological pain experience relates primarily to her right arm. Claimant contends, without benefit of any supporting doctor's opinion, that the psychological pain experience extends into her shoulder and even as far as her low back. We are not persuaded and, therefore, as in Needham, there is no basis for an additional unscheduled award.

ORDER

The Referee's order dated May 30, 1980 is modified. Claimant is awarded 48° for 25% scheduled loss of function of her right arm, which award is for all the residual impairment, including psychological, resulting from her September 21, 1978 injury; this award is in lieu of the Referee's award of both scheduled and unscheduled disability.

Claimant's attorney is allowed 25% of the permanent partial disability awarded by this order as a reasonable attorney fee; this is in lieu of the Referee's allowance of attorney fees from the permanent partial disability awarded by her order.

The remainder of the Referee's order is affirmed.

THOMAS E. HUMPHREY, Claimant
Dwight Gerber, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-02689
October 30, 1981
Request for Review by SAIF
Cross Request by Claimant

Reviewed by Board Members Barnes and McCallister.

The SAIF Corporation seeks Board review of that portion of Referee McSwain's order which reversed SAIF's denial and remanded claimant's condition of epididymitis to it for acceptance and the payment of benefits as required by law. Claimant cross requests review, contending that he is entitled to compensation for temporary total disability from December 9, 1979 through February 2, 1980.

The facts as recited by the Referee are adopted as our own.

The Board finds that the causal connection question hinges on expert medical evidence as this is a complicated medical question. It was the opinion of Dr. Loomis that if it were documented that claimant suffered lower abdomen trauma at the time of his industrial injury when he was thrown out of a car and if the symptoms of epididymitis occurred within seven to ten days later, it would be causally related to this industrial injury; but if, Dr. Loomis further opined, Dr. McClean's chart note of February 1980 was evidence of the first symptoms or complaints of the condition, then it would not be work-related.

We find Dr. Loomis' rationale persuasive. We further find no documentation of lower abdomen trauma except by claimant's lay testimony. By a report of December 1, 1980, Dr. McLean reported that:

> "...my first knowledge of his having signs and symptoms of this condition was reported to me as being one week previous to the examination of 2/2/80."

Dr. McLean indicated that he did not have the advantage of continuity because he did not see claimant between September 4, 1979 and February 2, 1980. We note, however, that there is a chart note from Dr. McLean dated December 4, 1979 wherein no mention of symptoms or complaints of epididymitis is made.

Applying the persuasive rationale of Dr. Loomis, the compensability of the epididymitis as being causally related to the industrial injury is unsupported by the medical evidence. Although Dr. Collins supports compensability, his opinion is based on an erroneous history of claimant having seen Dr. McLean for the condition of epididymitis one week after the injury. Had claimant, in fact, made complaints relative to the abdominal region at that time, the claim might well be compensable. The preponderance of evidence is that claimant made no complaint of his symptoms to any physician until two months after his industrial injury. Therefore, the denial of compensability will be upheld.

ORDER

The Referee's order dated March 9, 1981 is modified. The denial of February 22, 1980 is affirmed, and the attorney fee payable by the SAIF Corporation of $1,500 to claimant's attorney is reversed. The remainder of the Referee's order is affirmed.

MELBURN JAQUES, Claimant
Steven Yates, Claimant's Attorney
John Klor, Defense Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-02977 & 79-09740
October 30, 1981
Request for Review by SAIF

Reviewed by Board Members Barnes and Lewis.

The SAIF Corporation seeks Board review of Referee Baker's order which found it responsible for claimant's eye injury sustained when he fell on January 5, 1980. The Referee reasoned that the medical reports contemporaneous with claimant's July 1978 low back injury, which SAIF had accepted, documented leg involvement and weakness; and that absent any other explanation for claimant's January 1980 fall--and none is present in this record--the fall and resulting eye injury were compensable consequences of claimant's July 1978 low back injury.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated October 27, 1980 is affirmed.

J.M. LINN, Claimant
Michael Shinn, Claimant's Attorney
Scott Kelley, Defense Attorney

WCB 81-01707
October 30, 1981
Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee James' order which upheld the February 6, 1981 employer's denial of benefits for the claimant following his hospitalization on January 23, 1981. The claimant contends that the Referee erred in finding that the claimant had not met his burden of proof in establishing the compensability of his claim. We agree and therefore reverse the Referee's order of April 15, 1981.

Claimant, a 25-year-old materials handler, compensably injured his low back and right hip on December 13, 1978. Claimant obtained treatment from Clark Wolf, III, D.C. Dr. Wolf diagnosed lumbar strain/sprain and treated the claimant for back pain until November of 1980. In January of 1981 claimant was examined by Dr. Clyde Farris, M.D., who diagnosed a herniated disc at L4-5 and recommended a laminectomy which was performed on February 16, 1981.

In finding that the claimant failed to carry his burden of proof, the Referee noted that claimant failed to relate to his physicians two incidents which occurred in between the time of the original injury and the time in which a herniated disc was diagnosed. The first incident occurred in about March 1980. Claimant was helping repair a motorcycle and suffered pain and soreness following completion of the job. The second incident occurred in April or May of 1980. Claimant was walking on a porch at a friend's house when pain caused him to nearly fall.

The Referee found that the claimant's failure to inform the doctors of these two incidents could have resulted in their relating the worsened condition to the original injury on the basis of an incomplete history. The Referee felt that this was particularly significant in view of the fact that no radicular symptoms were reported until November 1980.

We disagree with the Referee's reasoning. An employer is required to pay benefits for worsening of a worker's condition where the worsening is a result of both a compensable on-the-job injury and a subsequent off-the-job injury to the same part of the body if the worker establishes that the on-the-job injury is a material contributing cause of the worsened condition. Grable v. Weyerhaeuser, 291 Or 387, 401 (1981).

A worker claiming benefits is required to prove his claim by a preponderance, by establishing that the fact asserted is more probably true than not. Hutcheson v. Weyerhaeuser, 288 Or 51, 55 (1979). Viewing the record as a whole, we believe that the claimant has met this burden and established the original injury as a material contributing cause of his worsened condition. Although the medical evidence sumitted does not use the exact language "material contributing cause," we are convinced that this is the combined effect of all the submitted reports.

Dr. Price Gripekoven, M.D., noted in his October 3, 1979 report that claimant had no previous musculoskeletal injuries. Dr. Farris' January 28, 1981 report and Dr. Franks' January 29, 1981 report note the original injury. Dr. Franks' report relates that the patient had gotten no better in the past two-plus years and was getting worse symptomatically. Dr. Franks also notes in his February 18, 1981 letter that the claimant's clinical history is straightforward and the findings were unequivocal.

The fact that the claimant may have suffered an intervening injury does not mean his worsened condition is noncompensable. It does, however, become a factor in determining if a material contributing cause has been established. We are convinced that neither of the described incidents was sufficient to defeat a finding of compensability. The incidents do not appear to have been exertions that were unreasonable, nor is there any indication that they were traumatic in nature. The pain claimant suffered following the incidents was no different from that experienced following the original injury. The fact that the claimant suffered no radicular symptoms until November 1980 is not dispositive of the issue.

Based on the foregoing, we therefore find that the claimant has carried his burden and established that the original injury was a material contributing cause of his worsened condition.

ORDER

The Referee's order dated April 15, 1981 is reversed. The denial issued by the employer of claimant's claim for aggravation is set aside and remanded for acceptance and the payment of compensation as provided by law.

Claimant's attorney is awarded as a reasonable attorney fee for services at Board review and also for services provided at the hearing before the Referee the sum of $1,800, payable by the employer.

JAMES A. McKNIGHT, Claimant
Steven C. Yates, Claimant's Attorney

WCB 79-06360
October 30, 1981
Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of the Referee's order which granted claimant an additional award of compensation for temporary total disability from July 28, 1979 to September 1, 1979 but affirmed the SAIF's denial of his claim for aggravation. In the alternative claimant contends he is entitled to an award of permanent partial disability.

The Board affirms and adopts the Referee's order.

ORDER

The Referee's order dated March 24, 1981 is affirmed.

MICHAEL D. MIRICH, Claimant
John O'Brien, Jr., Claimant's Attorney
Ridgway Foley, Jr., Defense Attorney

WCB 80-11535
October 30, 1981
Denial of Motion to Dismiss

The employer moves to dismiss claimant's request for Board review for the reason that all adverse parties were not served with copies of the request within thirty days of the Referee's order.

The motion is denied on the basis of Barbara Rupp, WCB Case No. 80-01803 (Order Vacating Order of Dismissal, March 4, 1981), attached hereto.

IT IS SO ORDERED.

DOROTHY MITCHELL, Claimant
William Mansfield, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-02379
October 30, 1981
Order of Dismissal

The Request for Review in the above-captioned matter was filed with the Workers' Compensation Board October 6, 1981. However, Referee Seifert issued an Order to Reopen on October 2, 1981. Therefore this matter is being dismissed.

IT IS SO ORDERED.

CARROLL PAINE, Claimant
Robert Burns, Claimant's Attorney
Daryll Klein, Defense Attorney

WCB 80-06329
October 30, 1981
Request for Review by Claimant and Employer

Reviewed by Board Members Barnes and McCallister.

Both claimant and the employer seek Board review of Referee Neal's order which found that the Determination Order was not premature and awarded claimant 30% permanent partial disability.

The Board affirms and adopts those portions of the Referee's order finding proper closure. We add, for the benefit of claimant's attorney, that an authorized program of vocational rehabilitation is not the same thing as an evaluation to determine eligibility for vocational rehabilitation.

The Board adopts the facts as set forth in those portions of the Referee's order on extent of disability. Those facts, however, lead us to a different conclusion.

Most doctors suggest only a soft tissue injury. From two different myelograms and assorted other diagnostic procedures, six of seven doctors can find no indication of disc or other neurological injury. No doctor can find any objective basis for claimant's continued complaints of pain. The doctors are divided on whether claimant physically can return to his former job as a truck driver; those that say he cannot offer no persuasive reason for that opinion.

Claimant testified he is able to use a chain saw to cut firewood; is able to carry firewood into his home; is able to mow his lawn and prune trees in his yard; and, just a week before the hearing, was able to pan for gold in a stream bed for two days.

Considering the medical evidence of minimal disability together with the relevant social/vocational factors set out in OAR 436-65-600, et seq, we conclude that claimant would be properly compensated by an award of 20% permanent partial disability.

ORDER

The Referee's order dated January 19, 1981 is modified. Claimant is awarded 64° for 20% unscheduled permanent partial disability in lieu of the Referee's award. The balance of the Referee's order is affirmed.

WALTER C. PHILLIPS, Claimant
Jan Baisch, Claimant's Attorney
Paul Roess, Defense Attorney

WCB 80-02130
October 30, 1981
Request for Review by SAIF

Reviewed by Board Members Barnes and McCallister.

The SAIF Corporation seeks Board review of Referee Daron's order which granted a 25% penalty and $500 attorney fee for SAIF's tardy payment of compensation ordered by the Board's Own Motion Determination of January 17, 1980. Claimant cross requests review, but only defends the Referee's order in his brief. We deem the cross request for review abandoned. SAIF contends that no penalty is warranted on the facts of this case and that the Referee's award of attorney fees is excessive.

The Board's Own Motion Determination of January 17, 1980 granted claimant about ten months of temporary total disability benefits and an additional 30° for 30% loss of his right foot, injured in a compensable 1966 injury. All temporary total disability had already been timely paid. Under OAR 436-54-310(4)(b) the employer or its carrier had 30 days in which to commence payment of the additional permanent partial disability award of the Own Motion Determination.

On March 6, 1980 claimant's attorney requested a hearing on the grounds that the additional permanent partial disability award had not yet been paid; the request for hearing prayed for penalties and attorney fees. On March 7, 1980, upon receipt of a copy of the request for hearing, the employer immediately paid the then-overdue permanent partial disability award in full.

No evidentiary hearing was actually held. The matter was instead submitted to the Referee on stipulated facts and argument.

It was stipulated that, prior to the request for hearing having been filed, "no request had been made of the employer to pay the additional permanent partial disability award, either by the claimant or claimant's attorney." From this stipulation and the additional stipulation that the award was paid in full on the same day the employer received a copy of the request for hearing, we infer that the employer would have promptly paid the award had the matter been called to its attention sooner.

We reject SAIF's argument that no penalty is warranted because the delay in payment was due only to "oversight." On the other hand, in setting the amount of a penalty, we recently interpreted the "up to 25%" language of the statute to mean that "the punishment should fit the crime." Zelda M. Bahler, WCB Case No. 79-06095 (June 15, 1981); see also Order on Reconsideration (decided this date).

Claimant relies on prior Board decisions which strongly suggest we have not been consistent in this regard. We imposed the maximum 25% penalty for fairly minor delays in paying awards in Wilbur Slate, 20 Van Natta's 81 (1977); Walter Rogers, 16 Van Natta's 92 (1976); and Albert Moore, 13 Van Natta's 34 (1974). Under Bahler it now appears that a maximum penalty for a minimal transgression cannot be sustained. To the extent inconsistent with Bahler, Slade, Rogers and Moore are overruled.

On the other hand, the Board's decision in Warren Collins, 17 Van Natta's 236 (June 22, 1976), is fully consistent with our more recent analysis in Bahler. We there agreed with the following findings by the Referee: (1) "Errors are to be expected in any system which involves paper work handled by numerous individuals and in great quantity;" (2) "It was the duty of the claimant to call to the carrier's attention the fact that a mistake had been made;" and (3) the carrier's "error was quickly rectified when discovered." Calling that case "an excellent example of a mountain manufactured from a molehill" and expressing doubt about "whether any penalty...is justified," the Board affirmed the Referee's imposition of a 10% penalty "because the sums involved are [of] such little consequence."

Here the sums involved are also of little consequence. The employer was under a duty to initiate monthly payment of the increased permanent partial disability awarded by our Own Motion Determination by about February 17, 1980. Instead, the employer made a lump-sum payment of the entire permanent partial disability award on March 7, 1980. Given the time-value of money, claimant may have been ahead in economic terms. In any event, any harm he suffered was insignificant.

Both the employer's deviation from duty and the claimant's resulting prejudice, if any, are minimal. Under Bahler and Collins, a 5% penalty is all that will be awarded.

Turning to the question of attorney fees, we repeat that no evidentiary hearing was held. Claimant's attorney's efforts, so far as reflected in this record, consisted only of collaboration with defense counsel to prepare a stipulation. That stipulation, also to repeat, provided in effect that the employer would have promptly paid the outstanding permanent partial disability award had the matter only been called to its attention. The stipulation expressly provided that claimant's attorney made no request on the employer to pay the permanent partial disability award before requesting a hearing.

In Joe Meeker, WCB Case No. 78-10097 (March 30, 1981), we stated: "The Board assumes that, had claimant's attorney made the same phone call rather than automatically requesting a quasi-judicial hearing, claimant's problem would have been solved long ago." The same is true here.

Nothing in the relevant statutes or rules guarantees an attorney any minimum fee regardless of the circumstances. In Clarence Carroll, 24 Van Natta 276 (1978), the Board upheld a Referee award of a $9 attorney fee. Even more closely on point, in Warren Collins, supra, the Board upheld a Referee's award of a $50 attorney fee based on the following reasoning:

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

We deem this part of Collins here applicable and controlling.

ORDER

The Referee's order dated December 10, 1980 is modified. Claimant is granted an additional 5% of the permanent partial disability awarded by the Board's January 17, 1980 Own Motion Determination as a penalty for the employer's tardy payment of that award. Claimant's attorney is awarded the sum of $50 as a reasonable attorney fee under the provisions of ORS 656.382(1).

DEAN PLANQUE, Claimant
Marianne Bottini, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-01379
October 30, 1981
Order Denying Remand

Claimant, by and through his attorney, has moved the Board for an order remanding this claim to the Referee for further evidence taking pursuant to ORS 656.295(5) and OAR 436-83-720(1). Claimant apparently contends that Grable v. Weyerhaeuser Co., 291 Or 387 (1981), which was decided after issuance of the Referee's order, changes the applicable rule of law in this claim and that he should be given another opportunity to develop medical evidence in light of this recent decision.

The Board is not persuaded that claimant's request in this case is distinguishable from the request in Robert A. Barnett, WCB Case Nos. 79-07210 and 79-11012, Order Denying Remand (June 25, 1981), or that the evidence which forms the basis of claimant's request could not have been obtained prior to or at the hearing in the exercise of due diligence.

The fact that Grable was decided after the Referee issued her order does not alter this conclusion.

ORDER

Claimant's Motion to Remand is denied.

CHAIRMAN BARNES, DISSENTING:

I agree completely with the standard governing remands from the Board to the Referees that the Board stated in Robert A. Barnett: Remands are only appropriate to develop new evidence that could not have been obtained prior to hearing and produced at the hearing by an attorney's reasonable diligence.

In this case, however, the Board majority seems to expect claimant's attorney to have been not only diligent, but prophetic. This case was heard before the Supreme Court's Grable decision. Without attempting a lengthy discussion of whether and to what extent Grable represents a significant shift in prior law (or from the widespread understanding of prior law), I would only say that the rules of the game may have changed enough to warrant allowing claimant's attorney to develop evidence germain to the Grable test. On that basis, I would grant the motion to remand and, therefore, respectfully dissent.

BERNETTA ROLL, Claimant
Charles Paulson, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-09372
October 30, 1981
Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Pferdner's order which affirmed the Determination Order of March 28, 1981 which granted claimant no further award for permanent partial disability beyond the 15% unscheduled low back disability award previously made. Claimant contends she is permanently and totally disabled.

The Board affirms and adopts the Referee's order.

ORDER

The Referee's order dated April 22, 1981 is affirmed.

PETER J. RUSS, Claimant
Robert Thorbeck, Claimant's Attorney
Dennis VavRosky, Defense Attorney

WCB 80-03289
October 30, 1981
Request for Review by Employer

Reviewed by Board Members Barnes and McCallister.

The employer seeks Board review of Referee Johnson's order which concluded that an "unexplained fall" which caused claimant injuries at work during working hours was compensable. We agree and affirm.

Professor Larson points out that there is more than a little confusion between unknown causation and idiopathic causation in the slip and fall cases. 1 Larson, Workmen's Compensation Law, section 12.10 (1978). "Unexplained fall cases begin with a completely neutral origin of the mishap, while idiopathic fall cases begin with an origin which is admittedly personal and which therefore requires some affirmative employment contribution to offset the prima facie showing of personal origin." Id.

Failure to sharply maintain this distinction is reflected in both prior Board and Court of Appeals decisions.

In William A. Payne, 4 Van Natta 195 (1970), the claimant fainted and fell, sustaining injuries. Payne was an idiopathic fall case and there was no evidence that the cause of the fainting was work-related. However, in finding the claim not compensable, the Board's statement of the rule was unnecessarily broad and potentially misleading: "The applicable rule of law is that an unexplained or idiopathic fall is not compensable." 4 Van Natta at 195. (Emphasis added.) Similarly, Denise Lundy, 26 Van Natta 573 (1979), was a faint-and-fall case with no evidence that the cause of the fainting was work-related; the claim was found noncompensable as an idiopathic fall, with the Board again stating the unnecessary dicta that an unexplained fall is not compensable.

There are two relevant Court of Appeals cases, Puckett v. Wagner, 6 Or App 269 (1971), a fall case, and Raines v. Hines Lumber Co., 36 Or App 715 (1978), a death case. Larson cites Puckett for the proposition that the Oregon courts have held an unexplained fall to be noncompensable. 1 Larson, Workmen's Compensation Law, section 10.31, note 72. We do not so read Puckett. In that case the claimant was sent home from work because he had been drinking. He fell down while leaving the employer's premises. As we understand it, Puckett was not a true unexplained fall case because idiopathic causation (voluntary intoxication) was a distinct possibility.

This reading of Puckett is consistent with the subsequent Raines decision. In Raines, the employee died on the job of a heart attack. The employee had non-work related, preexisting hypertensive arteriosclerotic heart disease. There were two equally plausable explanations of the death: (1) That the heart attack occurred spontaneously as a natural progression of the disease; or (2) that it was triggered by work-related exertion or stress. Faced with two equally plausable explanations, one solely idiopathic and one work-related, the court held the death claim was not compensable.

Under these authorities, an idiopathic fall is not compensable. Neither is a fall compensable where it is equally possible that the cause was idiopathic or work-related. Where, however, the evidence eliminates the possibility of idiopathic causation, it appears to be a question of first impression in Oregon whether a truly unexplained fall is compensable, notwithstanding our dicta in the Payne and Lundy cases.

We agree with the Referee and his reliance on the rationale expressed in 1 Larson, Workmen's Compensation Law, sections 10.30 and 10.31 and conclude that a truly unexplained fall (i.e., one where idiopathic causation is eliminated) that occurs on the employer's premises during working hours while the employee is working should be and is compensable.

The remaining question then is whether the evidence eliminates idiopathic causation in this case. We agree with the Referee and claimant's attorney that the medical reports and lay testimony do persuasively eliminate idiopathic factors as having caused claimant's fall, despite the employer's speculation to the contrary. The claim is, therefore, compensable.

ORDER

The Referee's order dated December 24, 1980 is affirmed. Claimant's attorney is awarded $600 as a reasonable attorney fee for services rendered on Board review, payable by the employer.

LUCINE SCHAFFER, Claimant
Douglas Green, Claimant's Attorney
Marshall Cheney, Defense Attorney

WCB 80-08314
October 30, 1981
Request for Review by Claimant

Reviewed by Board Members Barnes and McCallister.

The claimant seeks Board review of Referee Knapp's order denying an award of permanent total disability and awarding an additional 20% loss of the right leg for injuries sustained in 1972. The issues raised on appeal are the same as those raised at the hearing: Premature claim closure, entitlement to specific medical services, unreasonable resistance, including attorney's fees and penalties, and alternatively the extent of claimant's disability, including claimant's assertion that she is permanently and totally disabled.

The Referee found the claimant to be medically stationary on December 7, 1979 and not entitled to a reopening of her claim because of needed medical care. In support of that conclusion, the Referee stated:

> "I cannot find that after six surgical procedures and months of conservative care that a referral to the Pain Center to help claimant tolerate her pain without medication will materially improve her condition."

In so concluding, the Referee necessarily rejected the recommendation of Dr. James that claimant receive treatment at the Pain Center.

Dr. James has been one of claimant's treating physicians for several years. In Glenn R. Pettey, WCB Case No. 80-02562 (July 8, 1981), we stated:

> "On questions of the need for medical treatment, the Board will always defer to the treating doctor absent some compelling reason not to do so. None is present here."

There is a significant basis for the Pain Center referral in this case: Claimant's continued use of high dosages of pain medication can and often does result in drug dependency. As in Pettey, there is no compelling reason in this record not to defer to the treating doctor's recommendation. Claimant is entitled to the recommended medical treatment and to claim reopening for the payment of time loss upon entry into the Pain Center program.

Although we have concluded claimant is entitled to medical services, we also conclude that the employer's refusal to provide such services did not amount to unreasonable resistance to the payment of compensation within the meaning of ORS 656.262(8). The very reason advanced by the Referee for denying medical services--that after claimant's protracted course of treatment the Pain Center referral appeared to be a long-shot at best--was a reasonable, albeit erroneous, basis for the employer to seek to have the issue resolved by litigation.

Given our conclusion that claimant is entitled to medical services and claim reopening, we believe it is premature to rate claimant's extent of disability.

ORDER

The Referee's order dated April 13, 1981 is vacated. Claimant shall be provided with Pain Center services as recommended by Dr. James. Claimant's claim shall be reopened for payment of temporary total disability benefits upon entry into the Pain Center. Claimant is not entitled to penalties nor attorney fees pursuant to ORS 656.262(8). It is premature to resolve any other issues raised. Claimant's attorney is awarded a fee of $700 for prevailing on the employer's partial denial of medical services, payable by the employer.

WALLACE L. SHANKS, Claimant	WCB 79-08112 & 79-11111
Steven Yates, Claimant's Attorney	October 30, 1981
Steven Reinisch, Defense Attorney	Request for Review by Carrier
SAIF Corp Legal, Defense Attorney	

Reviewed by Board Members Barnes and McCallister.

The employer's current carrier, EBI Insurance Companies, requests Board review of Referee Foster's order which remanded claimant's claim to it as a new injury and granted claimant's attorney a fee of $950, payable by EBI. EBI contends claimant's condition represents an aggravation and that the attorney fee granted was excessive.

On the issue of aggravation versus new injury, we concur with the findings and conclusions of the Referee, that claimant's July 25, 1979 injury constitutes a new industrial injury and is the responsibility of EBI.

On the issue of attorney fees, EBI contends that the Referee's award of fees is excessive based on the amount of work involved and the nature of the case. It contends that, although two different carriers denied responsibility, no request for a .307 order was made because SAIF paid all interim compensation due with the exception of only a few days. Claimant's attorney recognized that the dispute was really between two carriers with claimant having little interest in the outcome in a letter to the Referee dated January 29, 1981: "This issue involved a question of responsibility between two carriers. I have no need to argue..." EBI further contends that the hearing was a short one, the transcript being only 31 pages and claimant being the only witness.

Claimant's attorney's only defense of the Referee's attorney fee award is to note that the transcript reflects he participated in the hearing more than either carrier's counsel. That may be, but there is still a limited amount of participation possible in a hearing that it only takes 31 pages to transcribe. We concur with EBI's contention that the award was excessive for the efforts expended and the results obtained. See OAR 438-47-010(2).

The Board finds claimant's attorney is entitled to an attorney fee, payable by EBI Company, in the amount of $400 for services rendered at the hearing level.

ORDER

The Referee's order dated March 4, 1981 is modified. Claimant's attorney's fee is reduced to $400, payable by EBI Companies. The remainder of the Referee's order is affirmed.

GLENDA SHOPTAUGH, Claimant	WCB 80-04422
William Sugahiro, Claimant's Attorney	October 30, 1981
SAIF Corp Legal, Defense Attorney	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.

TERRY SMITH, Claimant	WCB 80-08080
Steven Couch, Claimant's Attorneys	October 30, 1981
SAIF Corp Legal, Defense Attorney	Request for Review by SAIF

Reviewed by Board Members McCallister and Lewis.

SAIF seeks Board review of Referee's Leahy's order which set aside its denial of responsibility for claimant's carpal tunnel syndrome. SAIF contends that claimant's off the job activity, when viewed as cause, was the same as her work activity and therefore, the occupational disease should not be compensable. Claimant filed no brief.

The Board affirms and adopts the Referee's order.

ORDER

The Referee's order dated April 9, 1981 is affirmed.

ANNA STOCKTON, Claimant	WCB 77-03805
Steven Yates, Claimant's Attorney	October 30, 1981
Richard Lang, Defense Attorney	Order of Abatement

Claimant has requested that the Board reconsider its Order on Review, dated October 9, 1981. As a result of this request, we hereby abate our order so that we can give claimant's request more thorough consideration.

IT IS SO ORDERED.

ROCKY VINCENT, Claimant
Michael Strooband, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-06570
October 30, 1981
Request for Review by SAIF

Reviewed by Board Members Barnes and McCallister.

The SAIF Corporation seeks Board review of Referee Foster's order which remanded claimant's claim to it for acceptance and payment of compensation. SAIF contends claimant's inguinal hernia condition was not the result of his work activity.

Claimant contends that he sustained a compensable inguinal hernia on June 27, 1980 while attempting to lift a log. Claimant also had a hernia in 1974 and a ventral hernia in 1978 while employed for Roseburg Lumber Company. Claimant underwent repair of the left incisional ventral hernia in December 1978. Further surgery was necessary in December 1979 due to a reaction to the Marlex mesh which had been inserted in the earlier surgery. Dr. Kronner, claimant's treating physician both in 1978 and during the current episode, indicated on June 30, 1980 that claimant was suffering from a recurrent left inguinal hernia. He indicated that it was the result of an industrial injury or exposure.

SAIF gave their medical consultant, Dr. Norton, what information they had, and he opined that SAIF should not be responsible for this claim. Dr. Norton is an orthopedic physician, and hernias are not in his area of expertise. He did, however, research the subject and advised SAIF he did not feel it should be responsible for claimant's claim. He indicated on July 11, 1980 that "recurrent" left inguinal hernias are the result of a gradual breakdown of the previous tissue due to the inadequacy of an earlier surgery, or constitutional, nutritional or other unknown factors concerning a patient. He noted that there is a definite congential involvement in these types of hernias, except in the rare occasion of a direct penetrating wound to the groin. At the hearing, he testified that his reading revealed that trauma is never the source of an inguinal hernia, and it is rare that trauma will even aggravate or accelerate such a condition. On July 31, 1980 SAIF forwarded a copy of Dr. Norton's report to Dr. Kronner and asked him if he felt claimant's condition should be the responsibility of SAIF. Dr. Kronner returned the speed letter with the one word "No" written above his signature.

On August 21, 1980, Dr. Kronner indicated that claimant was suffering from a slight inguinal hernia which was aggravated by exercise and which was mildly painful. He did not recommend surgery at that point. He did not feel claimant's current problem was related to his earlier condition, although it could be remotely connected. He concluded his report with the statement: "Additionally, Mr. Vincent claims that his pain in his left groin started initially with lifting heavy logs at work. This is entirely consistent with his physical findings."

The Referee was persuaded by Dr. Kronner's August 21 report and found the hernia condition was SAIF's responsibility. We disagree. This claim does not represent an uncomplicated medical situation. Generally, we would give the greater weight to the treating physician when the only other opinion is that of the carrier's medical consultant who has only limited expertise in that field. However, we are not convinced that Dr. Kronner has established a relationship to claimant's work activities. His answer to SAIF in reply to their speed letter on July 31, 1980 definitely preponderates against the claimant. The most that we see in his August 21, 1980 report is that claimant's symptomatology was aggravated by exercise. That report is not persuasive that claimant's condition was worsened by his work activities and, in fact, does not even show that claimant's symptoms were caused by his work.

ORDER

The Referee's order dated November 20, 1980 is reversed. The denial dated July 14, 1980 is affirmed.

FRED L. WHITE, Claimant
Peter Hansen, Claimant's Attorneys
Richard Davis, Defense Attorney

WCB 79-11095
October 30, 1981
Request for Review by Claimant
Cross Request by Employer

Reviewed by Board Members Barnes and McCallister.

Claimant requests Board review of Referee Williams' order and amended order which found that claimant failed to prove his claim for aggravation or a need for medical services as a result of a compensable injury suffered on March 28, 1978. The employer cross requests review of that portion of the amended order which ordered payment of interim compensation from and including December 7, 1979 through and including February 7, 1980, less amounts paid, awarded claimant 10% of such compensation not paid prior to July 14, 1980 (hearing date) and granted claimant's attorney a $420 fee for prevailing on the issue of interim compensation.

Claimant suffered a compensable injury on March 28, 1978. He was eventually able to return to regular employment on October 24, 1978. Claimant thereafter moved to California and obtained a construction job with Fererro Electric Company. On September 27, 1979, claimant visited Dr. Wong. On December 7, 1979 the employer received a report from Dr. Wong indicating that claimant had been off work since September 20, 1979 due to an aggravation of his previous injury and that he would be able to return to work on December 10, 1979. Accordingly, the employer made a lump sum time loss payment to claimant on December 21, 1979, 14 days after receipt of Dr. Wong's report. The employer denied the aggravation claim on February 7, 1980.

The Board agrees with the Referee that claimant has failed to prove his claim for aggravation, especially given the Referee's finding that claimant was not a credible witness with regard to his continuing symptomatology since his March 28, 1978 injury.

The Referee, apparently based based on an affidavit submitted by claimant's attorney, ordered the employer to pay interim compensation to the claimant from December 7, 1979 through February 7, 1980, the date of the denial. Examination of the record, however, shows that the only interim compensation due for this period was from December 7 through December 10, 1979 which was subsequently paid by the employer.

ORS 656.273(6) requires that there be medical verification of inability to work before temporary total disability benefits must be paid. The December 3, 1979 report of Dr. Wong indicated that claimant was released for work as of December 10, 1979. The employer paid all interim compensation due on the basis of this report. Even though the employer was late in making a denial, there was no additional interim compensation due because there are no medical reports verifying inability to work after December 10, 1979. The Referee was in error in ordering such payments.

ORDER

The Referee's order dated October 28, 1980 and the amended order dated January 21, 1980 are modified. Those portions of the amended order requiring the employer to pay claimant interim compensation beginning on December 10, 1979 through February 7, 1980 inclusive and that order payment by the employer of a sum of 10% of such compensation not paid prior to July 14, 1980 are reversed. It follows that the $420 fee awarded to claimant's attorney for prevailing on the issue of interim compensation must also be reversed. All other portions of the Referee's order and amended order are affirmed.

JAMES L. WHITNEY, Claimant	WCB 80-05773
Rick McCormick, Claimant's Attorney	October 30, 1981
Frank Moscato, Defense Attorney	Request for Review by Employer

Reviewed by Board Members Barnes and Lewis.

The employer seeks Board review of Referee Nichols' order which remanded the claimant's aggravation claim to it for acceptance and payment of benefits as due.

The Board affirms and adopts the Referee's order.

ORDER

The Referee's order dated April 6, 1981 is affirmed. Claimant's attorney is awarded $500 as reasonable attorney fees for his services at this Board review, payable by the employer.

BETTY WILHITE, Claimant
Douglas Green, Claimant's Attorney
Ridgway Foley, Jr., Defense Attorney

WCB 80-07531
October 30, 1981
Request for Review by Employer

Reviewed by Board Members Barnes and McCallister.

The employer seeks Board review of Referee Pferdner's order which found claimant's shoulder condition compensable.

The Board finds the Referee's recitation of the facts basically accurate but reaches a different conclusion. First we hold that this is an occupational disease claim. Claimant contends her condition is due to work which required repetitive turning to the left about 1500 times a day. Claimant testified that she noticed "back pain" about noon of April 11, 1980 and that it gradually got worse as the day progressed. She also stated that she "didn't feel anything happen" and that there was no specific thing she did that day differently.

The repetitive movement at work is a possible cause of claimant's "back pain." Dr. Hurtado, the treating physician, reported, without explanation, that the back strain was the result of industrial exposure. This would possibly be sufficient to establish medical causation were it not for the following facts.

Claimant began exercising at a health spa only four days prior to the initial onset of her symptoms. The operator of the health spa testified her records indicated claimant weighed and exercised April 7, 8, 9, 10, 11, 14, 17, 18, 21, 22, and May 12 and 14. She further testified claimant increased her exercises with regular progression and that she was awarded a free month by April 17 for losing ten pounds in ten days. The exercise included the upper extremities using weights and periodically increasing the repetitions of the exercises.

The record is silent as to whether Dr. Hurtado was aware of this off-work exposure. We decline to infer that he was. Thus the off-the-job exposure at the spa is also a possible cause of claimant's condition. As an occupational disease, to be compensable, claimant's condition must be caused by at-work exposure. ORS 656.802(1)(a); James v. SAIF, 290 Or 348 (1981); Thompson v. SAIF, 51 Or App 395 (1981). Under these authorities, it is not sufficient to establish compensability merely to conclude, as did the Referee, that the work exposure was a material contributing cause. Walter J. Dethlefs, WCB Case No. 79-04604 (June 19, 1981). We do not find the evidence persuasive that claimant's condition was caused by work exposure.

ORDER

The Referee's order dated March 12, 1981 is reversed and the employer's denial is reinstated.

ROXANNE WOOD, Claimant
Mark Bocci, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-05047
October 30, 1981
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.

THOMAS WRIGHT, Claimant
Michael Strooband, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-06399
October 30, 1981
Request for Review by SAIF

Reviewed by Board Members Barnes and McCallister.

The SAIF Corporation seeks Board review of Referee Danner's order and Order of Reconsideration which: (1) Ordered SAIF to resume payment of temporary total disability to claimant effective April 16, 1980 less time worked until termination is authorized pursuant to statute; (2) pay claimant additional compensation equivalent to 25% of any amount due him for unpaid compensation, pursuant to ORS 656.262(8); and (3) pay claimant's attorney a fee of $900 in addition to compensation benefits due claimant. SAIF seeks to have the Referee's order reversed in its entirety.

SAIF agrees that claimant had not returned to regular work after April 16, 1980, but that, from a medical standpoint, the claimant was able to return to regular work. We disagree. We find the evidence as a whole supports the claimant's contention and the Referee's conclusion. The claimant is entitled to temporary total disability as ordered by the Referee.

The same evidence that supports claimant's contention on the temporary total disability issue does not support his contention on the issue of penalties. We believe the evidence is sufficiently equivocal to permit SAIF to have reasonably concluded they had no obligation to pay temporary total disability.

ORDER

The Referee's order dated December 1, 1980 and Order of Reconsideration dated February 4, 1981 are modified. Those portions of the orders which awarded claimant temporary total disability are affirmed. Those portions of the orders which awarded claimant penalties and attorney fees pursuant to ORS 656.262(8) and ORS 656.382(1) are reversed. In lieu of the carrier-paid attorney fee awarded by the Referee, claimant's attorney is allowed 25% of the increased compensation awarded by the Referee, not to exceed $750. The remainder of the Referee's orders are affirmed.

KENNETH YARBROUGH, Claimant
Jerome Bischoff, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-1709
October 30, 1981
Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

Claimant seeks Board review of Referee Foster's order which affirmed SAIF's denial of aggravation for claimant's back condition. Claimant contends the factual situation supports compensability.

The Board affirms and adopts the Referee's order.

ORDER

The Referee's order dated May 5, 1981 is affirmed.

FRED McKINNON, Claimant
Rolf Olson, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-02502 & 79-07856
November 4, 1981
Order on Reconsideration

On November 3, 1981 the Board received a Request for Reconsideration of attorney fees from claimant's attorney as had been awarded in our Order on Review dated October 5, 1981.

The Board has reconsidered the award of attorney fee and amends its award to $350 for claimant's attorney's services at the Board review, payable by the SAIF Corporation.

IT IS SO ORDERED.

CLIFFORD MATHENY, Claimant
Michael Stebbins, Claimant's Attorney
Paul Roess, Defense Attorney

WCB 80-05897
November 5, 1981
Request for Review by SAIF

Reviewed by the Board en banc.

The SAIF Corporation seeks Board review of Referee Braverman's order which rescinded the suspension of temporary total disability benefits ordered by the Workers' Compensation Department based on the Department's finding that claimant had unreasonably refused to submit to medical examinations scheduled by SAIF, ORS 656.325; the Referee also set aside the Determination Order issued on December 11, 1980.

The Board majority affirms and adopts the order of the Referee.

ORDER

The Referee's order dated February 3, 1981 is affirmed. Claimant's attorney is awarded $225 for services rendered on Board review, payable by SAIF.

(Concurrence and dissent follow.)

CHAIRMAN BARNES, Concurring:

Neither party's conduct in the dispute that gave rise to this litigation was completely reasonable. Claimant's refusal to make the 330 mile round trip by car from his home in Florence to Portland for the medical appointments SAIF had scheduled comes across to me as based in part on genuine concern about his physical well-being and in part on stubborness.

On the other hand, until this case got to hearing, apparently no SAIF representative had suggested the possibility of claimant flying to Portland at SAIF's expense. That possibility was suggested at the time of the hearing. Claimant's reasons for rejecting it were patently unreasonable. Had the option of flying been offered claimant sooner, I would vote to uphold the Department's suspension of benefits.

BOARD MEMBER McCALLISTER, Dissenting:

I find claimant's attitude in this case regarding compliance with the employer's scheduling of medical and psychiatric examinations to be unreasonable. I base my opinion on the fact that Dr. Goodman, claimant's Coos Bay doctor who refused to condone claimant's travel by car to Portland even when SAIF offered the most generous arrangements, is the very same doctor who recommended that claimant travel by car to Roseburg for medical treatment. The difference between those two trips is about 30 miles at most. I would reverse the Referee's order and, therefore, respectfully dissent.

ROGER BALLINGER, Claimant
Nick Chaivoe, Claimant's Attorney
Bill Davis, Defense Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-08724 & 80-09824
November 6, 1981
Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Neal's order which approved SAIF's November 5, 1980 denial of claimant's aggravation claim and denied Leatherby Insurance Company's (now Western Employer's Insurance Company) October 17, 1980 denial and ordered them to accept responsibility for the claim. Claimant contends that the Referee failed to rule on the issue of premature termination of the SAIF claim. Portland Iron and Wire has cross requested review contending that the Referee erred in failing to apply res judicata against SAIF at the hearing.

The Board, after de novo review finds that the claimant's claim against SAIF was properly closed by Determination Order of May 7, 1980. We affirm and adopt the balance of the Referee's order of March 24, 1981 with the following additional comments.

The issue presented at the December 6, 1979 hearing was whether the claimant sustained a new injury on June 19, 1979 while employed by Western Steel Erectors or if the claimant suffered an aggravation of the 1975 injury sustained while employed by Portland Iron and Wire Company. The extent of the claimant's disability as a result of the 1979 injury was not determined at the hearing. The determination was eventually made by the Evaluations Division which issued a determination on May 7, 1980, awarding only temporary total disability.

The claimant filed an appeal from the Determination Order. Prior to the hearing, it was agreed between the claimant and SAIF that the issue of extent of disability as a result of the 1979 injury would be deferred until the claimant completed a program of vocational rehabilitation. The Referee framed the issue as being responsibility between the two carriers for the claimant's 1980 surgery and resulting disability to his mid-back.

Portland Iron and Wire Co. (hereinafter "PI&W") contends that the resolution of the issue of responsibility at the first hearing is determinative of the issue of responsibility for the claimant's 1980 surgery and resulting disability. The reasoning of this argument is that SAIF was not held responsible for a "separate and distinct" injury at the first hearing, but for all of the claimant's post-1979 claims. Since SAIF failed to allege that the claimant suffered a "separate and distinct" injury in 1979, it is argued that they are prohibited from doing so at the second hearing by res judicata.

We are not convinced by the PI&W's argument that res judicata is applicable. SAIF's responsibility for the 1979 injury was all that was litigated in the first hearing. Extent of disability as a result of the 1979 injury was not in issue. We believe that the difference between "separate and distinct" and "extent" in this instance is only one of semantics. Therefore, whether the injury of 1979 was "separate and distinct" from the 1975 injury was not before the Referee in the first hearing. The first determination made on this issue occurred upon the issuance of the May 7, 1980 Determination Order.

Although SAIF and the claimant agreed to defer the issue of extent, there was no such agreement between SAIF and PI&W. Determination of responsibility between PI&W and SAIF for claimant's 1980 surgery and resulting disability necessarily involves a determination of extent of disability from the 1979 injury.

The issues involved at the second hearing were, therefore, not identical to those at the first hearing nor were they issues which would necessarily be determined at the first hearing. Farmers Insurance Company v. Hopson, 53 Or App 109 (1981). This is especially true since claimant was not medically stationary as a result of the 1979 injury until March 1981. Extent could, therefore, not be determined until that date at the earliest. Res judicata will not, therefore, bar SAIF from denying responsibility for the claimant's 1980 surgery and disability on the grounds that claimant suffered a "separate and distinct" injury in 1979.

ORDER

The Referee's order dated November 5, 1980 is affirmed.

CHARLES D. BAUDER, Claimant
Rick McCormick, Claimant's Attorney
Paul Roess, Defense Attorney

WCB 78-06397
November 6, 1981
Order on Remand

The Court of Appeals, on March 9, 1981, issued an Opinion on Judicial Review of the Board's Order on Review (entered June 6, 1980) reversing the Order of the Board and remanding this claim for further proceedings;

The Board received the Court's Judgment and Mandate which was issued May 1, 1981, and thereafter requested statements of respective counsel for the parties regarding the proper course of action pursuant to the Court's mandate; no response has been received; accordingly,

Claimant is declared to be of permanent total disability status as of his medically stationary date, June 13, 1978, and the carrier is directed to pay to claimant the benefits to which he is entitled, pursuant to the Act.

IT IS SO ORDERED.

JUDITH E. BINKS, Claimant
Larry Sokol, Claimant's Attorney
Dennis VavRosky

WCB 80-9248
November 6, 1981
Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

Claimant seeks Board review of Referee Mongrain's order which granted her compensation equal to 64° for 20% unscheduled low back disability. Claimant contends this award is inadequate.

The Board affirms and adopts the Referee's order.

ORDER

The Referee's order dated May 15, 1981 is affirmed.

BROADWAY CAB COMPANY, Appellant
Nelson Atkin, Attorney
SAIF Corp Legal, Attorney

WCB 79-01978
November 6, 1981
Order on Remand

The Court of Appeals, on June 15, 1981, issued an Opinion on Judicial Review of the Board's Order on Review (entered July 23, 1980);

The Board has now received the Court's Judgment and Mandate issued October 8, 1981; accordingly

The Request for Hearing and Request for Review filed herein by Broadway Cab Company are dismissed for lack of subject matter jurisdiction.

IT IS SO ORDERED.

DONNIE A. COOKE, Claimant
J. Rion Bourgeois, Claimant's Attorney
Ridgway Foley, Jr., Defense Attorney

WCB 78-09761
November 6, 1981
Request for Review by Employer

Reviewed by Board Members McCallister and Lewis.

The employer seeks Board review of Referee Fink's order which provided that the employer pay claimant compensation for temporary total disability for the period April 19 through June 14, 1978. Further, the employer was ordered to pay a penalty equal to 15% of the above temporary total disability plus $300 in attorney fees. Finally, claimant was awarded 32° for partial loss of use of the left arm which was in addition to 48° unscheduled disability for claimant's left shoulder awarded in a Determination Order.

Claimant is a 28-year-old welder with a high school education who is working on his Bachelor's degree at Portland State University. He sustained a compensable injury August 23, 1977 which resulted in a left shoulder dislocation. He has had two shoulder operations since--one to insert a screw in the shoulder and one to remove it after it loosened.

Payment of Temporary Total Disability

The employer did not pay claimant temporary total disability from April 19 through June 14, 1978. This period covered the time claimant was released to regular work up until he was admitted to the Callahan Center for rehabilitative services. This nonpayment was proper because, before a Determination Order is issued, an employer may unilaterally terminate temporary disability payments upon notice of a medical release for claimant to return to regular work.

The Referee found, and we agree, that the evidence shows that claimant was released to return to his regular job. "Accordingly, he was not entitled to temporary total disability or temporary partial disability for the period April 19 through June 14, 1978." (Opinion and Order, page 3.)

Therefore, we reverse that portion of Referee Fink's order which awards claimant temporary total disability for the disputed time period.

Penalty for Refusal to Pay Temporary Total Disability

The employer will still be assessed a penalty on the disputed portion of temporary total disability, however.

The claim was closed by Determination Order of August 25, 1978. Claimant was awarded temporary total disability compensation for the period August 24, 1977 through August 2, 1978.

The employer still maintained that it did not owe temporary disability for the disputed period in April to June 1978 because they understood claimant had been released to work for that time period, and they believed claimant had actually worked during that time period. (In fact, claimant did not work.) Therefore, the employer requested reconsideration of the Determination Order for the disputed time period. On October 30, 1978 the Evaluation Division modified its order to only require that temporary partial disability be paid for the disputed time period.

The employer chose to ignore both Determination Orders in that it never paid temporary total disability or temporary partial dis- ability.

The employer was aware of the proper appeal procedure, yet, unilaterally chose not to follow that statutory and regulatory scheme. Had they done so, the overpayment could have been offset in this later award of additional disability compensation.

But, because the employer should not be left in as good a position by refusing to comply with the Determination Orders as it would be had the orders been followed, a penalty will be assessed.

Like Referee Fink, we find there is no basis in the record upon which we could calculate temporary partial disability. Therefore, we will base the penalty on temporary total disability which was due and owing as of the date of the Determination Order of August 25, 1978.

We modify that portion of Referee Fink's order which assesses a penalty and increase the penalty to 25% of the temporary total disability compensation due April 19 through June 14, 1978.

Extent of Disability

In cases where a compensable injury to an unscheduled area results in additional disability to a scheduled area, separate awards may be made for each part. Foster v. SAIF, 259 Or 86 (1971); Audas v. Galaxie, Inc., 2 Or App 520 (1970).

The Referee found, and we agree, that the claimant has proven that he suffered loss of function of his left arm as well as unscheduled disability to his left shoulder. As a result of the shoulder injury, claimant suffered reduced range of motion, loss of strength and grip, and some atrophy of muscles in his left arm. The medical reports and testimony indicate that claimant suffered a 32° partial loss of the left arm.

Had the injury been such that it occurred to a scheduled part of the body which then resulted in additional disability in an unscheduled part (instead of the other way around, as in this case), then the claimant would have to prove that the unscheduled disability was, at a minimum, only a common or probable result in order to receive the further award. Woodman v. Georgia-Pacific Corpora- tion, 289 Or 551 (1980).

The Woodman court distinguished cases "in which a conceded injury to an unscheduled part of the body is accompanied by loss of function of a scheduled part, as in Surratt v. Gunderson Bros., [259 Or 65 (1971)]; Foster v. SAIF, 259 Or 86, 485 P2d 407 (1971); Walker v. Compensation Dept., 248 Or 195, 432 P2d 1018 (1967), for in such cases there is no reason to assume that the legislature meant the existence of a scheduled loss to limit the award for lost earning capacity payable for the unscheduled loss." Woodman, 289 Or at 556. In other words, two separate disabilities may be recognized and compensated in this case without the strict limitations of Woodman. We affirm the Referee's award of 32° partial loss of the left arm in addition to 48° unscheduled disability for the left shoulder.

ORDER

The Referee's order dated February 4, 1981 is modified.

The order is reversed in that the employer will not have this matter remanded to it for payment of temporary total disability for the period April 19 through June 14, 1978.

However, the employer is ordered to pay claimant a sum equal to 25% of the temporary total disability that should have been paid from April 19 through June 14, 1978 pursuant to the Determination Order as a penalty for unreasonable refusal to pay compensation. This penalty is in lieu of the 15% penalty ordered by Referee Fink. We affirm the Referee's award of $300 to claimant's attorney for an attorney fee in connection with this penalty.

We affirm the award of 32° for partial loss of the left arm which is in addition to the 48° unscheduled disability award for the left shoulder ordered by the Determination Order.

Finally, because claimant prevailed on the issues of permanent disability compensability, we award $600 to claimant's attorney for an attorney fee in connection with services rendered for Board review in addition to the claimant's award of compensation. ORS 656.382(2). This fee is in addition to the award of attorney fee to claimant's attorney in the sum of 25% of the increased permanent partial disability award.

EDWARD D. COOLEY, Claimant
Steven Yates, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-1143
November 6, 1981
Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

Claimant seeks Board review of that portion of Referee Daron's order which affirmed the denial of medical services and temporary total disability from December 6, 1979 through February 12, 1980, and affirmed the Determination Order which awarded 32° for 10% unscheduled permanent partial disability. Claimant contends SAIF should be held responsible for that medical treatment and temporary total disability and the permanent partial award should be increased to 50% along with penalties and attorney fees.

The Board affirms and adopts the Referee's order.

ORDER

The Referee's order dated May 15, 1981 is affirmed.

GLEN CURTHS, Claimant
Richard Kropp, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-843
November 6, 1981
Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

Claimant seeks Board review of Referee Knapp's order which affirmed the SAIF's denial of responsibility for claimant's myocardial infarction. Claimant contends that on-the-job stress was a material contributing factor in his heart attack.

The Board affirms and adopts the Referee's order.

ORDER

The Referee's order dated May 6, 1981 is affirmed.

CLARENCE E. FISK, Claimant
Dan O'Leary, Claimant's Attorney
Daniel L. Meyers, Defense Attorney
George Goodman, Defense Attorney

WCB 80-9446 & 80-9445
November 6, 1981
Request for Review by Employer
Cross Request by Claimant

Reviewed by Board Members McCallister and Lewis.

The self-insured employer, by its administering agency, Scott Wetzel Services, Inc., requests Board review of Referee Menashe's order which determined claimant's current condition was the result of a new injury and remanded claimant's claim to it for acceptance and payment of compensation. The employer contends that claimant's condition is due to an aggravation of an earlier injury sustained on September 19, 1979.

Claimant cross-requests review of the Referee's order on the issue of his failure to make a timely request for hearing on the February 21, 1980 Determination Order.

The Board affirms and adopts the Referee's order.

ORDER

The Referee's order dated May 6, 1981 is affirmed. Claimant's attorney is awarded the sum of $150 as a reasonable attorney fee for services rendered in connection with this Board review, payable by the employer.

GENE GADDINI, Claimant
R. Ray Heysell, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-8685
November 6, 1981
Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Baker's order which approved the denial of claims for medical services on or after August 27, 1980.

The Board affirms and adopts the Referee's order.

ORDER

The Referee's order dated April 13, 1981 is affirmed.

JAMES W. GALE, Claimant
Steven C. Yates, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-9582
November 6, 1981
Request for Review by SAIF

Reviewed by Board Members McCallister and Lewis.

The SAIF seeks Board review of Referee Gemmell's order which granted claimant permanent total disability effective the date temporary total disability was terminated by the Determination Order of September 22, 1980.

The Board affirms and adopts the Referee's order.

ORDER

The Referee's order dated May 11, 1981 is affirmed. Claimant's attorney is awarded the sum of $400 as a reasonable attorney fee for services rendered in connection with this Board review, payable by the SAIF Corporation.

ARNOLD HEGRENES, Claimant
Dale A. Rader, Claimant's Attorney
Michael Healey, Defense Attorney

WCB 79-4849
November 6, 1981
Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Neal's order which affirmed the carrier's denial of compensability.

The Board affirms and adopts the Referee's order.

ORDER

The Referee's order dated February 9, 1981 is affirmed.

JIM HILL, Claimant
Jeff Gerner, Claimant's Attorney
Dennis VavRosky, Defense Attorney

WCB 80-6228
November 6, 1981
Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

Claimant seeks Board review of Referee Johnson's order which affirmed the Determination Order of June 26, 1980 whereby claimant was awarded 3° for 50% loss of his left little finger. Claimant contends this award is inadequate.

The Board affirms and adopts the Referee's order.

ORDER

The Referee's order dated May 1, 1981 is affirmed.

DAVID HINES, Claimant
Mike Dye, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 79-07957
November 6, 1981
Order on Reconsideration

Claimant seeks Board reconsideration of its order that awarded no attorney fee though claimant prevailed on a claim which appeal was initiated by SAIF. After reconsideration, the Board finds that it erred in not awarding an attorney fee.

ORDER

It is ordered that claimant's attorney is granted, as and for reasonable attorney fees, the sum of $450 for prevailing at Board review.

DOROTHA A. KITTSON, Claimant
Charles Robinowitz, Claimant's Attorney
Mary Danford, Defense Attorney

WCB 80-4842
November 6, 1981
Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

Claimant seeks Board review of that portion of Referee Fink's order which denied penalties and attorney fees for non-payment of a doctor's report and denied temporary total disability from December 12, 1979 to March 25, 1980. Claimant contends entitlement to that temporary total disability with interest, interest and penalties for failure to pay temporary total disability on the aggravation claim, reimbursement for the doctor's report and her attorney fees.

The Board affirms and adopts the Referee's order.

ORDER

The Referee's order dated March 4, 1981 is affirmed.

JIM LAFFERTY, Claimant
Jack Ofelt, Claimant's Attorney
Katherine O'Neil, Defense Attorney

WCB 79-10756
November 6, 1981
Request for Review by Claimant

Reviewed by Board Members Barnes and McCallister.

The claimant seeks Board review of Referee Williams' order which awarded him 320° for 100% permanent partial disability; claimant contends he is permanently and totally disabled.

We agree with the Referee's order up to a point. The Referee concluded that the combination of claimant's compensable back injury and resulting psychological impairment which the employer has accepted as compensable renders claimant totally disabled. We agree. The Referee found this disability was not permanent. We disagree. "Permanency" for present purposes means only our best possible forecast of the foreseeable future based on presently available information. See Gettman v. SAIF, 289 Or 609 (1980). By that standard, claimant's total disability is now permanent.

The Referee reasoned that claimant's general refusal to seek employment and specific refusal to participate in one rehabilitation program foreclosed a finding of permanent total disability under ORS 656.206(3). There are exceptions to ORS 656.206(3). See Dock A. Perkins, WCB Case No. 79-09922 (June 25, 1981). This case indicates another exception is warranted. Here, claimant's psychological illness, which is a compensable consequence of his industrial injury, precludes his meaningful participation in a job search or in vocational rehabilitation.

Claimant's attorney has been already awarded or allowed fees to date totalling $3,800. Because of these prior awards, claimant's attorney will be allowed a smaller fee for services in connection with Board review than would otherwise be warranted.

ORDER

The Referee's order dated March 10, 1981 is modified. Claimant is awarded permanent total disability effective the date of this order. Claimant's attorney is allowed an additional fee of $200 payable from claimant's increased compensation.

RICHARD L. LAKEHOMER, Claimant
W.D. Bates, Jr., Claimant's Attorney
SAIF Corp Legal, Defense Atttorney

WCB 80-03181
November 6, 1981
Request for Review by Claimant

Reviewed by Board Members Barnes and McCallister.

The claimant seeks Board review of Referee Daron's order which affirmed the Determination Order of July 23, 1979 that granted claimant only temporary total disability and temporary partial disability benefits. There were two issues before the Referee: (1) The extent of claimant's disability, and (2) SAIF's request for a monetary adjustment for an overpayment of compensation for temporary total disability in the amount of $426.16. Because of the Referee's decision on the first issue, he did not reach the second issue.

We concur with the Referee that claimant does have right shoulder impairment from his industrial injury of November 18, 1978, but the record does not establish any loss of wage earning capacity as a consequence of that impairment. We further agree with the Referee that claimant's right arm is impaired as a result of the November 1978 injury. We, however, disagree with the Referee's conclusion that claimant "specifically limited his pursuit of workers' compensation disability award to unscheduled." The issue before the Referee was extent of claimant's permanent partial disability. At the hearing the following exchange occurred:

> "The Referee: Are you contending scheduled, unscheduled, or both?
>
> "[Claimant's attorney]: It would be unscheduled."

No further comment was made on the issue.

We find these remarks do not support the Referee's conclusion that claimant waived his right to pursue extent of permanent partial disability on a scheduled member.

We find claimant entitled to a nominal award for loss of function of his right arm as a result of his November 1978 injury. SAIF will be allowed to offset its overpayment of temporary total disability.

On the question of whether claimant's attorney's fee is based on our gross award or our net award (the gross award less the offset), although reasonable arguments could be made either way, we conclude the better approach is to allow claimant's attorney a fee based on our gross award.

ORDER

The Referee's order dated January 14, 1981 is modified. Claimant is hereby granted an award of 19.2° for 10% loss of the right arm.

SAIF is allowed to offset the overpayment of compensation for temporary total disability in the amount of $426.16 from the award granted by this order.

Claimant's attorney is awarded as a reasonable attorney fee a sum equal to 25% of the compensation granted by this order.

RONALD E. LEE, Claimant
Alice Goldstein, Claimant's Attorney
R. Kenney Roberts, Defense Attorney

WCB 80-08638
November 6, 1981
Request for Review by Employer

Reviewed by Board Members Barnes and McCallister.

The employer seeks Board review of Referee Wolff's order which awarded claimant 20% unscheduled permanent partial disability for a compensable injury to his left shoulder and upper back. The employer contends the Referee's award is excessive.

The Board affirms and adopts the order of the Referee with the following additional comments.

The standards for rating disability, OAR 436-65-600, et seq, do not work especially well in this type of case in which there is little or no objective medical evidence of physical impairment but the worker's testimony is a catalog of subjective complaints and the Referee finds the worker to be credible. The employer's real argument here seems to be that we should make a contrary finding on credibility. We find no comfortable basis in the record for doing so.

ORDER

The Referee's order dated March 23, 1981 is affirmed. Claimant's attorney is awarded $500 as a reasonable attorney fee for services at this Board review, payable by the employer.

DAVID L. REED, Claimant
Rolf Olson, Claimant's Attorney
Don Howe, Defense Attorney

WCB 79-09063
November 6, 1981
Supplemental Order

The Board issued its Order on Review in the above entitled matter on September 18, 1981. By a letter of September 25, 1981 claimant's attorney requested that we reconsider the issue of attorney fees. The Board issued an Order of Abatement on October 14, 1981.

After due consideration, the Board concurs with the claimant's attorney's request for attorney fees. See Willie Williams, WCB Case No. 80-341-1F (decided this date). We find claimant's attorney is entitled to a reasonable attorney fee in the sum of $400, payable by the defendant.

The remainder of the Board's order on Review of September 18, 1981 is readopted and republished.

IT IS SO ORDERED.

WILLIE E. WILLIAMS, Claimant
David Hittle, Claimant's Attorney
Don Howe, Defense Attorney

WCB 80-0341-IF
November 6, 1981
Supplemental Order

The Board issued its Order on Review on August 13, 1981 in the above entitled matter. Our order indicated that we had doubts about the awarding of attorney fees to claimant's attorney under this ORS Chapter 655 proceeding and left that issue open for the filing of supplemental briefs from the parties.

The claimant's attorney filed his supplemental brief on September 4, 1981 in which he cites the Supreme Court's decision in Johnson v. SAIF, 267 Or 299 (1973). Based on this Supreme Court ruling, we conclude claimant's attorney is entitled to an attorney fee.

Claimant's attorney is hereby awarded as a reasonable attorney fee the sum of $400, payable by the employer.

IT IS SO ORDERED.

WILLIAM McMICHAEL, Claimant
Gerald Doblie, Claimant's Attorney
Scott Terrall, Defense Attorney

WCB 79-09744
November 9, 1981
Order to Strike Claimant's Brief

Reviewed by Board Members Barnes and McCallister.

The employer has moved to strike the brief of claimant-respondent on the following grounds: (1) The brief of claimant-respondent should have been filed with the Board pursuant to the Board's rules in early September 1981; but (2) the brief of claimant-respondent was in fact filed with the Board on October 26, 1981 without explanation for its tardiness or even a related motion for an extension of time. The employer's motion is well taken. Claimant's brief will be striken, not considered by the Board in the review of the above case and returned to claimant's attorney with this order.

IT IS SO ORDERED.

ALFRED ARNOLD, Claimant
W.F. Schroeder, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-03803
November 13, 1981
Request for Review by SAIF

Reviewed by Board Members McCallister and Lewis.

The SAIF Corporation seeks Board review of Referee St. Martin's order which remanded claimant's aggravation claim to it for acceptance and the payment of benefits as required by law.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated March 6, 1981 is affirmed. Claimant's attorney is awarded $400 as reasonable attorney fee for services rendered at this Board review, payable by the SAIF Corporation.

ROY L. BEAMAN, Claimant
Russell DeForest, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-05215
November 13, 1981
Request for Review by SAIF

Reviewed by Board Members McCallister and Lewis.

The SAIF Corporation seeks Board review of Referee Foster's order which granted claimant compensation for permanent total disability.

The Board affirms and adopts the order of the Referee. We find that the evidence as a whole establishes that claimant is permanently and totally disabled and that his 1975 industrial injury contributed independently to his permanent disability.

An error on page four of the Referee's order should be corrected. In paragraph three of the "Order" portion, the amount "$6,428.78" should be changed to read "$6,440.78."

ORDER

The Referee's order dated April 30, 1981 is affirmed. Claimant's attorney is awarded $500 for services at this Board review, payable by the SAIF Corporation.

ISHBEL BREWER, Claimant
Daniel Lorenz, Claimant's Attorney
George Goodman, Defense Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-10782 & 81-00759
November 13, 1981
Request for Review by Employer
Cross Request by Claimant

Reviewed by Board Members McCallister and Lewis.

The employer, Heritage Convalescent Center (Heritage) and its insurer, EBI Companies, request Board review of Referee Leahy's order which determined claimant's condition was an aggravation of her April 1, 1979 industrial injury and remanded her claim to it for acceptance and payment of compensation. The Referee barred claimant's new injury claim against Viking Industries (Viking), insured by the SAIF Corporation, for failure to give timely notice as required by ORS 656.265. Claimant was given an award equal to 32° for 10% unscheduled back disability. Claimant cross-appealed, contending her claim against Viking should not be barred for failure to give timely notice.

This case involves a basic .307 situation: Aggravation versus new injury. The issue of claimant's failure to give timely notice of a new injury against Viking has been raised and will be addressed first. Claimant's alleged new injury occurred on September 13, 1980. No claim was filed until Viking filled out a Form 801 on December 4, 1980. Under the provisions of ORS 656.265(4) claimant must show either (1) the employer had knowledge of the injury, (2) the carrier has begun payments, or (3) good cause for failure to give notice within 30 days. The employer can have claimant's claim barred by showing they were prejudiced by failure to receive notice. This burden was erroneously placed on claimant in the Referee's order. We find that there was no convincing evidence the employer was prejudiced by claimant's late claim. The claimant failed to establish good cause for her late filing. However, the evidence indicates that the employer had knowledge of claimant's injury. Claimant was in contact with the employer by telephone within the week following the injury. Because she was positive her condition was an aggravation of the 1979 injury, she refused to file a claim against Viking. She apparently indicated to Viking merely that her back was acting up and she was positive it was the responsibility of Heritage. Claimant testified she did tell Viking of an incident at work, and the evidence is clear that Viking offered her a Form 801 within a week after the incident. This persuades us that Viking did have knowledge of an "incident" and claimant has satisfied the requirements of ORS 656.265(4)(a). Claimant's claim against Viking is not barred for untimely filing. We are not persuaded by SAIF's argument that since no claim was filed we cannot consider ORS 656.265(4); that argument is based on an erroneous assumption.

The Referee applied the last injurious exposure rule as stated in Smith v. Ed's Pancake House, 27 Or App 361 (1976). Using this criteria, he found claimant's condition was an aggravation of the April 1979 injury sustained at Heritage. We disagree. We find the medical and lay evidence indicates claimant's current condition is the result of a new injury sustained on September 13, 1980 while working for Viking. Claimant's April 1979 injury, which was diagnosed as muscle strain, upper and low back, resulted in approximately one month of time loss benefits. Claimant did not see a doctor for this condition between May 1979 and September 1980. She testified that her back gave her very little trouble during the year or so prior to her employment at Viking. On September 13, 1980, while pushing steel rods into a clipping machine, claimant felt immediate pain in her back of a severity to cause her to go home earlier than she had planned. After this incident she experienced a marked increase in the severity of her condition now diagnosed as chronic right sacroiliac and thoracic strain. We conclude that claimant's original compensable condition had become medically stationary with a mild residual permanent disability and that her September 13, 1980 injury represents "...the most recent injury that bears a causal relation to the disability" and "contributes independently to the injury... even if the injury would have been much less severe in the absence of the prior condition, and even if the prior injury contributed the major part to the final condition." We conclude that Viking Industries, by its carrier, the SAIF Corporation, should assume full responsibility for claimant's current condition.

We conclude the permanent disability award granted by the Referee should be affirmed.

ORDER

The Referee's order dated March 26, 1981 is modified. The award for permanent disability (32°) and attorney fee from that award remains unchanged.

EBI Companies' denial is affirmed.

Claimant's claim for a new injury is hereby remanded to SAIF Corporation for acceptance and payment of compensation to which claimant's entitled. All sums heretofore paid out by EBI Companies should be reimbursed by SAIF, including the attorney fee granted by the Referee for prevailing on a denied claim.

Claimant's attorney is awarded as a reasonable attorney's fee for prevailing at Board review a sum equal to $400.

MICHAEL CRAWFORD, Claimant
Todd Westmoreland, Claimant's Attorney
Margaret Leek Leiberan, Defense Attorney

WCB 80-04913
November 13, 1981
Request for Review by Claimant

Reviewed by Board Members Barnes and McCallister.

The claimant seeks Board review of Referee Siefert's order that found that claimant's varicocele was not a compensable consequence of claimant's February 1, 1980 compensable groin muscle strain.

The Board affirms and adopts the order of the Referee. It is most likely from the evidence that claimant's varicocele was discovered coincidentally in the course of treating his muscle strain. A prostrate gland condition was also discovered coincidentally; claimant withdrew his claim for that condition.

ORDER

The Referee's order dated April 1, 1981 is affirmed.

ROBERT E. DONAIS, Claimant
Richard Sly, Claimant's Attorney
Margaret Leek Leiberan, Defense Attorney

WCB 81-00783
November 13, 1981
Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of that portion of Referee Braverman's order which denied claimant compensation for temporary total disability.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated March 11, 1981 is affirmed.

FAY DRAKE, Claimant
Richard Condon, Claimant's Attorney
Noreen Saltveit, Defense Attorney

WCB 80-06756
November 13, 1981
Request for Review by Claimant

Reviewed by Board Members Barnes and Lewis.

The claimant seeks Board review of Referee Menashe's order which affirmed the carrier's denial of an injury which occurred after work on her way to catch a bus home.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated March 3, 1981 is affirmed.

MELVIN A. FULFER, Claimant
Gary Allen, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-03812
November 13, 1981
Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Braverman's order which granted him additional compensation equal to 16° for 5% unscheduled disability for injury to his low back. Claimant contends that the 10% total award is inadequate.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated May 28, 1981 is affirmed.

EDWAR GHORES, Claimant
Daniel Lorenz, Claimant's Attorney
R. Kenney Roberts, Defense Attorney

WCB 80-09673
November 13, 1981
Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Pferdner's order which affirmed the carrier's denial of compensability.

The Board affirms the conclusion of the Referee.

ORDER

The Referee's order dated May 12, 1981 is affirmed.

PATRICIA GONZALES, Claimant
S. David Eves, Claimant's Attorney
G. Howard Cliff, Defense Attorney

WCB 80-00115
November 13, 1981
Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Daron's order which affirmed the December 21, 1979 Determination Order whereby she was granted no additional compensation above the 25% she had already received.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated November 28, 1980 is affirmed.

KATHLEEN M. HALL, Claimant
Douglas Minson, Claimant's Attorney
Frank Moscato, Defense Attorney
Noreen Saltveit, Defense Attorney

WCB 80-04718
November 13, 1981
Request for Review by Carrier
Cross Request by Claimant

Reviewed by Board Members Barnes and McCallister.

Home Insurance Company seeks Board review of Referee William's order which set aside its denial and affirmed American Motorists Insurance Company's denial for claimant's low back condition. Home Insurance contends that claimant's September 1979 incident is not work related, that under the last injurious exposure rule, Kemper is responsible and that claimant did not give timely notice in filing her claim. Claimant cross-appeals contending that penalties and attorney fees should be awarded for unreasonable resistance. We reverse.

Claimant testified that during September 1979 she began experiencing low back pain that she attributed to kidney problems. September 20, 1979 claimant took a medical leave of absence and stated she told her supervisor of the pain. On October 10, 1979, Dr. Ramsthel diagnosed lumbar strain with pre-existing spondylolysis and noted the condition was not job related. Claimant signed that report. Claimant was referred to Dr. Keizer who hospitalized her. Claimant then supposedly remembered that a lifting incident might have caused her back condition. Dr. Keizer so reported in an unsigned and undated report.

In January 1980 claimant returned to work with the aid of a transcutaneous nerve stimulator (TNS). The employer had changed insurance companies on November 1, 1979 to American Motorist Insurance Company. Claimant worked until April 24, 1980 when she noticed a tightening in her back which subsequently became painful and led to hospitalization. Dr. Hill, claimant's new treating physician, reported:

> "However, on 4/24/80, she was at work and lifted and twisted with some boxes and felt a (sic) rather discomfort in her back. She worked for the rest of the day, but was unable to continue."

On May 5, 1980 Kemper denied responsibility stating that claimant had not recovered from the September incident. Claimant then filed with Home Insurance Company which denied, contending that the claim was untimely filed.

Medical evidence concerning the September 1979 incident is sketchy and contradictory. In Exhibit 2, dated October 10, 1979, both claimant and Dr. Ramsthel checked "no" in the boxes marked "due to accident" and "did the illness arise out of employment?" and both signed the form. Later Dr. Ramsthel reported:

> "The above first consulted me for this problem 9-19-79 stating that she had had back pain for two to three weeks with no known injury. It had been gradually getting worse and she wanted me to examine her for an opinion."

Dr. Keizer, however, reported in an unsigned and undated report:

> "The pain developed somewhat insidiously but was associated with her work at GAF. She stated that she was working her control pedal with her right foot and standing on her left lower extremity. She developed some increased pain with prolonged standing in the left lower aspect of the back."

We find this evidence does not persuasively establish medical and legal causation. It is noteworthy that claimant did not begin to pursue a workers' compensation claim until after she learned of the more limited benefits available through other insurance coverage.

Regarding the April 1980 injury, Dr. Hill reported that:

> "The patient's condition is that of grade one spondylolithesis (sic). The injury she sustained April 24, 1980 certainly did not cause any new anatomical changes that could be observed on myelogram. It did, however, irritate her pre-existing back condition, that is of low back strain. The diagnosis would have been pre-existing spondylolithesis (sic) aggravated by an industrial accident which occurred April 24, 1980."

In Weller v. Union Carbide, 288 Or 27 (1979), the Court set forth the test for compensable claims that fall into the category of a pre-existing condition that is symptomatic. In April 1980 claimant's condition was symptomatic and pre-existing, though not compensable. We find that claimant's underlying condition was not worsened but only made symptomatic by her work. It, too, is therefore not compensable.

ORDER

The Referee's order dated March 12, 1981 is reversed. It is ordered that Home Insurance's and American Motorists' denials are reinstated.

MILTON HARDAWAY, Claimant
Richard Sly, Claimant's Attorney
Frank Moscato, Defense Attorney

WCB 80-02015
November 13, 1981
Request for Review by Claimant

Reviewed by Board Members Barnes and McCallister.

The claimant seeks Board review of Referee Ail's order which sustained the insurer's denial issued on December 22, 1980 and affirmed the Determination Order of August 17, 1979 which awarded no temporary or permanent disability.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated May 12, 1981 is affirmed.

DENNIS H. HILE, Claimant
A.E. Piazza, Claimant's Attorney
R. Ray Heysell, Defense Attorney

WCB 81-01686
November 13, 1981
Order of Dismissal

The employer seeks Board review of the Opinion and Order in the above referenced matter which was issued August 27, 1981. The thirty days for filing a Request for Review expired September 26, 1981, and the request was dated October 20, 1981 and received by the Board October 23, 1981. Therefore, the order of the Referee is final by operation of law, and the employer's Request for Review is hereby dismissed as being untimely filed.

IT IS SO ORDERED.

GORDON A. JONES, Claimant
Paul Wiggins, Jr., Claimant's Attorney
Daryll Klein, Defense Attorney

WCB 80-03318
November 13, 1981
Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Pferdner's order which upheld the employer's denial of claimant's aggravation claim and, on appeal of a Determination Order, granted claimant an award of 32° for 10% unscheduled low back disability.

The Board affirms the conclusion the Referee.

ORDER

The Referee's order dated April 29, 1981 is affirmed.

WILLIAM W. McKENNEY, Claimant
Karen Fink, Claimant's Attorney
John Klor, Defense Attorney

WCB 80-11397
November 13, 1981
Order on Motion for Clarification

On October 21, 1981 the Board remanded this case to the Referee "for further proceedings." In context, the reference to further proceedings meant to admit and consider the deposition of Dr. Geist which the Referee had rejected as untimely. By motion for clarification, the SAIF Corporation asks whether our intent was that the Referee could only consider the deposition of Dr. Geist or whether, instead, all parties now have the opportunity to present additional evidence.

We did not intend and we do not believe that the parties are back at "square one" in presenting their evidence. The hearing that was already held in this case was not merely a dress rehersal or the highest form of discovery. The Referee's order that was already issued in this case is not just a roadmap to guide the parties in presenting the evidence that should have been presented at the first hearing.

Aside from the deposition of Dr. Geist that we have already determined is admissible, additional evidence offered on remand must comply with the standards of OAR 436-83-480 as interpreted in Robert A. Barnett, WCB Case No. 79-11012 (June 26, 1981).

IT IS SO ORDERED.

GENELLE REPLOGLE, Claimant
Richard Sly, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Martin Cohen, Defense Attorney

WCB 80-01264, 79-07529 & 80-2657
November 13, 1981
Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Mongrain's order which denied all her claims.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated May 8, 1981 is affirmed.

GERALD M. SAXE, Claimant
Thomas Huffman, Claimant's Attorney
Daryll Klein, Defense Attorney

WCB 80-06489
November 13, 1981
Request for Review by Employer

Reviewed by Board Members McCallister and Lewis.

The employer, Tradewell Stores, Inc., seeks Board review of Referee Pferdner's order which found the Determination Order of July 3, 1980 was premature and declared it null and void and ordered it to commence payment of compensation for temporary total disability on June 17, 1980 and until closure is authorized pursuant to ORS 656.268. The order also allowed the employer to adjust the award of permanent partial disability paid between July 3, 1980 and the date of his order and the compensation for temporary total disability due from his order.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated March 18, 1981 is affirmed. Claimant's attorney is awarded $50 for services at this Board review, payable by the carrier.

JEREL SHANDLEY, Claimant
Sam Hall, Jr., Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-05131
November 13, 1981
Request for Review by Claimant

Reviewed by Board Members Barnes and Lewis.

The claimant seeks Board review of Referee Braverman's order which affirmed the Determination Order of May 12, 1980 which granted claimant an award of 10% loss of the right hand. Claimant contends that the award is inadequate.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated April 14, 1981 is affirmed.

VERNAL J. SHOEMAKER, Claimant
SAIF Corp Legal, Defense Attorney

WCB 80-05639
November 13, 1981
Request for Review by Claimant

Reviewed by Board Members Barnes and McCallister.

The claimant seeks Board review of Referee Pferdner's order which affirmed SAIF's denial of further chiropractic care.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated March 4, 1981 is affirmed.

BILL STACEY, Claimant
J. David Kryger, Claimant's Attorney
Katherine O'Neil, Defense Attorney

WCB 80-05427
November 13, 1981
Request for Review by Claimant

Reviewed by Board Members Barnes and McCallister.

The claimant requests Board review of Referee Wolff's order which affirmed the Determination Orders dated December 31, 1979 and May 30, 1980, thus denying claimant's request for additional temporary total disability, an increased scheduled permanent partial disability award and penalties and attorney's fees for the carrier's unreasonable resistance to the payment of compensation.

The Referee, in denying all relief requested by the claimant, made a finding that claimant was not a credible witness. After de novo review of the record, we find no comfortable basis in the record for a contrary conclusion.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated April 6, 1981 is affirmed.

VERN E. STANLEY, Claimant
John Klor, Attorney
SAIF Corp Legal, Attorney

WCB 80-00815 & 80-08593
November 13, 1981
Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Mongrain's order which affirmed all denials of responsibility for claimant's left foot condition.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated March 31, 1981 is affirmed.

LOUISE THOMAS, Claimant
Gary Susak, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 79-09141
November 13, 1981
Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Gemmell's order which awarded her 15° for 10% scheduled permanent partial disability for the left leg. Claimant contends that medical evidence supports a greater award.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated April 13, 1981 is affirmed.

BRIAN J. WILLS, Claimant
Jerome Bischoff, Claimant's Attorney
Ridgway Foley, Jr., Defense Attorney

WCB 80-07735
November 13, 1981
Request for Review by Employer

Reviewed by Board Members Barnes and McCallister.

The employer requests Board review of Referee Foster's order which set aside its denial of claimant's right wrist condition. The employer contends the Referee erred when he based his decision on the conclusion that Weller v. Union Carbide, 288 Or 27 (1979), does not apply to a case of an industrial accident.

We have previously held that the rule of Weller applies in both accidental injury and occupational disease claims. Richard A. Davidson, WCB No. 80-01007 (February 23, 1981). An erroneous application of Weller by the Referee, however, does not necessarily lead to reversal. This is a situation that should have been considered as a matter of responsibility rather than compensability.

The medical evidence is clear that the claimant's 1980 surgery and any disability as a result thereof were caused by the industrial injury sustained by the claimant on May 27, 1976 while working for a Washington employer. Dr. Mohammed Hoda stated in his August 7, 1980 letter that the claimant's fall of May 1980 merely aggravated his symptoms of pain and notes the fracture sustained in 1976. Dr. Peter Nathan unequivocally stated that osteoarthritic changes definitely occurred before the injury of May 2, 1980 and felt that the May injury only aggravated the claimant's symptoms, not his condition, which eventually required surgery.

The Oregon employer, in its August 19, 1980 denial letter properly accepted responsibility for the May 2, 1980 wrist sprain. The letter suggested that claimant seek reopening with the Washington State Department of Labor and Industries for treatment resulting from the 1976 claim and denied responsibility for any such treatment.

We find that the medical evidence establishes that the May 2, 1980 injury sustained by the claimant was a separate injury which did not contribute to the causation of the claimant's condition which required surgery. Under the last injurious exposure rule, the employer at the time of the original injury remains responsible for the claimant's surgery and any disability as a result thereof. Smith v. Ed's Pancake House, 27 Or App 361 (1976).

ORDER

The Referee's order dated April 6, 1981 setting aside the employer's August 19, 1980 denial and awarding attorney fees is reversed. The denial is hereby reinstated.

WILLIAM BUNCE, Claimant
Dennis Henninger, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-00051
November 20, 1981
Request for Review by Claimant

Reviewed by the Board en banc.

The claimant seeks Board review of that portion of Referee Knapp's order which ruled claimant was not entitled to additional temporary total disability benefits or certain medical expenses.

The Determination Order of December 19, 1978 awarded claimant a combination of temporary total disability and temporary partial disability from February 25, 1978 to October 23, 1978. The Determination Order of April 23, 1980 awarded claimant additional temporary total disability from June 20, 1979 to November 11, 1979. The principal issue is whether claimant is entitled to temporary total disability during the interim between the two Determination Orders, that is, from October 24, 1978 to June 19, 1979. That issue arises from the following facts.

Claimant compensably injured his back in a motor vehicle accident. He received a variety of conservative treatments, but it produced little relief. His treating doctor's report that claimant was nevertheless medically stationary led to the first Determination Order of December 19, 1978.

In June of 1979 claimant consulted Dr. Hill for continuing low back pain. Claimant's prior doctors had not performed a myelogram. Dr. Hill did so, and it showed a herniated disc at L5-S1 on the left which was consistent with claimant's constant symptoms since his motor vehicle accident. In August of 1979, a laminectomy and decompression were performed which alleviated most of claimant's pain. In Dr. Hill's opinion, claimant's herniated disc was caused by his compensable February 1978 motor vehicle accident.

The SAIF Corporation reopened claimant's claim for his 1979 myelogram and surgery. The claim was again reclosed by the April 23, 1980 Determination Order.

The Referee discounted claimant's contention that he could not work during the October 1978 to June 1979 period between the two Determination Orders on credibility grounds. We share the Referee's doubts about the claimant's credibility. However, given the subsequent discovery of a herniated disc which is consistent with claimant's complaints about his constant symptoms from his accident to his surgery and the uncontroverted medical opinion that the disc injury was caused by the accident, we accept claimant's contention that he was unable to work during the period between the Determination Orders.

In sum, we find: (1) Claimant incurred a disc injury in February 1978; (2) because of limited diagnostic procedures, i.e., no myelogram, that injury was not discovered at the time of the first claim closure; (3) when the disc injury was subsequently discovered, claimant's claim was reopened and medical services for the disc injury were provided; and (4) because of the belatedly-discovered disc injury, claimant was unable to work from the date of his injury until his claim was reclosed following surgery.

This leads to the question of, procedurally, how to deal with temporary total disability benefits during the period between the two Determination Orders. On the one hand, it can be argued that the first Determination Order was not a premature closure because, based on the then-available information, claimant was medically stationary. On the other hand, it can be argued that claimant has no viable aggravation claim because his condition did not worsen after the first Determination Order but rather his condition (herniated disc) remained the same after the first Determination Order as it was (albeit unknown) at that time. Accepting those arguments produces the unacceptable conclusion that claimant is not entitled to compensation for a period of time he was unable to work due to the (admittedly then unknown) consequences of a compensable injury.

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

In concluding that such latent and later-discovered conditions should be regarded as a basis for finding premature closure, we are aware that Keefer v. SIAC, 171 Or 405, 410 (1943), states that aggravation includes "cases in which the disability proves to be greater than supposed when the order was made closing the claim." Whatever validity this may have had under the Workers Compensation Act of almost 30 years ago, we conclude it is inconsistent with the present aggravation statute, ORS 656.273, which requires a worsening of the worker's condition.

There is another issue--whether SAIF is responsible for paying the $270 bill of Dr. Fleming, a psychologist. There is very little information in the record about the nature or extent of Dr. Fleming's services. Apparently, he merely examined claimant on referral from claimant's attorney. Although Dr. Fleming recommended some psychological treatment, as best as we can tell from this record he has not actually treated claimant. Rather, it appears that Dr. Fleming's examination and report were solely intended and used for litigation. The Referee correctly concluded that Dr. Fleming's bill is claimant's responsibility, not SAIF's responsibility. Clara M. Peoples, WCB Case No. 79-09890 (June 11, 1981); Richard Stinson, 29 Van Natta 469 (1980).

ORDER

The Referee's order dated November 7, 1981 is modified. Claimant is awarded temporary total disability compensation from October 24, 1978 to June 19, 1979 inclusive. Claimant's attorney is allowed 25% of the increased compensation awarded by this order, not to exceed $750 for services rendered at the hearing level plus $350 for services rendered on Board review. The balance of the Referee's order is affirmed.

WILLIAM L. CAFFEY, Claimant
Michael Stebbins, Claimant's Attorney
Paul Roess, Defense Attorney

WCB 80-07258
November 20, 1981
Order on Reconsideration

The employer moves for reconsideration of our October 9, 1981 Order on Review contending we erroneously found a psychological component to claimant's impairment and disability resulting from his compensable injury.

We agree our Order on Review requires clarification. Under OAR 436-65-607 and 436-65-665 emotional and psychological consequences of a compensable injury either: (1) May constitute a separate, independent form of disability--in which case rating of disability is pursuant to OAR 436-65-665; or (2) may be directly and inextricably linked to the physical injury--in which case rating of disability is pursuant to OAR 436-65-607 as one element of rating disability arising from the physical injury.

Although not as clearly expressed as it could have been, it was our intent in our October 9, 1981 Order on Review to rely on the latter approach, i.e., to rate claimant's disability by relying on emotional and psychological findings pursuant to OAR 436-65-607. In this context, workers receive a greater disability award if "unable to adjust to the results of their injuries" and a smaller award if "demonstrating an unwillingness to adjust to the results of their injuries." OAR 436-65-607(4) and (6).

We found that the record demonstrated more of an inability for claimant to adjust than an unwillingness to adjust and rated disability accordingly. We adhere to that rating.

ORDER

Our Order on Review dated October 9, 1981, except as modified herein, is readopted and republished.

KEITH COOK, Claimant
Alan Scott, Claimant's Attorney
A. Thomas Cavanaugh, Defense Attorney

WCB 79-10047
November 20, 1981
Request for Review by Claimant

Reviewed by Board Members Barnes and McCallister.

The claimant seeks Board review of Referee Menashe's order which granted him compensation equal to 256° for 80% unscheduled neck and upper back disability. Claimant contends he is permanently and totally disabled. We agree.

The Board essentially agrees with and adopts the findings of the Referee. However, those findings lead us to a different conclusion. Based on the medical evidence, the social/vocational evidence, Butcher v. SAIF, 45 Or App 313 (1980), Dock Perkins, WCB Case No. 79-09922 (June 25, 1981), and OAR 436-65-600, et seq, we conclude that claimant is permanently and totally disabled.

ORDER

The Referee's order dated April 9, 1981 is modified. Claimant is hereby granted compensation for permanent total disability commencing as of the date of this order. This is in lieu of all previous awards claimant has been granted for his claim.

Claimant's attorney is allowed as a reasonable attorney fee a sum equal to 25% of the increased compensation granted by this order, not to exceed a total of $3,000 under the terms of the Referee's order and this order.

FRANK GLOVER, Claimant	WCB 81-04565
D. Keith Swanson, Claimant's Attorney	November 20, 1981
SAIF Corp Legal, Defense Attorney	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 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.

WILLIAM G. GUNTER, Claimant	WCB 80-11336
Gary Allen, Claimant's Attorney	November 20, 1981
SAIF Corp Legal, Defense Attorney	Request for Review by SAIF

Reviewed by Board Members McCallister and Lewis.

The SAIF Corporation seeks Board review of Referee Daron's order which set aside its denial of responsibility for claimant's right groin, right hip and low back condition. The Referee found the claim compensable as an occupational injury. SAIF contends that claimant suffered an occupational disease and that his work was not the only cause of his condition.

Claimant had a pre-existing short leg limp 15 years prior to his October 1980 claim. The 41-year-old mill worker pulled veneer on dry chain for two and one-half to three years which required standing and repetitive twisting hip movements. Claimant did not work for nine months in 1980 because Coast Range Plywood, the employer, was closed down. Claimant and two other people bucked 932 bales of hay three days in late July or early August 1980. Claimant testified that in late August he returned to his regular job and after two or three weeks began to experience progressively worsening pain in his right groin and hip. Claimant stopped work October 3, 1980 and saw Dr. Howard, chiropractor, on October 6.

Dr. Howard first diagnosed "sprain/strain low back, right sacroiliac, right hip" but later changed his diagnosis in agreement with Dr. Todd. Dr. Fax, orthopedist, examined claimant in November at the request of SAIF. Dr. Fax diagnosed mildly dysplastic hips, worse on the right with early degenerative arthritic changes in the right hip. Dr. Fax thought that claimant's work only made his condition symptomatic but did not worsen claimant's underlying condition. In January 1981, Dr. Todd, orthopedist, diagnosed iliopectineal bursitis and adductor tendonitis, right groin. Later Dr. Todd stated: "I have no reason from my examination and the information gleaned from his x-rays to believe that he had a preexisting problem causing this pain, and he gives me no history of specific injury causing it. Therefore, I am left to assume that it was the rigors of his duties pulling and twisting constantly through the day that caused the pain which I feel is caused by the bursitis and tendonitis in the right groin."

Claimant told Dr. Todd he did nothing physically during his nine-month lay-off, but claimant did buck hay. Dr. Todd's diagnoses and statement did not reflect knowledge of any other possible cause for claimant's condition. Claimant, claimant's wife and a friend testified that claimant suffered no symptoms after bucking hay. Dr. Todd, however, did not have the benefit of this testimony. Claimant also testified that he did not experience pain until two or three weeks prior to the time he quit. This is some 2-1/2 months after bucking hay, thus any possible temporal relationship is negated.

The Referee found claimant sustained an industrial injury. We disagree. Claimant testified that his pain gradually increased and finally became disabling. We, therefore, conclude that claimant's claim is for occupational disease. James v. SAIF, 290 Or 343 (1981).

Under Thompson v. SAIF, the Court has ruled that for an occupational disease to be compensable, the work must be the only cause of the occupational disease. The hay bucking was too far removed to be viewed as a possible cause. We find nothing else in this record as a possible cause other than the conditions of employment.

We find the claimant's conditions diagnosed by Dr. Todd as iliopectineal bursitis and adductor tendonitis, right groin are compensable under ORS 656.802, the occupational disease statute. See Beaudry v. Winchester Plywood Company, 255 Or 503 (1970).

ORDER

The Referee's order dated April 17, 1981 is affirmed. Claimant's attorney is awarded as and for reasonable attorney fees the sum of $450 for prevailing at Board review, payable by the SAIF Corporation.

TERRY L. HOLT, Claimant
Steven Yates, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-06519
November 20, 1981
Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Danner's order which affirmed the July 9, 1980 Determination Order which granted him no compensation for permanent disability. Claimant contends that he is entitled to an award of compensation for permanent disability and that his claim was prematurely closed.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated May 6, 1981 is affirmed.

ETHEL MOLCHANOFF, Claimant
Gary Hull, Claimant's Attorney
Alan Scott, Defense Attorney

Own Motion 81-0256M
November 20, 1981
Amended Own Motion Order

The Board issued its Own Motion Order in the above entitled matter on October 23, 1981. Claimant's attorney has submitted an affidavit from the claimant contending claimant is entitled to compensation for temporary total disability.

It is the Board's general policy not to award temporary total disability compensation to claimants on own motion cases who have voluntarily retired or otherwise left the labor market and who are not seeking gainful employment. As with all general policies, there will be exceptions. We conclude the claimant's situation in this own motion case warrants exceptional treatment.

Claimant retired in May 1981 because of continuing severe pain that was a consequence of her 1973 compensable injury. We do not regard that act as a completely voluntary retirement. Instead, the reason claimant has left the labor market is due, at least in part, to the continuing consequences of her compensable industrial injury. In such circumstances, temporary total disability compensation should be allowed by own motion order.

Therefore, our Own Motion Order is amended to reflect claimant's entitlement to compensation for temporary total disability commencing August 13, 1981, the date of her hospitalization for the August 14, 1981 surgery and until closure is authorized pursuant to ORS 656.278.

IT IS SO ORDERED.

MARGARET T. PARKINSON, Claimant
Peter Hansen, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 79-09004
November 20, 1981
Request for Review by SAIF

Reviewed by Board Members Barnes and McCallister.

The SAIF Corporation seeks Board review of Referee Neal's order which found that claimant had sustained, as the Referee put it, a "rather minor back strain" and as a consequence was permanently and totally disabled. Claimant has filed no brief in defense of the Referee's award. We agree with the Referee that claimant suffered a minor back strain. We do not agree that claimant is permanently and totally disabled.

Two lifting incidents at work in November 1978 produced claimant's back strain. Her claim was closed by Determination Order dated March 2, 1979 awarding temporary total disability from November 29, 1978 through December 6, 1978--a period of about one week, reflecting the minor nature of claimant's injury--and awarding 5% unscheduled disability.

There are four medical reports in the record that address claimant's physical impairment as a result of her November 1978 injury. Dr. Langston reports in Exhibit 9: "I could find no objective evidence of disability." Dr. Pasquesi reports in Exhibit 10: "I feel that her total impairment is 10 percent of a whole person, one half of which is the result of her industrial injury, and one half of which [pre-existed] the injury of 11-25-78." Dr. Gritzka reports in Exhibit 22 that he reviewed the reports of Drs. Langston and Pasquesi and agrees "in essence" with them. These are the <u>only</u> relevant narrative medical reports and certainly are a slender basis for a permanent total disability award.

The fourth and only other relevant medical "report" of sorts is a form supplied to Dr. Gritzka by a vocational rehabilitation organization on which the doctor checked boxes and filled in blanks regarding claimant's physical limitations. According to this form, claimant cannot stand in one position more than one-half hour; cannot walk more than 100 yards at a time; cannot sit more than one-half hour at a time; cannot climb or crouch at all; cannot bend more than once every four hours; and cannot lift, carry, push or pull more than 15 pounds occasionally.

The Referee seems to have accepted that claimant had such physical limitations uncritically. We do not. The physical limitations imposed by Dr. Gritzka are unexplained by this record, are grossly inconsistent with Dr. Langston's detailed findings, are grossly inconsistent with Dr. Pasquesi's detailed findings, and are grossly inconsistent with Dr. Gritzka's prior agreement with the other doctors' findings. Absent some explanation of these inconsistencies and absent some cogent medical opinion causally linking these severe physical limitations to claimant's November 1978 minor back strain--and none is present in this record--we attach little weight to the limitations imposed by Dr. Gritzka.

In sum, we find from the medical evidence that the physical impairment resulting from claimant's November 1978 injury does not preclude her from working. The non-medical evidence, specifically claimant's testimony, suggests more serious impairment. However, claimant has had virtually every diagnostic test known to medicine, a myelogram, a bone scan, a CAT scan, etc., and all have been essentially normal. We are not persuaded by claimant's subjective complaints in the face of this overwhelming objective medical evidence to the contrary.

Moreover, there is the possibility of a functional component to claimant's problems, although this was not investigated by any of the doctors. We note that claimant's rehabilitation and return-to-work efforts were undermined by a variety of personal and lifestyle problems: A pregnant daughter; an incarcerated son; alcohol abuse; physical and mental abuse by her live-in boyfriend who also attempted suicide; inability to keep a car operational; and sundry other problems. It is unfortunate that claimant has encountered so much adversity, but this adversity is not the responsibility of the workers compensation system to the extent it is these personal problems that are keeping claimant out of the labor market.

ORS 656.206(3) provides that to prove permanent total disability a worker must establish that reasonable efforts have been made to obtain employment. Claimant testified:

"Q Now, have you been looking for work?

A No.

Q Have you made application with any--?

A No.

Q Since you have been back to Portland?

A No.

Q Nothing?

A No."

Given our finding that claimant's November 1978 injury does not preclude her from working, ORS 656.206(3) and claimant's own testimony preclude a finding of permanent total disability.

Considering all relevant medical and social/vocational factors in OAR 436-65-600, et seq, and compared to other similar cases, we conclude that claimant would be properly compensated by an award of 40% unscheduled permanent partial disability.

ORDER

The Referee's order dated November 19, 1980 is modified. Claimant is awarded 128° for 40% unscheduled permanent partial disability in lieu of the award granted by the March 2, 1979 Determination Order and in lieu of the award granted by the Referee. The balance of the Referee's order is affirmed.

JOHN T. SEIBER, Claimant
James Francesconi, Claimant's Attorney
Joseph Robertson, Defense Attorney

WCB 81-03087
November 20, 1981
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.

JESSIE M. TATE, Claimant
Thomas McDermott, Attorney

WCB 80-08390
November 20, 1981
Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Leahy's order which affirmed a Determination Order of August 19, 1980 that awarded 19.2° for 10% loss of the right arm (shoulder) and 9.6° for 5% loss of the left arm (shoulder). Claimant contends she is permanently and totally disabled. We modify the Referee's order.

The Board adopts the facts set forth in the Referee's opinion and order but would add the following: Shoulder disability is unscheduled. Therefore, that portion of claimant's award for any shoulder residuals should be unscheduled.

We find claimant's scheduled arm disability award is appropriate and her shoulder disability to be minimal. We, therefore, add an unscheduled award for claimant's shoulder disability. Considering claimant's age, education and other appropriate social/vocational factors and when compared to similar cases, we find claimant has lost 5% of her earning capacity to shoulder disability.

ORDER

The Referee's order dated March 27, 1981 is modified. It is ordered that claimant is awarded 16° for 5% unscheduled permanent partial disability for both shoulder conditions in addition to the awards of scheduled disability previously awarded for her right and left arm conditions.

Claimant's attorney is awarded as and for a reasonably attorney fee 25% of the increased award for prevailing at Board review.

The remainder of the Referee's order is affirmed.

The claimant requested a hearing. By letter dated October 1, 1981 Presiding Referee Daughtry informed claimant that his five-year aggravation rights had expired from his 1970 industrial injury. The Presiding Referee stated he was forwarding claimant's file to the Board for consideration under the Board's own motion authority, ORS 656.278.

We followed standard procedure and requested a response from the carrier. That response includes the following recent medical reports: Dr. Campagna's report dated April 17, 1981; Dr. Hald's report dated May 28, 1981; and Dr. Rethwill's reports dated August 10, 1981 and October 16, 1981.

After a careful review of this information, we find no medical documentation that claimant's condition has materially worsened since his last award of compensation for his 1970 injury. The medical evidence only indicates that claimant is receiving some conservative treatment. Claimant is, of course, entitled to continuing medical services for his injury-related problems under the provisions of ORS 656.245 to be paid for by the carrier.

For claimant's benefit we point out that it is the Legislature, not this Board or any other part of the workers compensation system which he has accused of being unresponsive to his plight, that has established the rule that a worker is only entitled to claim reopening as a matter of right for five years. ORS 656.273, 656.278. Beyond that five year period, the Legislature has further provided that claim reopening is within the discretion of the carrier or the discretion of the Board under its own motion authority. ORS 656.278. Finally, it is the Legislature that has provided that claims should only be reopened when current medical reports document that a worker's physical impairment caused by a compensable injury has worsened. ORS 656.273, 656.278. Without this medical substantiation, the Board lacks legal authority, as created and defined by the Legislature, to do anything.

Own motion relief is denied.

IT IS SO ORDERED.

ALBERT J. HILGER, Claimant
Michael Swaim, Claimant's Attorney
Gary Hull, Attorney

WCB 79-10472 & 80-06171
November 25, 1981
Order on Reconsideration

The employer and carrier have requested reconsideration of the Board's Order on Review dated November 6, 1981.

In this case, claimant has suffered low back pain since May 11, 1976 when he fell while putting out a fire on a company truck. Despite surgery to the L-5 area, claimant's pain has persisted.

The focus in the Board's order was whether claimant had shown a worsening (aggravation) of the back since the January 19, 1978 Determination Order to justify a reopening. Our order pointed out that the report of the treating physician, Dr. Buza, of January 30, 1978 indicated a worsening in the low back shown by totally incapacitating pain and decreased reflexes. The doctor recommended that the L-5 nerve root be checked for degree of impairment. Claimant continued to have the increased pain and decreased reflexes including sensory loss. The diagnosis of nerve root impairment was confirmed by Dr. John Raaf, neurosurgeon, on August 20, 1979. In other words, it was shown that the nerve root impairment had increased since the Determination Order.

Dr. Buza opined in a report dated November 29, 1978 that the real problem of pain was caused by scarring within the nerve itself. He did not directly say the scarring resulted "as a consequence of the operation" to the L-5 area, so that wording in our order was, perhaps, unfortunate. Since Dr. Buza said that claimant's problems stemmed from scarring and claimant's pain is from the site of the compensable injury and claimant experienced no previous injury to the L-5 area which would have caused the scarring and consequent pain and loss of reflexes, the record as a whole does relate scarring of the nerve root at L-5 to claimant's low back claim.

ORDER

The Order on Review dated November 6, 1981 is affirmed.

DORIS M. BACORN, Claimant
James Francesconi, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-04438
November 27, 1981
Request for Review by Claimant

Reviewed by Board Members Barnes and McCallister.

The claimant requests review and the SAIF Corporation cross requests review of Referee Foster's order which granted claimant an award of 240° for 75% unscheduled disability. The issue is extent of disability: Claimant contends the Referee's award is inadequate; SAIF contends it is excessive.

We adopt the facts as recited by the Referee as our own. Claimant is 48 years of age with an eighth grade education. She has worked as a waitress, in a molding plant, in canneries, in a nursing home, as a police matron and as a dispatcher.

Claimant was injured lifting a 100 pound sack of sugar at Oregon Freeze Dry. Her injury required a lumbar laminectomy with disc excision performed on May 4, 1979.

Following the surgery, reports from the Callahan Center and from a clinical psychologist suggest moderate to severe psychological impairment. However, the Callahan Center's report states this psychopathology was of long-standing duration; neither report persuasively documents any causal relationship to claimant's industrial injury. We find no compensable psychological impairment.

As for claimant's physical impairment, none of the physicians who have treated and/or examined her felt she could return to her regular occupation. The lifting restrictions placed on claimant vary among the medical examiners from as high as twenty pounds to as low as two pounds. She is to do no repetitive bending, twisting, stooping, crouching or climbing of stairs. The Callahan Center physicians felt her physical impairment was mild. The Orthopaedic Consultants felt claimant could perform light to sedentary work and rated her loss of function of her low back as moderate.

Claimant testified she had sought employment, thus far to no avail, and felt that she was physically capable of doing clerical work.

We find, as did the Referee, that there is no basis in the record for finding claimant permanently and totally disabled. We disagree with the Referee, however, that claimant has lost 75% of her wage earning capacity. Based on the medical evidence and claimant's own testimony, we find that she is now employable, but we urge vocational rehabilitation to allow her to develop additional job skills.

Considering the standards in OAR 436-65-600, et seq, and compared to other similar cases, an award of 60% unscheduled disability appropriately compensates claimant for her loss of wage earning capacity due to this industrial low back injury.

ORDER

The Referee's order dated January 12, 1981 is modified. Claimant is granted an award of 192° for 60% unscheduled disability in lieu of all prior awards. The balance of the Referee's order is affirmed.

TRACY BENEDICT, Claimant
Richard Kropp, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-08964
November 27, 1981
Request for Review by SAIF

Reviewed by Board Members McCallister and Lewis.

The SAIF Corporation seeks Board review of Referee Wolff's order which granted claimant compensation for 20% loss of the left hand. SAIF contends this award is excessive.

Claimant sustained a compensable injury on January 4, 1980 while cleaning chickens. After surgery and conservative care she was granted an award equal to 5% loss of the left hand. Claimant's impairment was measured in terms of loss of grip strength, loss of two-point discriminatory ability in sensation and cold intolerance. A more recent report, received after the issuance of the Determination Order, actually indicates a slight improvement in claimant's loss of function. Although claimant's condition has improved since the Determination Order was issued, we find, after application of the criteria set forth in OAR 436-65-500 and considering claimant's subjective complaints, that a more appropriate award would be 10% loss of function of the left hand. The Referee's order should be so modified.

ORDER

The Referee's order dated June 8, 1981 is modified. Claimant is hereby awarded compensation for 10% loss of the left hand. This award is in lieu of any previous awards she has been granted for this injury.

EDWIN BOLLIGER, Claimant
David W. Hittle, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 78-09001
November 27, 1981
Order Denying Reconsideration

Claimant moves for reconsideration of the Board's Order on Review dated February 11, 1981.

Claimant contends that the Board erred in finding he suffered no permanent partial disability from the industrial injury of May of 1977. That is not what our Order on Review said. We stated that after the May 1977 injury, Dr. Paluska found claimant's condition medically stationary with no permanent residuals. Thereafter a Determination Order granted claimant compensation for temporary total disability only. It was after litigation in an earlier proceeding, WCB Case No. 78-02464, that claimant received an award for permanent partial disability.

Claimant contends that the Board is collaterally estopped from finding an intervening injury because of the Referee's decision in that earlier proceeding. At that time Referee Mongrain found that the August 1977 injury was a new injury. This new injury was an intervening injury. There is no conflict between Referee Mongrain's prior finding and the Board's finding in this case.

Dr. Buza testified by deposition that the August 1977 incident constituted an aggravation of the May 1977 industrial injury but admitted he was only guessing. Dr. Paluska also found the August incident constituted an aggravation. Any collateral estoppel that arises here would cut against, not in favor of, claimant's position because it is these medical opinions that are inconsistent with Referee Mongrain's prior finding.

Claimant nevertheless argues that we must accept the opinions of Drs. Buza and Paluska. We disagree. There is a uniform jury instruction used in this state which provides:

> "In determining the weight to be given such an opinion [i.e., the opinion of an expert witness], you should consider the qualifications and credibility of the witness and the reasons given for the opinion. You are not bound by such opinion. Give it the weight, if any, to which you deem it entitled."

We believe that, in the performance of our factfinding function, we have the same prerogatives and duties as does a jury or a trial judge sitting without a jury. Consistent with the above jury instruction, it is clear under Oregon law that a jury or judge as factfinder is not obligated to find the uncontradicted opinion of an expert witness persuasive. State v. Clark, 286 Or 33, 40 (1979); Cutsforth v. Kinzua Corp., 267 Or 423, 440 (1973); City of Portland v. Ruggero, 231 Or 624, 630 (1962).

Moreover, we think the prerogative to not be persuaded by an expert opinion, even if uncontradicted, extends to the Board's Referees and to the Court of Appeals in the exercise of its de novo review function in workers compensation cases. See Smith v. Lew Williams Cadillac, 31 Or App 21 (1978); Long v. Industrial Indem. Co., 20 Or App 24 (1975). Claimant argues that Neathamer v. SAIF, 16 Or App 402 (1974), stands for the contrary position that an uncontroverted expert medical opinion must be accepted by the factfinder. We do not so interpret Neathamer. The court's conclusion there was: "Our verdict is that Dr. Weinman's uncontroverted opinion makes the evidence preponderate in favor of claimant." 16 Or App at 404. (Emphasis added.) We understand the reference to a "verdict" to mean that in Neathamer the ultimate factfinders chose to find an expert opinion persuasive and not to mean that they were obligated to do so.

Claimant is encouraged to carry his argument to the Court of Appeals if there is any real doubt about the proposition that in weighing the evidence this Board and its Referees have the same authority as does a jury.

Claimant's final contention, that we misapplied the "last injurious exposure" rule, is well taken. What we should have referred to was the "intervening injury" rule. There may be overlap in philosophy between those two rules, but we were mistaken to refer to the former rather than the latter. The record established to our satisfaction at the time of Board review and again establishes to our satisfaction on reconsideration that claimant suffered an intervening, non-compensable injury in August of 1977 and that his worsened condition (herniated disc) was caused by that non-compensable injury rather than caused by his May 1977 compensable injury which resulted only in a back strain.

ORDER

Except as modified by this Order on Reconsideration, the Board's Order on Review dated February 11, 1981 is readopted and republished. Claimant's motion for reconsideration is denied.

VAUGHN H. BOYD, Claimant
William Holmes, Claimant's Attorney
James Larson, Defense Attorney

WCB 80-01134
November 27, 1981
Request for Review by SAIF

Reviewed by Board Members McCallister and Lewis.

The SAIF Corporation seeks Board review of Referee Howell's order which set aside its denial of responsibility for claimant's back condition. SAIF contends that claimant has not shown medical causation.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated May 22, 1981 is affirmed. Claimant's attorney is awarded $250 for services rendered at this Board review, payable by the SAIF Corporation.

GRETA BRUGIA, Claimant
Bernard Brink, Claimant's Attorney
Margaret Leek Leiberan, Defense Attorney

WCB 80-01097
November 27, 1981
Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee James' order which found claimant's request for hearing was untimely filed as a result of her denied aggravation claim. Although he noted the issue was moot based on this decision, the Referee also found claimant had failed to prove her aggravation claim.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated April 23, 1981 is affirmed.

WALLACE CALKINS, Claimant
Jerome Bischoff, Claimant's Attorney
Ridgway Foley, Jr., Defense Attorney

WCB 80-00776
November 27, 1981
Request for Review by Employer

Reviewed by Board Members McCallister and Lewis.

The employer has requested Board review of Referee Seifert's order which overturned the employer's January 14, 1980 denial of re- sponsibility for the claimant's bilateral inguinal hernias and the February 28, 1980 denial of further responsibility for the claim- ant's back condition.

The claimant, a 50-year-old millwright, suffered a low back strain on or about December 4, 1979 while straightening some dryer rolls at work. The diagnosis was lumbosacral strain and was accepted by the employer as compensable. The claimant visited Dr. Kenneth Orwick on December 14, 1979. Although finding pain still present, Dr. Orwick found him able to return to work. On December 15, 1979 the claimant stayed at home on his farm and fed his chickens. This activity apparently involved lifting a small can of grain. That night, he turned over in bed and experienceed "excruciating" pain.

The employer asserts that the claimant sustained a new injury on December 15, 1979 and there denies further responsibility for the claimant's back condition subsequent to that date. We affirm the Referee's finding that the claimant's worsened back condition is a compensable result of the original injury of December 4, 1979.

An employer is required to pay benefits for worsening of a worker's condition where the worsening is a result of both a compensable on-the-job injury and a subsequent off-the-job injury to the same part of the body if the worker establishes that the on-the-job injury is a material contributing cause of the worsened condition. Grable v. Weyerhaeuser, 291 Or 387, 401 (1981).

The fact that the claimant may have suffered an intervening injury does not mean his worsened condition is not compensable. We are not convinced that the "chicken feeding" incident is sufficient to defeat a finding of compensability.

Following the December 15, 1979 exacerbation, claimant visited Dr. Orwick who reported:

> "On December 15 the patient was working with the chickens doing some lifting and did a twisting where he felt acute pain in the right side of his back with a little radiation into the right buttock and right anterior thigh."

In his letter dated March 7, 1980 (Ex. 16), Dr. Orwick reported:

> "I do feel that his continued disability during the latter part of December stemmed from his initial back injury for which he was initially seen in the emergency room on December 7, 1979."

Dr. Orwick further noted:

> "The minor activities that he was doing at home at the time he incurred increasing back problems told me that his initial difficulties had not completely resolved..."

Under the test established in Grable, the claimant has carried his burden and established that the original injury was a material contributing cause of his worsened condition.

Having disposed of the first issue, we now turn to the question of the compensability of the claimant's bilateral inguinal hernia condition, diagnosed by Dr. Orwick in conjunction with his examination of the claimant for his back injury on December 10, 1979.

A worker claiming benefits is required to prove his claim by a preponderance, Hutcheson v. Weyerhaeuser, 288 Or 51, 55 (1979). Reading the record as a whole, we are convinced that the claimant has failed to establish that the injury he sustained on December 4, 1979 was the cause of his inguinal hernia condition.

Dr. Orwick in a note dated January 1, 1980 notes the hernias and states that, "It is difficult to say that they were caused by his work, but lifting, etc., exacerbates this type of problem." In his letter of January 29, 1980 Dr. Orwick relates that hernias are the result of a weakness of the inguinal canal floor acquired by multiple stress in terms of pushing, pulling or straining at work. He further states:

> "The patient states that he is a millwright and involved in the above mentioned activities, therefore, it would be reasonable to assume that he in fact did acquire these defects while working, although a specific injury is not reported or even necessary to the genesis of these defects." (Emphasis added.)

Unfortunately for the claimant, Dr. Orwick fails to relate the December 4, 1979 injury as a cause of the claimant's hernia condition. Implicit in his report is the assumption that the claimant did not engage in any type of pushing, pulling or straining activities off-the-job. Dr. Orwick's "reasonable" assumption does not reach the necessary level of proof required to connect the December 4 injury to his hernia condition nor would it be sufficient under an occupational disease claim based on the test established in James v. SAIF, 290 Or 343 (1981).

ORDER

The Referee's order dated April 22, 1981 is affirmed in part and reversed in part. The February 28, 1980 denial is set aside and remanded for acceptance and payment of compensation as required by law for the claimant's back condition. The January 14, 1980 denial of responsibility for the claimant's bilateral inguinal hernias is affirmed.

ALLEN DAVIS, Claimant
Todd Westmoreland, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-07823
November 27, 1981
Request for Review by Claimant

Reviewed by the Board en banc.

The claimant seeks Board review of that portion of Referee Baker's order which affirmed the SAIF Corporation's denial of medical services for acupuncture treatments.

Claimant suffers from arachnoiditis as a direct sequelae of his industrial injury which causes severe pain. Claimant, by an affidavit, indicated that the acupuncture treatments provided by Dr. Chiasson, a medical doctor, provided much pain relief.

Dr. Kiest had been claimant's treating orthopedic physician and had nothing further to offer claimant by way of treatment. Claimant requested acupuncture, and Dr. Kiest referred claimant to Dr. Chiasson whom he felt was the best acupuncturist he knew. The Orthopaedic Consultants, in their report, indicated that by history the acupuncture gave claimant only transient relief which never lasted more than a few days. They felt that the treatment provided no significant lasting benefit and that prolonging treatment was of no benefit.

Although Dr. Kiest opined that he personally was not impressed with long term benefit of acupuncture, he did not want to deny this possible treatment to anyone so desperately in need of help as claimant. He went on to say: "It is possible, but very unlikely, that he will benefit by his acupuncture treatment." Dr. Kiest felt that the treatment would not alter the final course of claimant's condition of arachnoiditis.

Dr. Chiasson, the acupuncturist, felt that claimant got significant benefit following these treatments; claimant experienced temporary improvement with more good days than bad. Claimant indicated to Dr. Chiasson that acupuncture had been the only treatment to help him in three years.

The Referee concluded that by a preponderance of evidence, claimant failed to establish that the denial of medical services was inappropriate. We reverse.

ORS 656.245 states:

> "...the SAIF 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..."

This statutory provision provides claimant with the right to continuing palliative treatment for injury-related conditions.

In Wait v. Montgomery Ward, Inc., 10 Or App 333 (1972), the Court held that medical services were to be provided when "necessarily and reasonably incurred." We find that claimant suffers from intractable pain, and acupuncture provides him with the only relief from this pain.

The medical opinions that the acupuncture treatments do not provide lasting or significant benefit miss the pertinent question that arises in this case. We find Wait, supra, dispositive since the evidence taken as a whole indicates that claimant suffers from intractable pain which is temporarily relieved by acupuncture treatment and, therefore, is "necessarily and reasonably incurred" within the meaning of Wait, supra.

ORDER

The Referee's order dated June 2, 1981 is modified. The SAIF's denial of acupuncture treatment under the provision of ORS 656.245 is reversed and the claim for payment for those treatments is remanded to the SAIF Corporation for acceptance.

Claimant's attorney is awarded as and for a reasonable attorney fee for his representation before the Referee and this Board the sum of $900, payable by the SAIF Corporation.

The remainder of the Referee's order is affirmed.

CHAIRMAN BARNES, Concurring:

I agree completely with the prevailing opinion. I write separately only to add that I regard it as short-sighted for an insurance carrier to be willing to pay indefinitely for narcotic pain medication as SAIF suggests it is willing to do in this case, the long term use of which can create dire consequences, but not be willing to pay for alternative methods of treating chronic pain, even an alternative as exotic as acupuncture.

EDWARD S. DINES, Claimant
Larry Moomaw, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Richard William Davis, Defense Attorney

WCB 79-02450, 79-00858 & 78-8673
November 27, 1981
Request for Review by Claimant

Reviewed by Board Members Barnes and McCallister.

The claimant seeks Board review of Referee Braverman's order which granted him additional compensation for 25% psychological disability, 10% back disability and 10% right knee disability. Claimant contends he is permanently and totally disabled.

The Board affirms and adopts the order of the Referee.

We note that when listing the Determination Orders from which claimant was appealing, the Referee failed to mention the March 9, 1979 Determination Order which granted claimant compensation for 5% loss of the right knee.

ORDER

The Referee's order dated April 20, 1981 is affirmed.

DEBRA J. ERICKSON, Claimant
David Hytowitz, Claimant's Attorney
Dana Rasmussen, Defense Attorney

WCB 80-09623
November 27, 1981
Request for Review by Employer

Reviewed by Board Members McCallister and Lewis.

The employer seeks Board review of Referee Fink's order which remanded claimant's claim to it for acceptance and payment of compensation as due.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated April 29, 1981 is affirmed. The claimant's attorney is awarded $400 for services rendered at this Board review, payable by the employer.

LEON E. EVERHART, Claimant
Nathan Heath, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-08667
November 27, 1981
Request for Review by SAIF

Reviewed by Board Members McCallister and Lewis.

The SAIF Corporation seeks Board review of Referee Knapp's order which remanded claimant's claim for neck injury to SAIF for acceptance and payment of compensation as required.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated April 15, 1981 is affirmed. Claimant's attorney is awarded $450 for services rendered at this Board review, payable by the SAIF Corporation.

IOLA C. HELMSTETLER, Claimant
Milo Pope, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-09075
November 27, 1981
Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of the Referee's order which granted claimant an award of 16° for 5% unscheduled low back disability. Claimant contends that the award is inadequate. The SAIF Corporation contends the award should be affirmed or in the alternative that it should be reversed and the Determination Order dated August 28, 1980 be affirmed.

The medical evidence does not support claimant's inability to perform her regular job but does indicate that no work restrictions were placed on her. We are pursuaded by the lack of objective medical findings together with Dr. Rosenbaum's opinion that if claimant's back pain is worse, he had a hard time relating it to her industrial injury. We reach the conclusion that claimant has not sustained her burden of proving that she has lost any wage earning capacity. We would reverse.

ORDER

The Referee's order dated April 30, 1981 is reversed, and the Determination Order dated August 28, 1980 is affirmed.

DOROTHY JONES, Claimant
Noreen Saltveit, Claimant's Attorney
Steven Reinisch, Defense Attorney

WCB 80-04097
November 27, 1981
Request for Review by Claimant
Cross Request by Employer

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review and the employer cross requests review of Referee Pferdner's order which affirmed the Determination Order of April 24, 1980. Claimant contends that the award of 10% loss of the right foot granted by the Determination Order is inadequate. The employer contends that the Determination Order of June 19, 1978 overcompensated claimant for temporary total disability.

The Board affirms the Referee's conclusion that the Determination Order of April 24, 1980 should be affirmed. The employer's argument that claimant was granted excessive compensation for temporary total disability by a June 19, 1978 Determination Order is res judicata as that Determination Order was never appealed.

ORDER

The Referee's order dated April 17, 1981 is affirmed.

TELPHEN N. KNICKERBOCKER, Claimant
Peter Hansen, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-07480
November 27, 1981
Request for Review by Claimant

Reviewed by Board Members Barnes and McCallister.

The claimant seeks Board review of that portion of Referee Knapp's order which allowed SAIF to recover an overpayment of temporary total disability benefits in the amount of $1,546.88 by deducting 10% from each monthly permanent total disability compensation payment due claimant until full recovery was made. Also, SAIF, in its brief, challenges the Referee's decision not to allow recovery of an overpayment of $210.49 in permanent partial disability benefits from claimant's award of permanent total disability benefits.

We affirm the Referee as to the overpayment of temporary total disability benefits but do so based on different reasoning.

The Referee found that Wilson v. SAIF, 48 Or App 993 (1980), only applied in situations where the insurer acted unilaterally in determining that an offset will apply to the claimant's award. The Referee found that Wilson did not here apply, apparently reasoning that the Determination Order of October 26, 1979, granted SAIF the necessary authority to make such deductions based on the following language contained therein:

> "Also, any temporary total disability payment you might have received for a period after the termination date specified will be treated as an advance payment on your award, if any."

We do not agree with the Referee that this "grant of authority" makes Wilson inapplicable. The language of the Determination Order only applied to the treatment of overpayments of temporary total disability in relation to the award of permanent partial disability in the Determination Order. It could not be utilized as authority by SAIF to make deductions from the claimant's permanent total disability benefits awarded following a hearing.

The carrier's authority to make such deductions is granted by OAR 436-54-320 which was adopted by the Workers Compensation Department after the facts that gave rise to the Court's opinion in Wilson. This rule allows insurers and self-insured employers to recover overpayments of benefits paid to a worker on an accepted claim from benefits which are or become payable on the claim. This rule supersedes Wilson.

The claimant argues in his brief that, since the date of his injury preceded the effective date of OAR 436-54-320, the rule should not be applied retroactively to affect legal rights and duties arising out of past actions. We are cited to no authority for the proposition that the methods for recovery of overpayments of compensation affect the claimant's substantive rights, or even that the right to retain an overpayment is a substantive right. We find this to be a procedural matter and, as such, OAR 436-54-320 is here applicable to allow SAIF to recover the overpayments.

With regard to the issue of overpayment of permanent partial disability benefits, the Referee on the basis of Wilson disallowed recovery of the $210.49 overpayment made by SAIF. Based on OAR 436-54-320 we reverse that portion of the Referee's order. In any event, we are not convinced that the Wilson case goes so far as to require hindsight on the employer's or carrier's part or requires them to anticipate all possible outcomes of a case upon dispostion at hearing.

ORDER

The Referee's order dated April 9, 1981 is affirmed in part and reversed in part. Deductions for the overpayments of temporary total disability benefits totalling $1,546.88 and for overpayments of permanent partial disability of $210.49 are to be made in accordance with the method ordered by the Referee.

SHIRLEY M. LOGSDON, Claimant.	WCB 79-08175
Daniel Vidas, Claimant's Attorney	November 27, 1981
SAIF Corp Legal, Defense Attorney	Request for Review by SAIF

Reviewed by Board Members McCallister and Lewis.

The SAIF Corporation seeks Board review of Referee James' order which set aside its denial of aggravation for claimant's low back, neck and shoulders and psychological conditions. SAIF contends that there is only a temporary worsening of symptoms of claimant's condition and that claimant did not prove that her neck and shoulder and her psychological conditions are causally related to her original injury.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated March 20, 1981 is affirmed. Claimant's attorney is awarded $450 for services rendered at this Board review, payable by the SAIF Corporation.

RODNEY H. LUCHT, Claimant
Mike Dye, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-02365
November 27, 1981
Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

Claimant seeks Board review of Referee Pferdner's order which affirmed the SAIF Corporation's denial of compensability for claimant's low back condition. Claimant contends that the Referee's findings of credibility do not negate the preponderance of proof of a compensable injury.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated May 14, 1981 is affirmed.

LEON NEAL, Claimant
Harold Adams, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-09515
November 27, 1981
Order of Remand

This matter having come before the Board on the SAIF Corporation's motion to remand for consideration of additional evidence by the Referee;

Claimant having now joined in this request for remand and both parties having agreed to the scope of additional evidence to be presented at the hearing;

This claim is remanded to the Referee for consideration of the following additional evidence:

1. Those documents originally submitted to the Board under cover of SAIF's July 29, 1981 letter which is prior claims information of this claimant under the name of Wilburn Leon Neal;

2. Any evidence offered by claimant which is directly relevant to responding to any new information or issues generated by the aforementioned additional evidence;

3. No other evidence, unless it is determined to be admissible pursuant to OAR 436-83-480 and Robert A. Barnett, WCB Case No. 79-11012 (June 26, 1981). See William W. McKenney, WCB Case No. 80-001397 (November 13, 1981).

IT IS SO ORDERED.

MARCIA C. NELSON, Claimant
Steven Yates, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-04740
November 27, 1981
Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

Claimant seeks Board review of Referee Danner's order which affirmed the SAIF Corporation's denial of an alleged injury of April 5, 1980.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated May 6, 1981 is affirmed.

BETTY OLSON, Claimant
James Francesconi, Claimant's Attorney
Ridgway Foley, Jr., Defense Attorney

WCB 80-08901
November 27, 1981
Order of Dismissal

An Order of Dismissal in this matter was entered October 21, 1981 on the claimant's request for review. The Board has now received a request for dismissal of the employer's cross-request for review.

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.

DOUGLAS WILLIAMS, Claimant
David Vandenberg, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 79-08974 & 79-10449
November 27, 1981
Request for Review by SAIF

Reviewed by Board Members McCallister and Lewis.

The SAIF Corporation seeks Board review of Referee Igarashi's order which set aside its denial of an aggravation claim (WCB Case No. 79-08974) and affirmed its denial for a new injury (WCB Case No. 79-10449). SAIF contends that without knowledge of an intervening incident the medical opinions do not prove a compensable injury.

The Board adopts the facts set forth in the Referee's Opinion and Order but adds the following.

A comparison of Exhibits 23 and 51 shows the same condition is worse. In Exhibit 66 Dr. Klump did know of an intervening incident which SAIF contends was not considered, and he did not retract any statement. Dr. Klump did indeed support the statement that claimant was not significantly worse. In doing so, the Dr. implies that he is aware of the previous condition and that the condition is not significantly worse. Mosquedo v. ESCO Corp., ___ Or App ___ (1981). The use of the word "significant" does not bar the claim. Based on claimant's testimony and the medical evidence, we conclude, as did the Referee, that claimant has sustained a worsening of his 1976 condition.

ORDER

The Referee's order dated March 26, 1981 is affirmed. Claimant's attorney is awarded as and for a reasonable attorney's fee the sum of $400 for prevailing at Board review, payable by the SAIF Corporation.

SOCORRO ARROYO, Claimant
Leeroy Ehlers, Claimant's Attorney
Lawrence Paulson, Defense Attorney

WCB 80-09868
December 2, 1981
Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Gemmell's order which affirmed the carrier's denial of compensability of an alleged injury of September 20, 1980.

The Board affirms and adopts the Referee's order.

ORDER

The Referee's order dated May 14, 1931 is affirmed.

ROGER BALLINGER, Claimant
Nick Chaivoe, Claimant's Attorney
Bill Davis, Defense Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-08724 & 80-09824
December 2, 1981
Order Abating Order on Review

The Workers Compensation Board issued an order in the above matter on November 6, 1981 but failed to serve all parties. In an attempt to rectify the problem, we realized that our order required clarification. Therefore, we are abating the Board order of November 6, 1981 in order to issue a corrected order.

IT IS SO ORDERED.

NEIL G. BRESHEARS, Claimant
Sam McKeen, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-01917
December 2, 1981
Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Leahy's order which awarded him 80° for 25% unscheduled permanent partial disability. No briefs were filed.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated April 13, 1981 is affirmed.

BARRY M. BROWN, Claimant
Richard Sly, Claimant's Attorney
Delbert Brenneman, Defense Attorney

WCB 81-00765
December 2, 1981
Order of Dismissal

Based upon the parties' November 20 and November 23, 1981 correspondence, claimant's request for Board review is dismissed without prejudice to claimant raising in any subsequent proceeding the issue of entitlement to temporary total disability benefits between the date of the Determination Order and the date he entered an authorized program of vocational rehabilitation.

IT IS SO ORDERED.

MINNIE K. CARTER (deceased), Claimant
Larry Bruun, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 78-04667
December 2, 1981
Request for Review by SAIF

Reviewed by Board Members Barnes and McCallister.

The SAIF Corporation seeks Board review of Referee Fink's order which found an oral settlement agreed to by the parties' attorneys should be executed despite the claimant's subsequent death.

Claimant was 74 years old when she sustained a compensable injury. A Determination Order granted her compensation for 5% of her left leg. She requested a hearing on the extent of her disability. Claimant's attorney and SAIF's attorney negotiated a stipulated settlement to submit to a Referee for approval. Before the settlement was reduced to writing or approved, claimant died from causes unrelated to her compensable injury.

The question then arose: What was the status of the oral settlement? The parties submitted that question to the Referee in this proceeding who, as stated above, ordered SAIF to execute the agreement.

We conclude the Referee's order is inconsistent with ORS 656.218. This statute is a modification of what may have been the common law rule that the duty to pay workers compensation terminates with the death of the worker. Subsections (2), (3) and (4) of ORS 656.218 permit a deceased worker's surviving spouse and minor children to pursue the worker's claim through the hearing process; in other words, in some circumstances, the "cause of action" survives death.

Subsection (1) is here the critical section. It states: "In the case of the death of a worker entitled to compensation, whether his eligibility therefor or the amount thereof <u>have been determined</u>, payments shall be made for the period during which the worker, if surviving, would have been entitled thereto." (Emphasis added.) The question is whether the amount of

claimant's compensation had been determined prior to her death. The meaning of this language in ORS 656.218(1) is illuminated by ORS 656.218(3) which permits certain survivors of a deceased worker to litigate the worker's compensation claim if "death occurs prior to the final disposition of" the worker's pending request for hearing. (Emphasis added.) ORS 656.218(1) and 656.218(3) are distinct alternatives: Either entitlement to compensation has been finally determined prior to death and is payable pursuant to ORS 656.218(1), or entitlement has not been finally determined prior to death and litigation may proceed to that determination pursuant to ORS 656.218(3). So viewed, "has been determined" in ORS 656.218(1) and "final disposition" in ORS 656.218(3) have the same meaning.

There was no final disposition or determination here prior to claimant's death. The parties had negotiated and agreed on a settlement, but it was not written down, signed or approved by a Referee prior to claimant's death. A pending hearing request can be finally disposed of by a settlement or stipulated order. But such a settlement or stipulated order does not constitute a final disposition until it is approved by a Referee. See James Leppe, WCB Case No. 79-08683 (June 11, 1981). Referee Fink erred in this proceeding in ordering compliance with a settlement that was not approved by a Referee prior to claimant's death.

ORDER

The Referee's order dated January 23, 1981 is reversed.

CHARLES A. CASTLEBERRY, Claimant	WCB 80-02453
Robert Hill, Claimant's Attorney	December 2, 1981
SAIF Corp Legal, Defense Attorney	Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Wolff's order which dismissed the claimant's request for hearing as untimely filed. The claimant contends he had good cause for the late filing.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated May 29, 1981 is affirmed.

ELLEN L. FEY, Claimant
Leeroy Ehlers, Claimant's Attorney
Daryll Klein, Defense Attorney
Mary Danford, Defense Attorney

WCB 80-06411
December 2, 1981
Request for Review by EBI

Reviewed by Board Members McCallister and Lewis.

The EBI Companies seeks Board review of that portion of Referee Menashe's order which remanded claimant's occupational disease claim to it for acceptance and payment of benefits as required by law and affirmed the Farmer's Insurance Company's denial of aggravation.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated March 23, 1981 is affirmed. Claimant's attorney is awarded $50 as a reasonable attorney's fee for services rendered at this Board review, payable by the insurer.

HOWARD GUNTER, Claimant
Roger Wallingford, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-09271
December 2, 1981
Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Neal's order which affirmed the October 2, 1980 Determination Order whereby claimant was awarded additional temporary total disability and no additional permanent partial disability beyond the unscheduled 48° previously awarded. Claimant contends the award is inadequate.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated April 28, 1981 is affirmed.

LORRAINE HISCOE, Claimant
Dan O'Leary, Claimant's Attorney
Ridgway Foley, Jr., Defense Attorney

WCB 80-09841
December 2, 1981
Request for Review by Claimant
Cross Appeal by Employer

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Pferdner's order which increased claimant's unscheduled low back permanent partial disability to 96° for 30% and awarded temporary total disability compensation from December 29, 1978 through April 18, 1979 and from June 17, 1979 through June 20, 1980, less time worked. Claimant contends the permanent partial disability award is inadequate and contends entitlement to temporary total disability from April 19, 1979 through June 16, 1979. The employer cross-appeals, contending the Determination Order of July 18, 1980 awarding 48° should be reinstated.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated May 12, 1981 is affirmed.

WILLIAM B. JOHNSON, Claimant
Robert Gardner, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-07036
December 2, 1981
Request for Review by SAIF

Reviewed by Board Members McCallister and Lewis.

The SAIF Corporation seeks Board review of Referee Braverman's order which set aside its denial of responsibility for claimant's motorcycle accident. SAIF contends that the evidence is insufficient to prove claimant's trip was for business or, in the alternative, under the "dual purpose doctrine," the primary reason for the trip was not business. SAIF also contends that if the trip was primarily for business, claimant had deviated from his normal business route for personal reason not related to his work, and that the accident occurred during that deviation from the normal business route.

The Board affirms and adopts the Referee's order.

ORDER

The Referee's order dated April 10, 1981 is affirmed. The claimant's attorney is awarded $400 for services rendered at this Board review, payable by the SAIF Corporation.

JACK L. KABRICH, Claimant
Jerry Gastineau, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-00319
December 2, 1981
Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

Claimant seeks Board review of Referee Nichols' order which affirmed the SAIF Corporation's denial of compensability for claimant's back condition. No briefs were filed.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated May 12, 1981 is affirmed.

DOUGLAS W. KISER, Claimant
James Bernstein, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-02551
December 2, 1981
Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Williams' order which affirmed the employer's denial of claimant's aggravation claim and his claim for psychological and psychiatric problems.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated May 18, 1981 is affirmed.

PAUL KORBULIC, Claimant
C.H. Seagraves, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-08742
December 2, 1981
Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Howell's order which affirmed a Determination Order dated September 4, 1980 awarding no permanent partial disability. Claimant contends his disability justifies a substantial award.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated April 27, 1981 is affirmed.

MIKE LEMLY, Claimant
Robert Morgan, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-06766
December 2, 1981
Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Ail's order which affirmed the carrier's denial of his claim for aggravation.

After de novo review, the Board affirms the findings and conclusion reached by the Referee. We find that although claimant attempted to explain the inconsistency between his testimony and the doctor's history concerning whether he lifted or rolled the tarp in February 1980, the inconsistency is of some importance. We also note the fact that claimant saw different doctors before and after the alleged aggravation making it difficult for Dr. Saalfeld, his current chiropractor to come to an unequivocal conclusion. Questions such as this render the Referee's finding of claimant's non-credibility to be significant. We conclude claimant has failed in his burden of proof.

ORDER

The Referee's order dated April 27, 1981 is affirmed.

STEPHEN McDERMOTT, Claimant
Robert Udziela, Claimant's Attorney
E. Kimbark MacColl, Defense Attorney
Katherine O'Neil, Defense Attorney

WCB 80-06179
December 2, 1981
Request for Review by Employer

Reviewed by Board Members McCallister and Lewis.

Dillingham Marine and Manufacturing seeks Board review of Referee Fink's order which found it responsible for claimant's aggravation claim and affirmed the denial of his new injury claim.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated May 14, 1981 is affirmed. Claimant's attorney is awarded $350 as a reasonable attorney's fee for services rendered at this Board review, payable by the employer.

WILLIAM S. McMICHAEL, Claimant
Gerald Doblie, Claimant's Attorney
Scott Terrall, Defense Attorney

WCB 79-09744
December 2, 1981
Order Vacating Order Striking Claimant's Brief and Denying Expedited Review

On November 11, 1981 the Board entered an order pursuant to the motion of the employer/carrier striking claimant's brief as untimely filed. The employer/carrier has since advised the Board that it withdraws its objection to the untimely filing of claimant's brief. Therefore, our November 11, 1981 order is vacated and claimant's attorney is requested to resubmit its brief.

The employer/carrier also requested expedited Board review. Under the circumstances described in the first paragraph of this order it is hard to be receptive to that request. The request for expedited review is denied.

Upon receipt of claimant's brief, this case will be docketed for review in due course.

IT IS SO ORDERED.

BEVERLY J. NEUMAN, Claimant
Alice Goldstein, Claimant's Attorney
Dennis Reese, Attorney
Frank Susak, Attorney
Thomas McDermott, Attorney

WCB 80-04646
December 2, 1981
Request for Review by Carrier

Reviewed by Board Members McCallister and Lewis.

Aetna Casualty Insurance Company seeks Board review of Referee St. Martin's order which set aside its denial and affirmed INA's and Western Employer's denials for claimant's back condition. Aetna contends that claimant's condition is an aggravation of previous injuries.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated May 21, 1981 is affirmed. Claimant's attorney is awarded $100 as a reasonable attorney's fee for services rendered at this Board review, payable by Aetna.

ARTHUR NIMS, Claimant
John DeWenter, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-06239
December 2, 1981
Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Foster's order which awarded him 160° for 50% unscheduled permanent partial disability. Claimant contends he is permanently and totally disabled.

We affirm the Referee's order and correct an oversight in his amended order in which temporary total disability was not ordered paid for the period of August 14, 1979 through August 17, 1979. With this correction, we affirm the Opinion and Order dated March 16, 1981 and the Amended Opinion and Order dated April 1, 1981.

ORDER

The Referee's order dated March 16, 1981 and the Amended Opinion and Order dated April 1, 1981 are affirmed. Temporary total disability compensation is ordered for August 14, 1979 through August 17, 1979.

ROBERT A. VOSS, Claimant
Donald Wilson, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 79-07439
December 2, 1981
Request for Review by SAIF

Reviewed by Board Members McCallister and Lewis.

The SAIF Corporation seeks Board review of that portion of Referee Fink's order which remanded claimant's hospitalization and medical care bills occurring in June 1979 to it for payment as a consequence of claimant's industrial injury awarded an attorney's fee of $500 to claimant's attorney on that issue, and granted claimant an award of 80° for 25% unscheduled low back and psychological disability.

The evidence indicates that claimant is 39 years of age with an eleventh grade education and his GED. His employment experience has been mostly in manual labor occupations. The consensus of medical opinion is that he is now precluded from performing that job and must find lighter work with lifting limitations. We conclude that the award granted by the Referee adequately compensates claimant for his loss of wage earning capacity.

On the issue of payment of medical bills for claimant's hospitalization in June 1979, we reverse. The weight of the medical evidence is that claimant's hospitalization due to an overdose of sleeping pills is not causally related to his industrial injury. It follows that the attorney's fee granted by the Referee on that issue must be vacated.

ORDER

The Referee's order dated January 19, 1981 is modified. The partial denial of responsibility for claimant's June 1979 hospitalization and ensuing medical bills is affirmed. The Referee's award of a $500 attorney's fee for prevailing on that issue is vacated. The remainder of the Referee's order is affirmed.

WAYNE L. WEIR, Claimant
Peter Hansen, Claimant's Attorney
Dan Meyers, Defense Attorney

WCB 80-09864
December 2, 1981
Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee St. Martin's order which affirmed the October 23, 1980 Determination Order which granted him no compensation for permanent partial disability.

The Board affirms the conclusion reached by the Referee. In order to substantiate an award for permanent partial disability, claimant must show that he has some permanent impairment. OAR 436-65-609 gives the guidelines by which permanent impairment is to be measured. Although some of claimant's physicians placed a minimal to mild rating on his impairment, few, if any, objective findings were recorded by any of them. The most that could be said was that claimant had pain upon extreme bending, rotation and extension. Absent a showing of permanent impairment, we do not reach a consideration of claimant's social/vocational factors.

ORDER

The Referee's order dated April 13, 1981 is affirmed.

CYNTHIA K. BOWMAN, Claimant
Bedingfield, Joelson & Gould, Claimant's Attorneys
Foss, Whitty & Roess, Defense Attorneys

WCB 80-06844
December 7, 1981
Request for Review by SAIF

Reviewed by Board Members Barnes and McCallister.

The SAIF Corporation seeks Board review of Referee Braverman's order which set aside its denial of compensability for claimant's alleged psychological condition.

The first issue is whether claimant has proven she has any disease, much less a compensable occupational disease. Claimant began working as a "girl Friday" for Custom Business Systems, primarily being a receptionist and performing general office duties. Her job evolved and expanded into marketing computer software to radio stations. This involved a lot of traveling selling to radio stations and installing the computer program once sold. Claimant testified that with her expanded duties she occasionally had to work six days a week, twelve to fourteen hours a day. About six months after claimant assumed these marketing duties, she began to experience a variety of nonspecific ailments which the Referee correctly summarized as "bizarre symptomatology". Between the onset of these symptoms in about August 1979 and May 1980 when claimant quit work, she consulted a number of doctors. None was able to diagnose her condition; none documents any disease.

Not every physical discomfort of life is a disease. Claimant's intermittent headaches, nausea, nervousness, etc., are not established by this record to be manifestations of any known disease. The medical opinion that might support a contrary conclusion is that of Dr. Radmore who found "psychophysiologic response". Dr. Radmore does not explain whether, why or how this amounts to a disease.

Assuming, however, that claimant has a disease, the second issue is whether it is compensable as an occupational disease. We have considered this case along with several others. In Henry McGarrah, WCB Case No. 79-05440 (decided this date), we concluded that an adverse psychological reaction to normal and reasonable supervision is not within the scope of employment when the precipitating event (supervision) occurred because the employee was not functioning within the scope of employment. In Kay L. Murrens, WCB Case No. 79-01573 (decided this date), we concluded that, when there is possible work and nonwork causation of a disease, claimant must prove that the significant preponderance of causation was work related in order for the disease to be compensable under ORS 656.802. Neither McGarrah nor Murrens support claimant's position.

Claimant quit her job in May 1980 not because of any medical difficulties but because of a dispute with her employer about her travel schedule and compensation time. These issues were part of the employer-defined scope of employment. Claimant was, of course, free to disagree with her employer's definition of her job -- even to express the ultimate form of disagreement by quitting, which she did -- but psychological conditions caused by disagreement over the expected scope of employment are not compensable. McGarrah, supra.

Applying the Murrens requirement that the significant preponderance of causation be work related is difficult because of the above noted ambiguities about whether claimant suffers from any disease. Without knowing what disease exists, it is impossible to weigh evidence about causation. Suffice it to say that if claimant has any disease, we are not persuaded that a preponderance of causation is work related.

The final issue is: If claimant were found to have a compensable occupational disease, when did it become disabling? None of claimant's doctors suggested that claimant quit working before she quit on May 20, 1980. As noted above, she quit at that time for other than medical reasons. It was not until Dr. Radmore's first, last and only examination of claimant on July 2, 1980 that there was medical verification of inability to work. Therefore, if this claim were compensable claimant would be entitled to compensation commencing July 2, 1980.

ORDER

The Referee's order, dated November 7, 1980, and amended order, dated November 13, 1980, are reversed and the denial issued by the SAIF Corporation is reinstated.

KENT L. HALEY, Claimant
Rolf Olson, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 79-04345
December 7, 1981
Order on Remand

This case is before us on remand from the Court of Appeals for further consideration pursuant to the Supreme Court's decision in James v. SAIF, 290 Or 343 (1981).

We have considered this case along with several others. In Henry McGarrah, WCB Case No. 70-05440 (decided this date), we concluded that an adverse psychological reaction to normal and reasonable supervision is not within the scope of employment when the precipitating event (supervision) occurred because the employee was not functioning within the scope of employment. In Kay L. Murrens, WCB Case No. 79-01573 (decided this date), we concluded that, when there is possible work and nonwork causation of a disease, claimant must prove that the significant preponderance of causation was work-related in order for the disease to be compensable under ORS 656.802.

McGarrah is not relevant to this case. Murrens is controlling and under it the claim is not compensable.

Claimant alleges that his work as an Episcopalian priest caused or aggravated his psychological condition. Possible work causation includes the following. Church doctrine, according to claimant, is growing more liberal; claimant is more conservative on most religious and social issues. This created a problem, according to claimant, in counselling members of his congregation on sensitive contemporary issues. Claimant also testified to increased work caused by the growth of his congregation from about 30 - 40 to about 130 - 150. However, on cross examination claimant admitted that his prior three churches had memberships of 425, 360 and 550.

Possible nonwork causation includes, primarily, claimant's physical condition. He underwent ileostomy surgery in 1969 due to ulcerative colitis. He has myriad other physical problems including a left leg and foot condition, arthritis in his hands, fingers and jaw, chronic postnasal drip, prostate trouble. lesions on his arms, back problems from an injury in 1965 and some dead toes. The main problem, according to claimant's testimony and all medical evidence, is his ileostomy. It has caused stress, anxiety and low self-esteem.

Claimant's argument for compensability is: He is uncomfortable meeting people because of his ileostomy; his work as as priest required him to meet people; therefore, the resulting psychological impairment is compensable. The flaw in this argument is that claimant must contend with the consequences of his ileostomy 24 hours a day, seven days a week, both on and off the job. Claimant has not proven that his work was the significant predominant cause of his psychological condition.

ORDER

The Referee's order dated April 23, 1980 is modified. The Referee's finding that claimant's mental condition is compensable is reversed; the balance of the Referee's order is affirmed.

The Board's Order on Review dated December 1, 1980 is vacated.

IT IS SO ORDERED.

HENRY McGARRAH, Claimant
Robert Grant, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 79-05440
December 7, 1981
Request for Review by Carrier

Reviewed by Board Members Barnes and McCallister

The SAIF Corporation seeks Board review of the Referee's order finding claimant's occupational disease claim for psychological disability to be compensable. That order was written by Referee McSwain on his last day in the Board's employ and subsequently, after minor corrections, was signed by Presiding Referee Daughtry.

Claimant was a deputy sheriff in the Jackson County Sheriff's Department. We agree with and adopt the Referee's description of the circumstances of claimant's job that allegedly caused his psychological disability:

> "The evidence does not support, objectively, many of the claimant's contentions. Captain Bjornson testified credibly that the Department was equipped with avenues to correct improper behavior by officers and to allow them to express their grievances and that these avenues alone were used for disciplinary measures and for the evaluation of complaints by employees. I do not understand the law here to require that the claimant's perception of a vendetta against him be accurate. It requires that the claimant's mental difficulty can be traced to objective stimuli on the job. It is a fact that the claimant was removed from his public relations job. It is a fact that he was changed from day shift to night shift. It is a fact that he was reprimanded on various occasions for not writing traffic tickets or for not having proper appearance in uniform. It is a fact that he tried for professional advancement and was repeatedly turned down. It is probably a
>
> fact that the claimant's perception of what he should be, as a professional law enforcement officer, differed somewhat markedly from the notion held by his superiors and that friction repeated itself due to this problem It is probably a fact that at times the claimant's performance fell down. At least one of his superiors testified that the claimant tended to fail to respond to calls on occasion and did not pay enough attention to traffic enforcement.

> "Given all of these facts a different individual, even a somewhat sensitive individual, might not have responded with the gradual emotional buildup the claimant suffered. For the claim to be compensable it is not, in my understanding, required that stress on the job be illegitimate. There are many jobs which legitimately are stressful on a day-to-day basis. Responding to identifiable and objective verifiable stimuli, the claimant suffered a mental disease from his job experience, an experience which was stressful to him for circumstances to which he was not subjected other than at work during the course of the development of his difficulty."

In sum, the origin of claimant's stress was a conflict between the way he wanted to do his job (including his belief about his entitlement to promotion) and the way his supervisors wanted the job done (including their contrary position on promoting claimant).

There are two prongs to the test of whether a disease is a compensable occupational disease under ORS 656.802. The first is that the disease must arise out of and in the scope of employment. (The definition of a compensable injury uses the term "course" of employment, ORS 656.005(8)(a); the definition of a compensable disease uses the term "scope" of employment, ORS 656.802(1)(a); we do not attach any significance to this different wording; we deem "course" and "scope" to be substantially synonymous.) The second, stated in the conjunctive, is that the disease must be caused by something to which the employee is not ordinarily exposed other than in employment. The first prong--that an occupational disease arise out of and in the scope of employment--has not previously been explored in the cases involving psychological disability claims.

A recurring fact pattern in these cases is that the claimant has an adverse psychological reaction to normal and reasonable guidance, direction, control and supervision by his or her employer. But the employer is generally entitled to define the scope of employment, defining the employee's duties, the manner in which they are to be performed and the expected quantity and quality of work; or the scope of employment is jointly defined by the employer and employee when their contract of employment is negotiated and the employer is then entitled to require compliance with the jointly-defined scope of employment. Normal and reasonable supervision can thus mean telling an employee what the expected scope of employment is (in this case, for example, claimant's transfer from day shift to night shift) or telling an employee that he or she is not functioning within the expected scope of employment (in this case, for example, the criticism of claimant's performance).

It is a familiar doctrine in workers compensation that an injury that happens when an employee is acting beyond the scope of employment is not compensable. Clark v. U.S. Plywood, 288 Or 255 (1980); Lane v. Gleaves Volkswagen, 39 Or App 5 (1979); Frosty v. SAIF, 24 Or App 851 (1976). Sometimes these cases find a worker is beyond the scope of employment because of deviation from employment duties. O'Connell v. SAIF, 19 Or App 332 (1974). Certain forms of horseplay have been found to be a deviation from work duties. Hackney v. Tillamook Growers, 39 Or App 655 (1979). In all of these situations, one of the significant tests used to determine whether the employee was within or beyond the scope of employment is whether the injury-producing activity was contemplated by the employer and employee either at the time of hiring or later. Ramseth v. Maycock, 209 Or 66 (1956); Etchison v. SAIF, 8 Or App 395 (1972). "The law intends...to protect against the risk or hazard taken in order to perform the master's task." Brady v. Oregon Lumber Co., 117 Or 118, 196 (1926). Compensability depends upon whether the worker was injured "doing the duty which he is employed to perform." Stuhr v. SIAC, 186 Or 629, 635 (1949).

To repeat, normal and reasonable supervision can involve defining the scope of employment or telling an employee that he or she is not functioning within the expected scope of his or her employment. If such supervision produces an adverse psychological reaction, arguably an occupational disease, did the disease arise within the scope of employment when the precipitating event (supervision) occurred because the employer was defining the scope of employment or because the employee was not functioning within the scope of employment? The most recently stated test is: "A unitary 'work connection' approach," i.e., "Is the relationship between the injury [or disease] and the employment sufficient that the injury [or disease] should be compensable? Rogers v. SAIF, 289 Or 633, 642-43 (1980).

The general Rogers test can be argued both ways here as illustrated by Frosty v. SAIF, supra. In that case a charter bus driver was instructed not to ski when he drove a group to a ski area i.e., his employer defined the expected scope of employment. What if the empoyer's definition of the expected scope of employment caused an adverse psychological reaction? On the one hand, it could be argued that if skiing caused an injury, that injury would not be compensable because the injury-producing activity was not within the worker's scope of employment as contemplated by the parties; it would follow, the argument could continue, that the worker's adverse psychological condition did not arise in the scope of employment because the entire transaction occurred only because the employee was functioning outside the scope of employment.

On the other hand, applying the general Rogers test it could be argued that the consequences of ordinary supervision always have a sufficient work connection to be compensable; that it is to be expected that employees will deviate from the scope of their employment, as the employer did in Frosty; and that, when a supervisor tells an employee he is doing so, there is a sufficient nexus between the employment relationship and any resulting psychological disability for that disability to be compensable.

For two reasons we adopt the former approach: An adverse psychological reaction to normal and reasonable supervision is not within the scope of employment when the precipitating event (supervision) occurred because the employee was not functioning within the scope of employment. First, it seems illogical to say that the physical results of an injury-producing activity are not compensable when the injury-producing activity is beyond the scope of employment, but to also say that the psychological results of supervision intended to end that deviation are compensable. Second, assuming supervision to keep employees functioning within the scope of their employment is inevitable in the employment relationship, then it is nothing more than the existence of the employment relationship itself that produces a finding of compensability if this supervision supplies the only nexus that makes resulting psychological problems compensable. Just as the employer must take the employee as he is, the employee must to a large extent take the job as it is.

ORDER

The Referee's order dated April 14, 1981 is reversed.

CHARLES MADDOX, Claimant
Olson, Hittle et al, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 77-02861
December 7, 1981
Order on Remand

Reviewed by Board Members Barnes and McCallister.

This case is before us on remand from the Court of Appeals for further consideration pursuant to the Supreme Court's decision in James v. SAIF, 290 Or 343 (1981).

Claimant worked as a counselor for the Rehabilitation Division from 1972 to 1977. Toward the end of this period he became involved in a number of conflicts with his supervisors over his job performance. Management wanted claimant to service clients from a certain geographical area; claimant wanted to and did serve clients from other areas. Management wanted agency resources expended in accordance with agency policy; claimant wanted to and did make his own judgments about policy and priorities. As a result: "Rates of spending in [claimant's] caseload have exceeded most other caseloads in the state". Exhibit 11. Claimant wanted to and did close cases promptly; management believed the data "suggests inadequate time for evaluation, interpretation and necessary consultation". Ibid. Claimant wanted to and did work at his own pace; management felt his "caseload size is disporportionately small when compared to the remainder of the office". Ibid.

In short, claimant's employment stress arose from a conflict between the way he wanted to do his job and the way his supervisors wanted the job done. We confronted the same situtation in Harry McGarrah, WCB Case No. 79-05440 (decided this date). We there concluded that an employer is entitled to define the expected scope of employment and that an adverse psychological reaction to reasonable and normal supervision intended to define the scope of employment or require adherence to the defined job duties does not arise within the scope of employment. McGarrah is controlling here.

In Kay L. Murrens, WCB Case No. 79-01573 (decided this date) we concluded that to be compensable as an occupational disease under ORS 656.802 the significant predominate causation of a dissease must be work related. In so concluding, we rejected the material contributing cause test. In this case, claimant has not sustained the burden required by Murrens. The most favorable medical evidence to claimant's position is Dr. Smith's report: "[Claimant's] disorder was not caused by his work, but his work situation materially contributed to and exaggerated his depression". Under Murrens this is insufficient.

ORDER

The Referee's order, dated January 31, 1978, is reversed.

The Board's Order on Review, dated March 21, 1979, is vacated.

The denial issued by the SAIF Corporation is reinstated.

CHARLES MADDOX, Claimant
Rolf Olson, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 79-09937
December 7, 1981
Request for Review by SAIF

Reviewed by Board Members Barnes and McCallister.

The SAIF Corporation seeks Board review of Referee Fink's order awarding claimant compensation for permanent total disability.

In Charels Maddox, WCB Case No. 77-02861 (Order on Remand, decided this date), we concluded that claimant's occupational disease claim for psychological disability is not compensable. It follows that the Referee's decision in this case must be reversed.

ORDER

The Referee's order dated June 30, 1980 is reversed.

KAY L. MURRENS, Claimant
David M. Cuniff, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 79-01573
December 7, 1981
Request for Review by Claimant

Reviewed by Board Members Barnes and McCallister.

Claimant seeks Board review of Referee Knapp's order which found her psychological condition was not compensable. We agree with the Referee's conclusion, but our reasoning is somewhat different.

In late 1977 and early 1978 claimant was working as a "human resource aid" in an educational program for low income women run by Oregon State University. At that time her working and personal relationship with her supervisor and her general mental health deteriorated, but it is a chicken-and-egg problem to determine causation.

Claimant had an abortion in late 1976. (There are conflicting dates in the record - 1976 or 1977 - and conflicting information about number of abortions - one or two; we find there was one abortion, although requiring two separate medical procedures, and that it occurred in late 1976.) Claimant and the man with whom she had been living for about a year and a half separated in December 1977. Claimant admitted having previously used a variety of street drugs, including LSD, and admitted continued use of marijuana while employed in the OSU program.

After claimant's psychological symptoms required treatment, a variety of diagnoses were offered. If we had to pick and choose, Dr. Grimmer's diagnosis of schizophrenia is the more persuasive. There is substantial evidence in this record (and others we have reviewed) that schizophrenia cannot be caused by job stress. Nevertheless, assuming claimant's psychological condition was other than schizophrenia and assuming that condition could have been caused by work factors, we confront two problems: (1) none of claimant's work factors in late 1977 or early 1978 were novel or unusually stressful - manifestation of her psychological symptoms then, at work could have been purely coincidental; and (2) still assuming possible work causation, the question arises of how much work causation is legally required.

On that issue, it is important to note at the outset that we are not concerned only with the compensability of psychological conditions; we are concerned with the compensability of all occupational disease claims. As tempting as it might be, it is impossible to fashion specialized rules for psychological claims because all occupational disease claims, psychological and all others, are governed by a single statute. "Workers' compensation is covered by statute and there is nothing in the Oregon Workers' Compensation Law that would distinguish between the test for mental illness and other kinds of injury or disease." James v. SAIF, 290 Or 343, 347 (1981). ORS 656.802(1)(a) limits compensation for diseases to those that: (1) "arise out of and in the scope of employment"; (2) "and to which an employee is not ordinarily subjected or exposed other than during . . . employment". These statutory requirements are equally applicable to respiratory disease claims, hearing loss claims, psychological claims and all other occupational disease claims.

We analyze arising-in-the-scope-of test in Henry McGarrah, WCB Case No. 79-01573 (decided this date). As for the other facet, in some instances just the not-ordinarily-subjected statutory language combined with a small dose of common sense is sufficient to determine whether an occupational disease claim is compensable. In Norman W. Hickman, WCB Case No. 78-06990 (August 4, 1981), the claim was that the worker's duty of dictating reports caused his vocal cord ulcer. Yet talking -- and dictating reports is just one form of talking -- is an ubiquitous part of daily life with no unique link to employment. It is difficult to see how such a claim could be compensable under ORS 656.802. Likewise, in William Valtison, WCB Case No. 80-07383 (June 30, 1981), the claim was that the worker's duty of occasionally driving a van without accident or other trauma caused his back disease. Driving motor vehicles is almost as ubiquitous as talking; we held the claim in Valtison was not compensable.

Conversely, it would seem equally obvious that a worker who develops cancer because of exposure to massive amounts of asbestos while working in the shipyards during World War II has a compensable occupational disease. See Fossum v. SAIF, 45 Or App 77 (1980), reversed, 289 Or 777 (1980), opinion on remand, 52 Or App 769 (1981). It also seems elementary that a worker in a nuclear facility who contracts some form of radiation poisoning or disease has a compensable condition.

We would feel comfortable with these common sense conclusions even though, at least in urban environments, there is general exposure to small amounts of asbestos and even though in all environments there is exposure to minute amounts of background radiation.

In many situations, probably including all claims for psychological conditions, the language of ORS 656.802 does not produce an immediate or obvious answer. Further analysis is required.

The basic quandry is whether the not-ordinarily-subjected test contemplates a quantitative or a qualitative approach. A qualitative approach would require that the cause of an occupational disease be something completely and totally unique to the claimant's work environment or work experience. In its most extreme form, a qualitative approach would bar compensability of an asbestos-caused cancer claim on the ground that microscopic amounts of asbestos are in the off-work environment, and would bar compensability of a radiation-poisoning claim on the ground that minute amounts of natural radiation are in the off-work environment.

A quantitative approach, on the other hand, would focus on the relative percentage contribution of at-work and off-work causation. Such an approach would immediately create the further question of: How much at-work causation constitutes "not ordinarily subjected" within the meaning of ORS 656.802(1)(a)? (Emphasis added.)

We attempted to resolve this qualitative versus quantitative quandry in Walter J. Dethlefs, WCB Case No. 79-04604 (June 19, 1981), and Robert Sanchez, WCB Case No. 80-00224 (July 17, 1981). Dethlefs involved a respiratory disease claim where the medical evidence established that the pollutants to which claimant was exposed at work were part of the cause and claimant's serious allergies to common off-work substances were also part of the cause. Sanchez was a claim for carpal tunnel syndrome. The evidence established that claimant's work activity could have been the cause; the Board found that claimant's hobby of handball playing was as likely the cause. In both Dethlefs and Sanchez we adopted a purely qualitative test, requiring the work environment or exposure to be the sole cause of the disease.

Dethlefs and Sanchez are consistent with one sentence in James: "If this off-the-job condition or exposure is a condition substantially the same as that on the job when

viewed as a cause of the particular kind of disease claimed as an 'occupational disease', it precludes the claim under ORS 656.802(1)(a)". However, upon further consideration, we now regard the purely qualitative test we applied in Dethlefs and Sanchez as neither compelled by James nor correct. As suggested above, our notions of common sense and simple fairness dictate that a worker with asbestos-caused cancer who suffered 99% of his exposure to asbestos at work should receive compensation. Likewise, a worker with radiation poisoning who suffered 99% of his exposure to radiation at work should receive compensation. To the extent that a purely qualitative test would produce different results, it is illogical and unfair.

Moreover, James must be interpreted in light of Beaudry v. Winchester Plywood Co., 255 Or 503 (1970), that was cited by the James court with apparent approval. Beaudry found a claim for aggravation of pre-existing hip bursitis compensable as an occupational disease despite the employer's contention that the bursitis was caused at least in part by the worker's nonwork activities like walking and climbing stairs. Unless James was intended to sub silentio overrule Beaudry, James does not compel a purely qualitative test in occupational disease cases.

A number of quantitative tests are possible. The lowest possible burden of proof would be "material contributing cause". This approach is seemingly supported by cases like Holden v. Willamette Industries, 28 Or App 613 (1977), and Mathis v. SAIF, 10 Or App 139 (1972). This would be the least possible requirement to establish compensability because, as "material contributing cause" has come to be used in the vocabularies of doctors and workers' compensation attorneys, it does not even mean the predominant cause. Stated differently, if cause "A" were responsible for 30% of an effect and cause "B" were responsible for the other 70%, nothing in present workers' compensation law would foreclose a finding that cause "A" was a "material contributing cause".

Another quantitative test would be something like "majority cause", an approach that seems to find support in O'Neal v. Sisters of Providence, 22 Or App 9 (1975). Under this approach, the at-work cause would have to be more than 50% of the total cause of the resulting disease.

At the time the Supreme Court decided James v. SAIF, supra., there was thus existing case law that supplied both a material contributing cause test and a majority cause test. Unless the Supreme Court was rejecting these prior tests in James, it is impossible to understand its remand for further proceedings. 290 Or at 351. Unless the Court of Appeals understood the Supreme Court as having rejected the prior tests, it is impossible to understand its subsequent remand for further proceedings. James v. SAIF, 51 Or App 201 (1981).

The remaining possibility is that a disease is compensable as an occupational disease if at-work causation is something more than a majority of the cause but something less than sole cause, that is, more than 50% but less than 100% of the cause. Our English language has no words really suitable for meaningful gradations within this range. But despite its possible ambiguity, we will refer to this possibility as significant predominant cause.

We conclude that the not-ordinarily-subjected requirement of ORS 656.802(1)(a) is best interpreted to mean that the work-connected cause of disease must be the significantly predominant cause for the disease to be found compensable under the Workers' Compensation Act. This is consistent with the plain meaning of the word "ordinarily"; if a predominance of exposure is in one contest, there is not "ordinary" exposure in other contexts. Furthermore, this interpretation is consistent with Beaudry v. Winchester Plywood Co., supra.

Beaudry is a difficult case to analyze because it arose under a completely different review procedure: "The review of the circuit court and the appellate courts is limited to questions not within the cognizance of the medical board of review." 255 Or at 517. Nevertheless, the basic thrust of Beaudry is consistent with requiring work exposure to be the predominant cause of an occupational disease. The "conditions of employment which distinguish occupational diseases from ordinary diseases of life . . . may be distinctive because familiar harmful elements are present in unusual degree . . ." 255 Or at 515. (Emphasis added.) Applying this standard the court concluded:

> "While other-than-work activities could aggravate claimant's condition, a person is not ordinarily subjected in non-work related activities to standing for eight hours upon a vibrating base. It was the opinion of claimant's doctor that claimant's 'most traumatizing activity' was standing during his work shift while subject to vibration." 255 Or at 515.

To the extent that Dethlefs and Sanchez are inconsistent with our interpretation of "not ordinarily subjected" to mean significant predominant cause, they are overruled.

The significant predominant cause test will generally depend, as do most questions of causation, on expert medical evidence. Although as noted above the statutory standard for compensability is the same for all occupational diseases, including psychological conditions, in weighing medical opinion in psychological-condition cases there is one significant difference.

Unlike other branches of medicine that have available various objective diagnostic procedures, the opinions of psychiatrists and psychologists are based almost exclusively on history obtained from patients. Yet a patient receiving psychological treatment is almost by definition a person whose ability to correctly perceive, properly interpret and accurately remember events is impaired. We do not intend to belittle the opinions of psychiatrists and psychologists or other mental-health specialists; we only recognize the reality that their opinions are largely based on history from potentially poor historians.

We have recently reiterated our belief that the factfinder is not bound to find even uncontroverted medical opinion persuasive. Edwin A. Bolliger, WCB Case No. 78-09001 (Order on Reconsideration, November 27, 1981). It is possible this doctrine applies with even more force when the uncontroverted opinion is from a mental-health specialist. See State v. Sands, 10 Or App 438 (1972). While it would be difficult to imagine a psychological condition being found compensable in the absence of a favorable medical opinion, it does not follow that the converse is true -- that a favorable medical opinion necessarily produces a finding of compensability. It remains the obligation of the factfinder in all cases to weigh all the evidence, both medical and nonmedical, and all reasonable inferences to be drawn from it, to determine whether it makes sense that work-connected causes significantly predominate in causing a psychological condition.

In summary, the appropriate methodology in occupational disease cases is:

(1) Identify possible work causation;

(2) Identify possible off-work causation;

(3) Determine if the claimant has sustained the burden of proving a significant preponderance of work causation (something akin to the shipyard worker who receives virtually all exposure to asbestos at work or the worker who receives virtually all exposure to radiation at work). This approach to the burden of proof will often require the claimant to prove a negative - that off-work causation did not contribute more than minimally to the disease in question. We appreciate the practical difficulties of requiring proof of a negative, but see no other alternative to the legislatively mandated requirements of ORS 656.802(1)(a).

(4) In all cases this agency's task is to weigh the evidence; in cases involving claimed psychological disability that weighing process must necessarily and largely be based on our insight and intuition.

Applying these standards, we conclude:

(1) Possible work causation is ill-defined in this record. It might be the general stress of claimant's job, which does not sound especially stressful to us. It might be the deterioration of claimant's professional and personal relationship with her supervisor, but that followed claimant's break-up with her live-in boyfriend, producing a chicken-and-egg analytical problem.

(2) Possible off-work causation includes, primarily, claimant's break-up with her male companion, secondarily, claimant's possible continuing remorse about her abortion, and as a distant tertiary consideration, her use of drugs.

(3) Which set of causal forces significantly predominated to produce claimant's psychological condition? We cannot tell from this record; from which it follows, we believe, that claimant has not proven that at-work factors were the predominant cause of her psychological problems.

(4) We have considered the opinions of Drs. Straumfjord and Grimmer. The latter's opinion of causation is inconclusive. The former's opinion of causation is not persuasive. State v. Sands, supra.

ORDER

The Referee's order, dated April 29, 1980, is affirmed.

KRISTIE PARESI, Claimant
Merten & Saltveit, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 77-06083
December 7, 1981
Order on Remand

Reviewed by Board Members Barnes and McCallister.

This case is before us on remand from the Court of Appeals for further consideration under the Supreme Court's decision in James v. SAIF, 290 Or 343 (1981).

We have considered this case along with several others. In Henry McGarrah, WCB Case No. 79-05440 (decided this date), we concluded that an adverse psychological reaction to normal and reasonable supervision is not within the scope of employment. In Kay L. Murrens, WCB Case No. 79-01573 (decided this date), we concluded that, when there is possible work and nonwork causation of a disease, claimant must prove that the significant preponderance of causation of a disease, claimant must prove that the significant preponderance of causation was work-related in order for the disease to be compensable under ORS 656.802.

Nothing in McGarrah or Murrens changes the conclusion we previously reached that claimant's psychological condition is compensable. Most of the conduct of claimant's supervisors was neither normal nor reasonable. Claimant's supervisors interferred in her personal life, transfered her between offices more often than any other employee and subjected her to intense locked-door "counseling" sessions. There is no evidence of any possible nonwork causation. Claimant's condition improved after she left this hostile working environment.

ORDER

The Board adheres to the conclusion stated in its Order on Review, dated February 8, 1979.

HENRY AVILA, Claimant
Charles Maier, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-03414
December 9, 1981
Request for Review by SAIF

Reviewed by Board Members Barnes and Lewis.

The SAIF Corporation seeks Board review of Referee Foster's order which remanded claimant's aggravation claim to it for acceptance and payment of compensation to which claimant was entitled. SAIF contends claimant has failed to prove a compensable aggravation claim.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated June 18, 1981 is affirmed. Claimant's attorney is awarded $500 as a reasonable attorney's fee for services rendered at this Board review, payable by SAIF.

CHARLES E. BLAKE, Claimant
Larry Bruun, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-10545
December 9, 1981
Request for Review by SAIF

Reviewed by Board Members McCallister and Lewis.

The SAIF Corporation seeks Board review of Referee Neal's order which granted the claimant an award of permanent total disability as of May 28, 1981. The SAIF Corporation also contends that the award is excessive in that the claimant has not satisfied the requirements of ORS 656.206(3).

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated June 5, 1981 is affirmed. Claimant's attorney is awarded $350 as a reasonable attorney's fee for services rendered at this Board review, payable by SAIF.

DAVID A. CAPEHART, Claimant
Jerry Gastineau, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-11634
December 9, 1981
Request for Review by SAIF

Reviewed by Board Members McCallister and Lewis.

The SAIF Corporation requests review of Referee Mannix's order which granted claimant 32° for 10% unscheduled permanent partial disability for residuals of his back injury. SAIF contends the award is excessive and not supported by the medical evidence. The claimant has cross appealed the Referee's order stating "claimant was not satisfied with said opinion and order and desires review of the same."

SAIF contends the weight of medical evidence is that claimant has no permanent impairment either physical or psychological. They contend further that the Referee erred "in playing doctor" making a diagnosis of conversion reaction; that he further erred in attributing that diagnosis to the injury; and that he finally erred in finding that said diagnosis led to permanent impairment." We disagree with SAIF and affirm the Referee's order.

The Referee's reason for granting the disability award is stated on the record as follows: "Now, in terms of the issue about closure of this claim, I do not buy Dr. Flowers' recitation of the history and I do not buy his opinion. I do go along with the opinion of Dr. Yamodis and Dr. Maukonen. So about the closure of this claim I'm going to buy Dr. Maukonen's opinion in Exhibit 35 and 36 where he finds a mild disability from a chronic strain." (Emphasis supplied.)

The Referee concluded that the "mild disability" was not based on "particular objective medical findings" but rather was "primarily psychological in manifestation." We neither agree nor disagree with this conclusion; we find it is sufficient that in reaching that conclusion the Referee relied on the opinion of Dr. Maukonen that claimant does have a mild disability.

The Referee's order dated May 11, 1981 is affirmed.

KATHRYNE EATWELL, Claimant
Rolf Olson, Claimant's Attorney
George Goodman, Defense Attorney

WCB 79-08058
December 9, 1981
Request for Review by Employer

Reviewed by Board Members McCallister and Lewis.

The employer seeks Board review of Referee Baker's order which disapproved its denial of claimant's surgery and remanded the claim for reopening and the payment of benefits as required by law and granted claimant's attorney a fee of $1800.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated April 24, 1981 is affirmed. Claimant's attorney is awarded $550 as a reasonable attorney's fee for services rendered at this Board review, payable by GAB.

CLEO I. GRAHAM, Claimant
Donald Wilson, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-06277
December 9, 1981
Request for Review by SAIF

Reviewed by Board Members Barnes and McCallister.

The SAIF seeks Board review of Referee Foster's order which granted claimant 10% loss of use of the right arm, 10% loss of use of the right forearm, 10% loss of use of the left forearm unscheduled right shoulder disability. SAIF contends the awards granted are excessive and not supported by the evidence.

Claimant, 55 years of age, was employed as a laundress for a nursing home. On October 2, 1978 she injured her right shoulder pulling wet laundry from a washing machine.

The condition was orignally diagnosed as tendonitis of the rotator cuff by Dr. Lisac. On December 11, 1978 Dr. Lisac diagnosed bilateral carpal tunnel syndrome which was consistent with the nerve conduction studies performed. Claimant underwent decompression surgery on the left wrist on January 17, 1979 and decompression surgery of the right wrist on March 25, 1979. After these operations claimant's wrist complaints improved but her shoulder complaints continued.

An arthrogram performed in May, 1979 showed a tear of the rotator cuff and on May 22, 1979 repair surgery was performed by Dr. Clarke. Subsequently, Dr. Schular found the claimant had mild disability of the right shoulder and recommended lighter work. Claimant was examined by the Orthopaedic Consultants on May 14, 1980 and these physicians found her precluded from her regular occupation but physically capable of light work. They found her condition was medically stationary with the impairment of the wrists rated as mild, of the right shoulder as moderate.

In August 1980 claimant was examined by Dr. Button who recommended surgery to the left hand, which was performed on August 21. On November 21, 1980 Dr. Button reported he had last seen claimant on October 27 and she had mild symptoms of tenosynovitis of both hands, but she was stationary with no hand impairment.

Based on the medical reports we agree with the Referee's award of 10% loss of both the right and left forearms. We further concur with his award to the right shoulder of 30% unscheduled disability which compensates claimant for her loss of wage earning capacity from this injury. We do not agree, however, with the award of 10% loss of the right arm. There is no medical justification for such an award or loss of use of the upper extremity. The injury was to the shoulder, and the shoulder is unscheduled.

ORDER

The order of the Referee, dated February 24, 1981 is modified by reversing that portion of the order granting 10% loss of the right arm. The remainder of the order is affirmed.

BENETA KISSAS, Claimant	WCB 80-08636
Peter Hansen, Claimant's Attorney	December 9, 1981
Ridgway Foley, Defense Attorney	Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Pferdner's order, which granted claimant an award of 240° for 75% unscheduled head disability. Claimant contends that she is permanently and totally disabled, and that her refusal to accept surgery was not unreasonable.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated April 15, 1981 is affirmed.

NIELS P. MARTIN, Claimant
Roderic MacMillan, Claimant's Attorney
G. Howard Cliff, Defense Attorney
SAIF Corp Legal, Defense Attorney

WCB 78-08866 & 78-09938
December 9, 1981
Request for Review by Carrier

Reviewed by Board Members McCallister and Lewis.

Industrial Indemnity Insurance seeks Board review of Referee Menashe's order which set aside its denial (WCB Case No. 78-08866), affirmed SAIF's denial (WCB Case No. 78-09938) and found claimant's claim was filed late for good cause. Industrial Indemnity contends that claimant's new injury claim is precluded because of late filing and that medical evidence does not support a finding of new injury. Industrial Indemnity also contends that the attorney fee granted claimant is excessive.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's Opinion and Order dated March 3, 1981 and his Order on Reconsideration dated April 22, 1981 are affirmed. Claimant's attorney is awarded $300 for services at Board review, payable by Industrial Indemnity.

CHAT ROSE, Claimant
Evohl Malagon, Claimant's Attorney
Brian Pocock, Defense Attorney

WCB 79-07432
December 9, 1981
Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Knapp's order which affirmed the Determination Order of July 26, 1979 and granted claimant no award for permanent partial disability.

We affirm the conclusion reached by the Referee.

ORDER

The Referee's order dated May 22, 1981 is affirmed.

ANGEL B. ALBAREZ, Claimant
Peter Hansen, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 79-07651
December 14, 1981
Request for Review by Claimant
Cross Appeal by SAIF

Reviewed by the Board en banc.

Claimant has requested and SAIF has cross-requested review of Referee Menashe's order which awarded the claimant 90% permanent partial unscheduled disability, affirmed the scheduled disability award made by the Board of 20% for loss of the left leg and 40% for loss of the right leg and granted claimant's attorney 25% of the increased compensation not to exceed $2,000.

SAIF contends that the Referee improperly assigned the burden of proving a change in claimant's permanent total disability status to it, rather than to the claimant. SAIF additionally maintains that the Referee improperly denied admission of certain exhibits which it submitted at the hearing. Both parties challenge the Referee's finding of extent of disability. SAIF contends that the Board order of July 26, 1979 finding the claimant's disability to be 50% is correct, while the claimant contends that he is permanently and totally disabled.

Claimant suffered a compensable injury in 1971 when struck in the back by a log. A Determination Order issued on May 25, 1972 found the claimant to be permanently and totally disabled. Vocational rehabilitation was attempted, but the program was terminated in 1974.

In 1974 claimant moved to Florida where he obtained employment as a horse groomer. Thereafter, claimant worked for several different employers in Florida, Washington and Oregon in jobs mainly involving the care of horses.

In 1979, SAIF requested re-evaluation of the claimant's permanent total disability status pursuant to ORS 656.206. The request for re-evaluation was made directly to the Board, apparently based on the Board's own motion powers under ORS 656.278. The Board, based on a recommendation from the Evaluations Division, terminated the claimant's permanent total disability award and in its stead awarded 50% permanent partial unscheduled disability for the claimant's back, 20% scheduled disability for loss of the left leg and 40% scheduled disability for loss of the right leg. Claimant requested a hearing. At the hearing, the Referee found claimant's permanent partial unscheduled disability equal to 90% and affirmed the awards of the Board for the claimant's scheduled disabilities.

The Referee placed the burden of proving change of permanent total disability status on SAIF based on Bentley v. SAIF, 38 Or App 473 (1979). SAIF argues that this burden should only be placed on the carrier when initially requesting re-evaluation, and that once an order terminating total disability status issues, the burden shifts to the claimant. We disagree. The Court in Bentley placed the burden of proving a change in a claimant's permanent total disability status on the carrier, even though the carrier had requested re-evaluation and received a Redetermination Order terminating the claimant's permanent total disability status. The only apparent difference between Bentley and the current case is that the Redetermination Order in this case was issued by the Board pursuant to its own motion powers rather than by the Evaluation Division. This is a distinction without significance.

The same policy considerations which guided the Court in Bentley are also controlling here. The carrier should not be allowed to shift the burden of proof to the claimant by alleging a change in the claimant's status and thereafter obtaining a Redetermination Order, whether from the Evaluation Division or the Board. The claimant's first opportunity to respond to the insurer's allegations is at the hearing. The claimant has proven his case in the first instance that he is permanently and totally disabled. It is now up to the carrier to prove its case.

SAIF contends, as a second issue, that the Referee erred in denying admission of certain exhibits which it submitted at the hearing. Two of these exhibits are letters from former employers of the claimant, and the third is a letter from the accounting firm of another of the claimant's former employers. ORS 656.283(6) provides that the Referee is not bound by statutory or common law rules of evidence and may conduct a hearing in any manner that will achieve substantial justice. There are, however, certain parameters even in administrative hearings beyond which it is inappropriate to stray.

The Referee found that the documents in question were hearsay, related to a material element of the case, was prejudicial to the claimant and the claimant had no opportunity to examine the author of the documents. ORS 656.283(6) is discretionary. We find that the Referee properly exercised his discretion to exclude the documents in question for the reasons which he noted.

We now turn to the issue of extent of the claimant's disability. The claimant contends his physical condition has not improved since the time of the finding of permanent disability, and that the Referee improperly found that the claimant was able to regularly sell his services in a branch of the labor market. Claimant therefore argues that he is still permanently and totally disabled.

SAIF made its request for re-evaluation of the claimant's permanent total disability status pursuant to ORS 656.206(5). This statute provides that the insurer must periodically re-examine permanent total disability cases in order to determine whether the worker is currently unable to perform work regularly at a gainful and suitable occupation. In Gettman v. SAIF, 289 Or 609 (1980), the Court noted that:

> "The legislative provision in ORS 656.206(5) for periodic reexamination of each permanent total disability award further indicates that a permanent total disability award is based upon existing occupational abilities. That award can be adjusted if the claimant is no longer permanently incapacitated from regularly performing work at a gainful and suitable occupation." 289 Or at 614-15.

There is no question that claimant has demonstrated commendable fortitude and shown a remarkable capacity for overcoming his physical disabilities. Claimant moved to Florida in 1974 and obtained employment with Linn-Drake Farm grooming horses for five month periods over two seasons. In 1978 claimant moved to Prineville, Oregon where he was employed as a caretaker for a 4,500-5,000 acre ranch and earned $650 per month. Thereafter claimant obtained employment in Longacre, Washington for Roy Lumm attending horses at a wage of $500 per month. Claimant then obtained work with Wood Creek Training Center in Washington in a supervisory capacity, earning $1,200 per month for eleven months. Claimant then returned to work for Roy Lumm and Bill Ides. At the time of the hearing, claimant was employed by Bill Ides at a rate of $700 per month.

Rather than demonstrating permanent total disability, claimant's work history since 1974 clearly demonstrates, as noted by the Referee, that claimant is able to regularly sell his services in a branch of the labor market where there appears to be a genuine demand for his abilities as a horse handler. As noted by Dr. Calvin Kiest in his May 31, 1979 report:

> "There is little question that this man is functioning quite adequately in society at this point in time. He is working at what he knows best and is adequately performing it."

It does not appear that the claimant's employment was the result of mere generosity on the part of his employers. Nor does it appear that his work has been infrequent or occasional. Although there have been periods of unemployment, it appears that the work history since 1974 has been quite steady. We find that the request for re-evaluation of claimant's status as permanently and totally disabled was proper and that, for the time being, claimant is not permanently and totally disabled.

The Referee found that the claimant was entitled to an award of 90% permanent, partial unscheduled disability. It would appear that the Referee took into consideration the claimant's scheduled disability as well as his unscheduled disability when he made his determination. Claimant has already received an award of scheduled disability for loss of function in his right and left legs. In determining claimant's unscheduled permanent partial disability, it is proper to consider loss of earning capacity only as it relates to claimant's back. After taking into consideration all the relevant medical and social/vocational considerations, we find that the claimant is entitled to an award of 70% permanent, partial unscheduled disability for his back.

As previously noted, SAIF requested redetermination of the claimant's permanent total disability status by the Board based on the Board's own motion authority under ORS 656.278. Although it would appear that ORS 656.278 is broad enough to permit the Board to re-evaluate a claimant's permanent total status, the Board, as a matter of policy, will no longer entertain such motions. All requests for re-evaluation of a claimant's permanent total disability status must be submitted to the Evaluation Division. OAR 436-65-200 et. seq.

ORDER

The Referee's order dated December 30, 1980 is modified. Claimant is awarded 70% permanent partial unscheduled disability for his back, equal to 224°, being an increase of 64° from the July 26, 1979 Board order. The remainder of the Referee's order is affirmed.

Board Member George Lewis, respectfully dissenting:

I would agree with the majority opinion on the issue of burden of proof, the inadmissibility of the documents in question and the reference to the proper procedure to be followed in submitting claims for reevaluation. I dissent, however, from the majority's finding on the issue of extent of the claimant's permanent partial unscheduled disability, and would affirm the Referee's finding on that issue and award an attorney fee of $550, payable by the SAIF Corporation.

When determining permanent partial unscheduled disability, the proper test is set forth in ORS 656.214(5):

> "In all cases of injury resulting in permanent partial disability, other than those described in subsections (2) to (4) of this section, the criteria for rating of disability shall be the permanent loss of earning capacity due to the compensable injury. Earning capacity is the ability to obtain and hold gainful employment in the broad field of general occupations, taking into consideration such factors as age, education, training, skills and work experience." * * *

Dr. Calvin H. Kiest, M.E., after reviewing films of the claimant at work provided by SAIF, stated in his May 13, 1979 report:

> * * * "There is no question that this man has had a severe serious injury, that he has continuing major objective evidence of impairment. He has failure of fusion of his spinal fusion, objective evidence of nerve injury involving both legs. His examination and history are compatible.
>
> "I honestly believe this man has managed to overcome serious physical impairment."

With regard to claimant's work activity, Dr. Kiest goes on to state:

> * * * "With medical probability he is performing these duties with continuous pain. He should be able to perform these duties for several years, although eventually even this somewhat tough little man will not be able to perform at his present level."

Combining Dr. Kiest's opinion with that part of the statue which speaks of "ability to obtain and hold gainful employment in the broad field of general occupations...," I would agree with the Referee that the claimant's potential job market is so narrow, that when taking into consideration all of the other factors required by the statute, the claimant is more adequately compensated by a higher award. The fact that the claimant has been able to obtain employment at all is due to the fact that there remains open to him this single narrow niche of the job market into which he has been able to temporarily fit. As soon as that niche closes the claimant's permanent partial disability will become permanent total disability. I would therefore affirm the Referee's finding of 90% permanent partial unscheduled disability and award as a reasonable attorney fee the sum of $550, payable by the SAIF Corporation.

MICHELLE L. BARELLA, Claimant	WCB 80-9617
Dennis H. Henninger, Claimant's Attorney	December 14, 1981
SAIF Corp Legal, Defense Attorney	Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

Claimant seeks Board review of Referee Mulder's order which affirmed the carrier's denial of her claim.

The Board affirms and adopts the order of the Referee.

ORDER

The order of the Referee, dated March 25, 1981, is affirmed.

KENNETH BRACKLEY, Claimant
Hayner, Waring et al, Claimant's Attorneys
Foss, Whitty & Roess, Defense Attorneys

WCB 81-00693
December 14, 1981
Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

Claimant seeks Board review of that portion of Referee Mannix's order which granted him additional compensation for a total equal to 96° for 30% unscheduled disability. Claimant contends this award is inadequate.

The Board affirms and adopts the order of the Referee.

ORDER

The order of the Referee, dated April 10, 1981, is affirmed.

VIVIAN BRANDON, Claimant
Daniel Hoarfrost, Claimant's Attorney
Richard Lang, Defense Attorney

WCB 79-03341
December 14, 1981
Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

Claimant requests Board Review of referee Mongrain's order dated March 5, 1981 and the amended order dated March 25, 1981. The Referee affirmed the employer's denial of responsibility for claimant's respiratory and eye condition.

We affirm the Referee's order and amended order.

ORDER

The Referee's order dated March 5, 1981 and the amended order dated March 25, 1981, are affirmed.

JOSEPH J. BRANDOW, Claimant
Michael D. Kennedy, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-09917
December 14, 1981
Request for Review by SAIF

Reviewed by Board Members McCallister and Lewis.

SAIF Corporation seeks Board review of Referee Neal's order which remanded the claimant's claim to it for acceptance and payment of compensation to which claimant is entitled.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated April 30, 1981 is affirmed. Claimant's attorney is awarded $300 as a reasonable attorney's fee for services rendered at this Board review, payable by SAIF.

RALPH CASTRO, Claimant
Merrill Schneider, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 78-03909
December 14, 1981
Order on Remand

Reviewed by Board Members Barnes and McCallister.

This case is before us on remand from the Court of Appeals for further consideration pursuant to the Supreme Court's decision in James v. SAIF, 290 Or 343 (1981).

We have considered this case along with several others. In Henry McGarrah, WCB Case No. 79-05440 (December 7, 1981), we concluded that an adverse psychological reaction to normal and reasonable supervision is not within the scope of employment when the precipitating event (supervision) occurred because the employee was not functioning within the scope of employment. In Kay L. Murrens, WCB Case No. 79-01573 (December 7, 1981), we concluded that, when there is possible work and nonwork causation of a disease, claimant must prove that the significant preponderance of causation was work-related in order for the disease to be compensable under ORS 656.802.

Claimant here fails under both the McGarrah test and the Murrens test.

More significantly, this record does not establish that claimant has a disease, much less a compensable occupational disease. As we stated in Cynthia K. Bowman, WCB Case No. 80-06844 (December 7, 1981): "Not every physical discomfort of life is a disease". Claimant's gastro-intestinal distress, insomnia, etc., are not established by this record to be manifestations of any known disease. As the Board stated in its prior Order on Review dated May 16, 1979: "The record reveals no diagnosis of what, if any, claimant's psychological problems are and, if he has any, whether or not they are permanent". We have again reviewed the record. We find, once again, that it supports no other possible conclusion.

Assuming higher authority finds claimant has a disease, McGarrah and Murrens become relevant in determining its compensability.

Claimant was a counsellor with the Department of Vocational Rehabilitation. Because of an approaching audit, claimant and all other counsellors were asked to be more careful about documentation of actions taken for and with clients. This led to conflicts between claimant and his supervisors. Claimant was unable or unwilling to accept instructions and criticisms, including constructive criticisms, from his supervisors. In short, if claimant has a psychological disease and if it was caused by his work, it arose from normal and reasonable supervision intended to define the scope of employment and intended to point out when and in what particulars claimant was not functioning within the expected scope of employment. This is insufficient to establish compensability. McGarrah, supra.

Turning to the Murrens requirements, we simply are not persuaded by the opinions of Drs. Levine and Maletzky. "In all cases this agency's task is to weigh the evidence; in cases involving claimed psychological disability that weighing process must necessarily and largely be based on our insight and intuition". Kay L. Murrens, supra, Order on Review at 7. Our insight and intuition tell us that doctors unable to offer a diagnosis more precise than "personality disorder" cannot offer a reliable or persuasive opinion on the causation of a condition that they cannot even identify.

ORDER

On remand and reconsideration, the Board adheres to the conclusion reached in its Order on Review, dated May 16, 1979. The Referee's order, dated December 12, 1978, is again affirmed.

JAMES COPENHAVER, Claimant	WCB 80-05221
J. David Kryger, Claimant's Attorney	December 14, 1981
SAIF Corp Legal, Defense Attorney	Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

Claimant requests Board review of Referee Knapp's order which approved SAIF Corporation's denial of his left knee condition.

The Referee found the claimant not credible. Claimant contends that the Referee's finding was unsupported by the evidence. We disagree.

We find the evidence as a whole supports the Referee's findings, or to state it differently, we find nothing in the record sufficient to persuade us that the Board should substitute its judgment for that of the Referee.

We affirm the order of the Referee. See Hannan v. Good Samaritan Hospital 4 OR AP 178 (1970).

ORDER

The Referee's order dated May 28, 1981 is affirmed.

EMILE H. EULER, Claimant
Don A. Olowinski, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 79-10877
December 14, 1981
Request for Review by SAIF

Reviewed by Board Members Barnes and McCallister.

The SAIF Corporation seeks Board review of Referee James' order which remanded claimant's claim of aggravation for a hospitalization in December, 1979 and July-August, 1980 for acceptance and the payment of benefits as required by law and on attorney's fee payable by SAIF of $1,500. The claimant cross requests review of the order contending that claimant's April, 1979 stroke is also compensable.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated April 29, 1981 is affirmed. Claimant's attorney is awarded $1,500 as a reasonable attorney's fee for services rendered at this Board review, payable by SAIF.

DANIEL R. FEREBEE, Claimant
James L. Francesconi, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-06306 & 80-06307
December 14, 1981
Request for Review by SAIF

Reviewed by Board Members Barnes and Lewis.

SAIF Corporation seeks Board review of that portion of Referee Foster's order which awarded claimant 15% (48°) permanent partial disability as a result of a March 3, 1980 injury (80-06307). SAIF Corporation contends there is no objective medical evidence which merits a permanent partial disability award.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated April 8, 1981 is affirmed. Claimant's attorney is awarded $200 as a reasonable attorney's fee for services rendered at this Board review, payable by SAIF.

JERRY N. FRALEY, Claimant
Rolf Olson, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-08564
December 14, 1981
Request for Review by Claimant

Reviewed by Board Members Barnes and McCallister.

Claimant seeks Board review of Referee Leahy's order that affirmed the Determination Order of September 10, 1980 awarding 25% unscheduled low back disability. Claimant contends his permanent disability is greater than previously awarded. We agree.

As a result of his industrial injury, claimant had two back fusion operations. He now only has about 75% normal range of motion in the low back. He cannot do jobs that require prolonged walking or standing, any twisting or crouching or lifting over 20 pounds. All of claimant's prior work experience is in jobs that he is now physically unable to do. Claimant is in his mid 30's and has a GED.

Exhibit 68 is the evaluator's worksheet that explains the basis for the 25% award of the Determination Order. We generally agree with the evaluator's analysis with one notable exception. The evaluator assigned a minus value that otherwise would not have been applicable because of claimant's participation in a vocational rehabilitation program. However, claimant did not complete this rehabilitation program; instead, his participation was terminated because of his absenteeism that, claimant testified, was due to his continuing physical problems. Claimant's physical inability to even participate in the rehabilitation program should count, we think, as a plus value rather than the negative value assigned by the evaluator.

With this one change factored in, we conclude claimant would be appropriately compensated with an award of 40% permanent partial disability.

ORDER

The Referee's order dated December 15, 1980 is modified. Claimant is awarded 128° for 40% permanent partial unscheduled disability; this is in lieu of all prior awards.

Claimant's attorney is allowed as and for a reasonabale attorney's fee 25% of the increased compensation awarded by this order.

DIANNA GOBLER, Claimant
Larry Bruun, Claimant's Attorney
James Huegli, Defense Attorney

WCB 79-03896
December 14, 1981
Order on Reconsideration

This case is before us again on claimant's motion for reconsideration of our Order on Review dated March 13, 1981. The issue is the compensability of claimant's occupational disease claim for psychological disability.

Our Order on Review affirmed Referee Pferdner's order finding the claim not compensable. We reasoned in part that the preponderance of the evidence "indicates that conditions at work were not as claimant described them." That reasoning was erroneous; the courts have ruled that the causation inquiry in this type of case depends upon a worker's perception of work conditions, even if that perception is proven to have been totally inaccurate.

There is, however, a different reason this claim is not compensable. In Henry McGarrah, WCB Case No. 79-05440 (December 7, 1981), we ruled that a worker's adverse psychological reaction to reasonable and normal supervision does not arise in the scope of employment. In this case, claimant's alleged adverse psychological reaction primarily arose from: (1) supervision about the quantity of work she was expected to perform; (2) a supervisor's criticism of the quality of her work; and (3) disappointment about being turned down for a promotion. Control of the quantity and quality of an employee's work is control of the scope of employment; the consequences of supervision intended to keep an employee functioning within the expected scope of employment are not compensable because they originate in circumstances beyond the scope of employment.

ORDER

On reconsideration the Referee's order dated June 27, 1989 is again affirmed.

DAVID N. GRAY, Claimant
Cynthia Barrett, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Katherine O'Neil, Defense Attorney

WCB 79-10962
December 14, 1981
Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

Claimant seeks Board review of Referee Fink's order which affirmed SAIF and Kemper's denials of aggravation and new injury, and found the claimant not credible. Claimant contends medical evidence supports a finding of compensability.

ORDER

The Referee's order dated January 26, 1981 is affirmed.

EDWARD HERRINGTON, Claimant
Carlotta H. Sorensen, Claimant's Attorney
David O. Horne, Defense Attorney

WCB 79-06434
December 14, 1981
Request for Review by Employer

Reviewed by Board Members McCallister and Lewis.

The employer seeks Board review of Referee Baker's order which awarded additional temporary total disability from June 27, 1979 to May 5, 1980. The employer contends the claim was properly closed and no temporary total disability should be awarded during that period.

The Board affirms and adopts the order of the Referee.

ORDER

The order of the Referee, dated April 16, 1981, is affirmed.

Claimant's attorney is awarded as a reasonable attorney's fee a sum equal to $350, payable by the carrier.

HIROSHI GEORGE HITOMI, Claimant
Richard Sly, Claimant's Attorney
Ridgway Foley, Defense Attorney

WCB 79-10101
December 14, 1981
Request for Review by Employer

Reviewed by the Board en banc.

The employer seeks Board review of Referee Williams' Order and Referee Fink's Order on Reconsideration which granted claimant a scheduled permanent, partial disability award of 10% loss of the left hand. The employer contends the award for the injuries of March 1979 and April 1979 should be limited to disability of the left middle finger and not the entire hand and in the alternative that the award is excessive.

At hearing two claims were considered, both involving injuries to claimant's left hand. Both injuries occurred while claimant was employed by this employer, who was insured by SAIF for the first claim and Northwest Farm Bureau for the second.

The record is somewhat confused and confusing because claimant has a pre-existing nonindustrial peripheral vascular disease (Buerger's). One of the problems of Buerger's disease is that minor injuries to the extremities, in this case fingers, may result in medical treatment and recovery problems far out of proportion to the magnitude of injury. Claimant does not contend the pre-existing Buerger's disease is work-related. The salient facts necessary to decide this case are:

1. Claimant has noncompensable Buerger's disease that pre-existed the injuries involved in these claims.

2. The claimant has been employed by this employer for about fourteen years.

3. In September 1978 claimant injured the tip of his left ring finger. Gangrene related to peripheral vascular insufficiency complicated the case resulting in amputation of the ring finger through the middle of the distal phalanx. At the time of this injury, SAIF insured the employer. It initially denied the claim but later accepted it.

4. In August 1979, a Determination Order was issued on the September 1978 injury awarding temporary total disability plus 30% loss of the left ring finger.

5. In March and April 1979 the claimant injured his left middle finger. The same complications arising out of the pre-existing condition occurred, as with the ring finger injury. The employer had changed carriers and was insured by Northwest Farm Bureau. This injury resulted in a scheduled permanent par- tial disability award of 20% loss of the left middle finger by Determination Order of October 12, 1979.

6. Claimant requested a hearing and the Referee awarded 10% loss of claimant's left hand for the injury to the left middle finger in lieu of the Determination Order award on that finger alone.

On this record it is difficult to understand the basis upon which the Referee concluded the award for the injury to the left middle finger should be based on disability to the left hand instead of to just the injured finger. We find nothing in the record or the Referee's order or the Order on Reconsideration to assist us in understanding the result. The disability here in dispute arises from an injury to one digit--there is no involvment of any other part of the hand. The possible exception to this statement is loss of effective opposition between the middle finger and the thumb--yet there is no medical evidence to support any finding on that proposition.

Another possibility, not mentioned by either Referee who ruled on this case, is possible reliance on ORS 656.214(4) which states: "A proportionate loss of the hand may be allowed where disability extends to more than one digit, in lieu of ratings on the individual digits." (Emphasis added.) Claimant's "disability extends to more than one digit" because of his September 1978 left ring finger injury and his March/April 1979 left middle finger injury. However, the permissive rule of ORS 656.214(4) ("may be allowed") cannot be applied in a standardless, whimsical manner. The ultimate standard for all scheduled injuries is loss of use. Boyce v. Sambo's Restaurants, 44 Or App 305 (1980). Accordingly, the Board has previously applied the rule that multiple finger injuries "may be" combined into a hand award only when there is evidence of loss of use of the entire hand. Steven A. Mills, 29 Van Natta 633 (1980); James Elsey, 27 Van Natta 808 (1979); Shirley Guinn, 24 Van Natta 35 (1978). There is no evidence of loss of use of the entire hand in this case.

The evidence is clear--the injury here in question was to the left middle finger--no other injury-related hand involvement has been proven. Since the disability evaluation for this injury does not involve any other digit, the rating must be on the one digit injured; therefore, the Determination Order was correct both in limiting permanent partial disability to the left middle finger and, based on Dr. Acher's reports, in the amount of disability awarded.

ORDER

The Referee's order dated January 22, 1981 and the Order on Reconsideration dated February 18, 1981 are reversed. The October 12, 1979 Determination Order awarding 20% loss of the left middle fingers is reinstated. The balance of the Referee's order is affirmed, except that claimant's attorney's fee for obtaining additional temporary total disability benefits is limited to $750.

GREGORY O. HUDSON, Claimant	WCB 80-06591
Johnson, Harrang et al, Claimant's Attorneys	December 14, 1981
SAIF Corp Legal, Defense Attorney	Request for Review by Claimant
	Cross Appeal by SAIF

Reviewed by Board Members McCallister and Lewis.

Claimant appealed and SAIF cross-appealed Referee Seifert's order dated April 8, 1981. Claimant contends he was not medically stationary until August 5, 1980. SAIF contends that the Determination Order issued January 1, 1980 which awarded 5% unscheduled disability and temporary total disability from June 6, 1979 to August 8, 1979 and temporary partial disability from August 9, 1979 to December 31, 1979 should be affirmed.

The Referee's order awarded claimant 15% unscheduled permanent partial disability and additional temporary total disability from January 29, 1980 to February 28, 1980.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated April 8, 1981 is affirmed.

SUSAN A. JENNEN, Claimant
John D. McLeod, Claimant's Attorney
Katherine O'Neil, Defense Attorney

WCB 79-05868
December 14, 1981
Request for Review by Claimant

Reviewed by Board Members Barnes and McCallister.

Claimant requests Board review of Referee Mongrain's order which affirmed the carrier's denial of her claim for a psychiatric condition.

The order of the Referee is affirmed. See Kay L. Murrens WCB Case No. 79-01573 (December 7, 1981).

ORDER

The Referee's order dated March 31, 1981 is affirmed.

RICHMOND C. JOHNSON, Claimant
Jerome F. Bischoff, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-09632
December 14, 1981
Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Braverman's order which affirmed the carrier's denial of his claim for a bilateral hernia.

Claimant contends that the Referee's finding that claimant lacks credibility conflicts with the evidence as to medical causation. The report relied upon by claimant is not evidence for medical causation, however. Dr. Innes merely indicates that claimant first noticed his hernia pain at work and, due to the type of hernia claimant had, Dr. Innes felt it could have happened as claimant described. Two problems are evident in this report: 1) Dr. Innes did not state how the injury happened, but merely indicated he could not argue with claimant's contention, and 2) this is very directly related to the Referee's finding on credibility (contrary to claimant's contention in his brief). Absent a compelling reason to do so, the Board will not reverse a Referee when his conclusion is based on his finding that the claimant lacked credibility. Referee Braverman's order should be affirmed.

ORDER

The Referee's order dated May 4, 1981, is affirmed.

PATRICIA A. KANE, Claimant
Robert L. Chapman, Claimant's Attorney
Keith D. Skelton, Defense Attorney

WCB 80-10925
December 14, 1981
Request for Review by Employer

Reviewed by Board Members Barnes and Lewis.

The employer seeks Board review of Referee Howell's order which remanded claimant's aggravation claim to it for acceptance and payment of compensation to which claimant is entitled.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated April 27, 1981 is affirmed. Claimant's attorney is awarded $300 as a reasonable attorney's fee for services rendered at this Board review, payable by Liberty Mutual.

RICHARD C. LANDERS, Claimant
Peter O. Hansen, Claimant's Attorney
Paul Roess, Defense Attorney

WCB 80-5456 & 80-3584
December 14, 1981
Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

Claimant seeks Board review of Referee Daron's order which affirmed SAIF's denials of new injury (80-03584) and aggravation (80-05456) of claimant's low back. Claimant contends that the Referee erred in affirming SAIF's denial of aggravation and medical services for a July 7, 1972 injury.

ORDER

The Referee's order dated May 8, 1981 is affirmed.

DANIEL LEARY, Claimant
Pozzi, Wilson et al, Claimant's Attorneys
Schwabe, Williamson et al, Defense Attorneys

WCB 80-1939
December 14, 1981
Request for Review by Employer

Reviewed by Board Members Barnes and McCallister.

The employer seeks Board review of Referee Ail's order which set aside its denial of claimant's occupational disease claim for allegedly work-stress-induced physical and mental problems.

We have considered this case along with several others. In Henry McGarrah, WCB Case No. 79-05440 (December 7, 1981), we concluded that an adverse psychological reaction to normal and reasonable supervision is not within the scope of

ehployment when the precipitating event (supervision) occurred because the employee was not functioning within the scope of employment. In Kay L. Murrens, WCB Case No. 79-01573 (December 7, 1981), we concluded that, when there is possible work and nonwork causation of a disease, claimant must prove that the significant preponderance of causation was work-related in order for the disease to be compensable under ORS 656.802.

Claimant here fails under both the McGarrah test and the Murrens test.

At the time of hearing claimant was 54 years old and had worked for the phone company as an installer and repairman for over 30 years. During the late 1970's, claimant was involved in a series of conflicts with a series of supervisors. Claimant's supervisors criticized him for coming to work late, for leaving early, for being consistently less productive than other crew members and for failure to adapt to changes in company policy and procedure.

Claimant was especially hostile when younger women served as his supervisor. Claimant's supervisors testified that in many instances they treated him more leniently than other employees rather than incur claimant's irrational wrath.

Claimant's adverse psychological and physical reaction did not arise within the scope of his employment as defined in Henry McGarrah, supra. Claimant's supervisors were merely (and usually leniently) defining the expected scope of employment -- hours of work, required productivity and company procedures to be followed. Our conclusion in McGarrah is especially applicable here: "Just as the employer must take the employee as he is, the employee must to a large extent take the job as it is." Order on Review at 4.

Moreover, claimant has not shown and on this record cannot show that the significant predominant cause of disease was work-connected. Claimant repeatedly cited two main stress factors to his doctors and to the Referee. First, younger supervisors. Second, women supervisors. However, by the time an individual is in his 50's, as is claimant, a large and growing proportion of the population is younger. Many of these younger people have various positions of authority. This is in no way unique to the work environment. Furthermore, the phenomenon of women in positions of authority is not limited to the telephone company, but rather, in our changing contemporaneous society, is increasingly common. Claimant undoubtedly had difficulty coping with his own aging process and the changing world around him, but these stress factors he claims caused an occupational disease are really factors which any person claimant's age encounters everywhere. This is insufficient to establish compensability. Kay L. Murrens, supra.

ORDER

The Referee's order, dated December 31, 1980, is reversed.

David F. McGhee, Claimant WCB 80-9284
Malagon, Velure & Yates, Claimant's Attorneys December 14, 1981
Cowling, Heysell & Pocock, Defense Attorneys Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

Claimant seeks Board review of Referee Seifert's order which affirmed the employer/carrier's denial of claimant's claim for occupational disease of the low back. Claimant contends his low back disability is work-related.

The Board affirms and adopts the order of the Referee.

ORDER

The order of the Referee, dated May 28, 1981, is affirmed.

WESLEY C. MUFFETT, Claimant WCB 80-00805
Burton J. Fallgren, Claimant's Attorney December 14, 1981
SAIF Corp Legal, Defense Attorney Request for Review by Claimant

Reviewed by Board Members Barnes and Lewis.

Claimant seeks Board review of Referee Mongrain's order that sustained SAIF's denial of his occupational disease claim for carpal tunnel syndrome.

The Board affirms and adopts the order of the Referee subject to the following qualifications and additions. We disagree with the Referee's reliance on Weller v. Union Carbide, 288 Or 27 (1980), because we have previously concluded that Weller is inapplicable when an underlying condition is asymptomatic before a possible claim arises. Richard A. Davidson, WCB Case No. 80-01007 (February 23, 1981).

Aside from Weller, the Referee's order presents cogent reasons, with which we fully agree, for finding Dr. Dietrich's opinion more persuasive than the opinions of Drs. Stolzberg and Silver. In addition, the most that the latter opinions would support is that claimant's work contributed materially to his carpal tunnel syndrome. This is insufficient to establish compensability of claimed occupational disease. Kay L. Murrens, WCB Case No. 79-01573 (December 7, 1981).

ORDER

The Referee's order dated January 8, 1981 is affirmed.

ABDULLAH MUHAMMED, Claimant
Peter O. Hansen, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-11446
December 14, 1981
Request for Review by Claimant

Reviewed by Board Members Barnes and McCallister.

Claimant seeks Board review of Referee Mongrain's order which granted all relief which claimant requested except for penalties and attorney fees. Specifically, the Referee found that claimant did not unreasonably resist or obstruct two medical examinations and was therefore entitled to temporary total disability compensation from October 28, 1980 to December 10, 1980 notwithstanding a suspension order which the SAIF Corporation had obtained from the Workers Compensation Department. The Referee reasoned in part: "I note that both examinations [by two different doctors] were scheduled for the same time, thereby making attendance at both impossible."

In rejecting the claim for penalties and attorney fees, the Referee reasoned: ". . . absent evidence that the Fund submitted false information, the Department's authorization of suspension validated the Fund's conduct as at least arguably correct and therefore reasonable."

We agree completely with the Referee.

ORDER

The Referee's order dated March 24, 1981 is affirmed.

THOMAS A. MUSGROVE, Claimant
Charles Robinowitz, Claimant's Attorney
Dennis Reese, Defense Attorney

WCB 80-10805
December 14, 1981
Request for Review by Employer

Reviewed by Board Members Barnes and McCallister.

The employer seeks Board review of Referee McCullough's order.

The issue is whether the employer has to simultaneously make periodic payments of claimant's increased permanent partial disability as ordered by a Referee while it is simultaneously paying temporary total disability benefits because the claimant is in an authorized program of vocational rehabilitation. The Referee in this case answered that question in the affirmative. The Board has previously answered that question in the negative. Charles C. Tackett, WCB Case No. 79-08040 (May 18, 1981).

ORDER

The Referee's order dated April 23, 1981 is reversed.

CLAIR NEIMI, Claimant — WCB 80-05944
Roll, Roll & Westmoreland, Claimant's Attorney — December 14, 1981
Rankin, McMurry et al, Defense Attorneys — Request for Review by Employer

Reviewed by Board Members McCallister and Lewis.

The employer seeks Board review of Referee Gemmell's order which awarded 25% permanent partial disability for low back disability, set aside its denial of medical services, ordered reimbursement of travel expenses, awarded penalties and attorney fees, and set aside the employer's cross-request to reduce temporary total disability. The employer contends that claimant should not be allowed temporary total disability after November 21, 1979, that claimant has not established entitlement to travel expenses, and that the permanent partial disability award is excessive.

The Board affirms and adopts the order of the Referee.

ORDER

The order of the Referee, dated April 27, 1981, is affirmed. Claimant's attorney is hereby awarded a fee equal to $500, payable by the employer/carrier.

JO ANN PALMQUIST, Claimant — WCB 80-1739
Evohl F. Malagon, Claimant's Attorney — December 14, 1981
SAIF Corp Legal, Defense Attorney — Request for Review by SAIF
Cross Appeal by Claimant

Reviewed by Board Members Barnes and McCallister.

The SAIF seeks review by the Board and the claimant cross-requests review of Referee St. Martin's order which remanded claimant's aggravation claim to SAIF for acceptance and the payment of benefits as provided by law; ordered SAIF to pay claimant a 25% penalty on compensation for temporary total disability from December 31, 1979 to March 28; 1980 and awarded claimant's attorney an attorney's fee. SAIF contends claimant's aggravation claim is not compensable. Claimant contends she is entitled to temporary total disability commencing December 15, 1979, the date she quit working, and the that penalty should be assessed on the temporary total disability due from December 15, 1979 to March 28, 1980.

Claimant had been employed one week by Chin's Restaurant as a waitress when she fell on January 26, 1977. Claimant testified she injured her neck, low back and left leg. The initial diagnosis was severe degenerative arthritis and cervical and lumbosacral strain. Dr. Streitz also noted that claimant had arthritis in both hips.

Subsequently claimant moved to Reno and saw Dr. Teipner who provided conservative care. In November 1977 claimant was enrolled at the Callahan Center, and Dr. Van Osdel reported that claimant felt her condition was worsening. The psychological evaluation provided indicated she was moderately emotionally disturbed. The vocational team felt claimant could do cashiering hostess work. Her vocational impairment was mildly moderate and physical impairment was moderate. She was capable of sedentary work.

Dr. Streitz concurred with this opinion and the claim was closed by a Determination Order of May 3, 1978 with an award of 80° for 25% unscheduled disability. By a stipulation of August 4, 1978 claimant was granted an additional award of 20% for a total award of 45% unscheduled disability.

Claimant moved to Reno to search for work and from August 26, 1979 until December 15, 1979 was employed servicing a snack bar at a casino. Claimant testified that standing for eight hours forced her to quit. She has not been employed since.

In Reno claimant saw Dr. Cunningham on December 18, 1979. He diagnosed low back pain with left sciatica, osteoarthritis of the lumbosacral spine and arteriosclerotic vascular disease. He recommended physical therapy and weight loss. At that time claimant weighed 205 pounds and was 5'10".

Claimant was examined by the Orthopaedic Consultants on March 11, 1980. They diagnosed lumbar and cervical strain, functional overlay and marked obesity. It was their opinion that her subjective complaints were not substantiated by objective medical findings. Claimant was not in need of any further treatment except for weight loss. There was no evidence of any neurological impairment and she had normal range of motion of the cervical spine and good range of motion of the lumbosacral spine. There was moderate severity of functional overlay manifested by inconsistencies.

On March 28, 1980 SAIF denied claimant's aggravation claim.

Dr. Smith, a neurosurgeon, examined claimant for the first time on August 12, 1980. At that time claimant's complaints were shoulder and neck pain radiating into both upper extremities. X-rays showed significant spondylosis at C5-6. The doctor stated, "I believe that her history suggests her condition has progressively worsened". Based on Dr. Smith's opinion the Referee found claimant's aggravation claim compensable.

The Board finds claimant's aggravation claim is not compensable. Claimant has underlying degenerative arthritis of the spine. The Orthopaedic Consultants found claimant was not in need of treatment, and had no neurological impairment. Dr. Smith saw claimant for the first time three years after her 1977 injury and although he finds her condition "clinically worsened" he does not indicate whether that worsening is causally related to the industrial injury, or whether it was simply claimant's arthritic condition that had progressively worsened. Without evidence to establish a causal nexus between claimant's worsened condition and her 1977 compensable fall, her aggravation claim cannot be sustained.

The Referee granted claimant compensation for temporary total disability as of the verified time loss date of December 31, 1979, and a penalty of 25% assessed on compensation due from that date to the date of the carrier's denial. This portion of the Referee's order is also reversed. There is no verified time loss as of December 31, 1979. Claimant quit working on December 15, 1979 and saw Dr. Cunningham on December 18. He neither verified time loss nor recommended any treatment, except for palliative care. The next medical report is dated January 25, 1980 from Dr. Welck who likewise does not verify time loss.

ORDER

The Referee's order dated October 6, 1980 is reversed. The denial of aggravation dated March 28, 1980 is affirmed.

ROBERT A. PARKER, Claimant	WCB 80-00711
Milo Pope, Claimant's Attorney	December 14, 1981
SAIF Corp Legal, Defense Attorney	Order on Reconsideration

The motion of the SAIF Corporation for reconsideration of the Board's Order on Review, dated September 24, 1981, is denied and that Order is readopted and republished.

IT IS SO ORDERED.

EARL W. PERDUE, Claimant	WCB 79-6785
Quentin D. Steele, Claimant's Attorney	December 14, 1981
SAIF Corp Legal, Defense Attorney	Order on Remand

Reviewed by Board Members Barnes and Lewis.

The Court of Appeals issued its Order on July 13, 1981 reversing the Board's Order on Review (entered October 28, 1980), finding that claimant sustained an aggravation of a prior compensable injury and not a new injury;

The Board has now received the court's Judgment and Mandate, issued October 29, 1981; therefore,

The claim is remanded to SAIF for processing of claimant's aggravation claim and payment of all benefits according to law.

IT IS SO ORDERED.

IRA I. PUGH, Claimant
Peter W. McSwain, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-00953
December 14, 1981
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.

LEROY R. SCHLECHT, Claimant
Pozzi, Wilson et al, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 79-06304
December 14, 1981
Order on Reconsideration

The motions of the SAIF Corporation and of claimant for reconsideration of the Board's Third Party Distribution Order, dated September 24, 1981, are denied and that Order is re-adopted and republished.

IT IS SO ORDERED.

Board Member McCallister, concurring:

I join in the denial of reconsideration based on my understanding that our use of the term "certainty" in connection with estimating of future claim costs means "reasonable certainty".

JOSEPH A. SIZEMORE, Claimant
Steven Yates, Claimant's Attorney
Brian Pocock, Defense Attorney
David O. Horne, Defene Attorney

WCB 80-07096 & 80-05363
December 14, 1981
Request for Review by Claimant

Reviewed by Board Members Barnes and McCallister.

Claimant seeks Board review of Referee McSwain's order which required Employer's Insurance of Wausau to accept as compensable claimant's June 5, 1980 arthroscopy and associated time loss, denied claimant's request for aggravation or new injury benefits against either Wausau or Industrial Indemnity and found claimant entitled to no further permanent disability benefits for his knee condition.

Claimant sustained a compensable injury to his left knee in 1975 which eventually required excision of the lateral meniscus. A Determination Order entered on January 17, 1977 allowed 15° for 10% loss of the left leg. A stipulation of May 9, 1977 allowed claimant a total award of 37.5° for 25% loss of the left leg.

On February 17, 1978 claimant, while pushing a cart full of veneer, slipped on a wet floor and suffered a pain in the left lower lumbar region of his back. The injury was eventually diagnosed as lumbosacral strain by Dr. Donahoo. A Determination Order of August 29, 1979 awarded claimant 48° for 15% unscheduled low back disability.

Following his return to work, claimant fell off a platform and again injured his back. Following a program of vocational rehabilitation, a third Determination Order was entered awarding only additional temporary total disability benefits. A stipulation followed on May 9, 1980 allowing claimant an additional 10% permanent partial disability for a total of 25% unscheduled low back disability.

On June 5, 1980, claimant underwent a diagnostic arthroscopy on his left knee. Wausau, the insurer at the time of the knee injury in 1975, and Industrial Indemnity, the insurer at the time of the back injury in 1978, both denied responsibility for the claim. Wausau refused to participate in a .307 order on the grounds that claimant failed to sustain a compensable aggravation to his knee.

The Referee found that the issue of whether the claimant suffered any further permanent knee disability as a result of the 1978 back injury was raisable at the time of the 1980 stipulation and thus now foreclosed. The Referee additionally found that with regard to the aggravation claim against Wausau, the claimant suffered a "dry aggravation" and was entitled to no further permanent disability but only medical expenses and time loss associated with the June 5, 1980 arthroscopy.

The issues on review are far from clear; nevertheless, the Board has determined the issues before it to be: (1) Whether the claimant suffered a compensable worsening of his knee condition; (2) if there has been a worsening, whether it was the result of the 1978 back injury; (3) whether, due to the 1980 stipulation between claimant and Industrial Indemnity, Wausau is relieved of any further liability for the claimant's knee condition following the 1978 back injury; and (4) whether the Referee erred in determining extent of disability of claimant's knee condition.

The threshold question is whether there has been a compensable worsening. ORS 656.273. Although the claimant has presented minimal evidence on the issue, we are convinced that a worsening in some degree has been established. The issue is not whether claimant's knee condition is worse since the time of the Determination Order of April 29, 1979 or the stipulation of May 9, 1980, each of which related only to claimant's back injury, but since the last arrangement of compensation for claimant's knee injury. There is no better evidence in the record with regard to the worsening of the claimant's knee condition than reports from those doctors who actually viewed the claimant's knee. This is especially true since the record is replete with statements from doctors who deem the claimant to exhibit a significant amount of functional overlay and a tendency to hyperbolize. The arthrogram performed on September 9, 1977 produced findings of slight deformity of the posterior horn of the lateral meniscus, normal cartilaginous structures, and normal articular surfaces of the femur, patella and tibia with no change in the medial meniscus since the October 22, 1975 arthrogram. The June 5, 1980 arthroscopy, however, revealed for the first time anterolateral rotary instability, some chondromalacia changes and some flattening of the lateral femur. The 1980 arthroscopy thus indicates an objective worsening in the claimant's knee condition, albeit minor.

Having determined that claimant has suffered a worsening of his knee condition, we turn to the issue of whether the worsening was the result of the back injury sustained by the claimant in 1978. The evidence on this issue is more well-defined. Dr. Donahoo states in his April 25, 1978 report:

> "...please be informed that his left knee injury of September 13, 1975 was not aggravated by his present back injury and his present residuals appear to be directly related to his previous injury..."

Dr. James, in his November 17, 1980 letter, remarked that the claimant's current knee problems relate to the injury of 1975. Both Dr. James and Donahoo were aware of the 1978 back injury. It would be difficult to find clearer statements on the issue. We conclude that the claimant did not sustain a new injury to his knee in 1978.

The third issue involves the effect of the May 9, 1980 stipulation. The Referee found that any issue of further permanent disability of the claimant's knee following the 1978 back injury was raisable at the time of the stipulation and thus stipulated away. We conclude that the Referee erred in assigning such effect to the stipulation. The only condition referred to in the stipulation relates to the claimant's back. The stipulation followed the Determination Order of April 29, 1980 which followed the August 29, 1979 Determination Order. These orders only relate to time loss and disability with regard to claimant's back. The only way that the stipulation could have the effect assigned to it by the Referee would be to find that the claimant sustained a new injury to his knee in 1978. We have found to the contrary. Moreover, the stipulation was entered into between the claimant and Industrial Indemnity only, the carrier at the time of the 1978 back injury. Industrial Indemnity could not be liable for an aggravation of the claimant's knee unless a new injury was sustained to it in 1978. We have found there was no 1978 knee injury. The only objective evidence of a worsening of the claimant's knee condition was not obtained until the June 5, 1980 arthroscopy and thus the knee condition could not have been an issue at the time the stipulation was entered.

Finally, we conclude that the Referee erred in making a determination of extent of further permanent disability to claimant's knee. Although we agree with the Referee that the only time loss referrable to the knee condition was associated with the 1980 arthroscopy, the medical reports do indicate that claimant's permanent disability may now be greater than previously determined. It would also appear that the Referee, due to the effect he gave to the 1980 stipulation, only considered evidence of worsening following the 1978 back injury rather than from the last arrangement of compensation for the knee injury. That was incorrect.

ORDER

The Referee's order dated March 16, 1981 is modified. It is ordered that the July 18, 1980 denial issued by Wausau be reversed and the claim be remanded to Wausau for proper processing.

Claimant's attorney is entitled to a carrier-paid attorney fee for prevailing on a denied claim rather than a fee payable from claimant's compensation as ordered by the Referee. Claimant's attorney is awarded as and for a reasonable attorney fee for services rendered at the hearing and on Board review the sum of $1,600, payable by Wausau.

The remainder of the Referee's order is affirmed.

ANNA STOCKTON, Claimant
Allan H. Coons, Claimant's Attorney
Richard Lang, Defense Attorney

WCB 77-03805
December 14, 1981
Order on Reconsideration

Claimant's request for reconsideration of the Board's Order on Review, dated October 30, 1981, is denied.

Claimant's aggravation rights expire in May 1982. At that time, claimant is invited to apply to the Board for own motion relief with then-current medical information about the permanency of her vision loss. If it is medically documented at that time that claimant's vision loss is permanent, there will be a compelling basis for then granting own motion relief.

IT IS SO ORDERED.

REID F. STOCKWELL, Claimant
Robert W. Hill, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-02514
December 14, 1981
Request for Review by SAIF

Reviewed by Board Members Barnes and McCallister.

SAIF Corporation seeks Board review of Referee Wolff's order which granted claimant compensation equal to 112° for 35% unscheduled disability for back, neck and shoulder disability. SAIF contends that claimant is not entitled to any compensation for permanent disability, or at least that the Referee's award should be decreased.

After de novo review, we modify the order of the Referee. Based upon the facts recited by the Referee, when considered in light of OAR 436-65-600 et. seq., we conclude that claimant would be more properly compensated by an award equal to 32° for 10% unscheduled disability. The Referee stated his higher award was justified by Dr. Henderson's opinion. The doctor, however, offered a wide range of opinions: "orthopedic picture is now essentially normal"; claimant "participates in sports such as tennis"; whether claimant can do even "light lifting with any frequency . . . is a grey area". Dr. Henderson's opinions thus could justify a variety of conclusions and therefore do not really justify any conclusion.

ORDER

The order of the Referee, dated May 19, 1981, is modified.

Claimant is hereby granted compensation equal to 32° for 10% unscheduled disability for injury to his back, neck and shoulder. This award is in lieu of that granted by the Referee's order which, in all other respcets is affirmed.

ALAN R. TOWNSEND, Claimant
Philip L. Nelson, Claimant's Attorney
E. Kimbark MacColl, Defense Attorney
Marcus K. Ward, Defense Attorney
Jerry K. McCallister, Defense Attorney

WCB 79-09947 & 80-01573
December 14, 1981
Request for Review by Employer

Reviewed by Board Members Barnes and Lewis.

The self-insured employer seeks Board review of Referee Menashe's order which set aside its denial of claimant's aggravation and affirmed SAIF's denial of a new injury claim. The self-insured employer contends claimant suffered a new injury that is SAIF's responsibility. Claimant cross-appeals and contends aggravation of a compensable injury or, if a new injury, that claimant is not time-barred from filing.

The generally elusive question of carrier responsibility in the aggravation versus new injury distinction is especially elusive in this case. We conclude that we cannot improve on the Referee's analysis. Therefore, we affirm and adopt the Referee's order.

ORDER

The Referee's order dated November 25, 1980 is affirmed. Claimant's attorney is awarded $200 as a reasonable attorney's fee for services rendered at this Board review, payable by the self-insured employer.

HELEN TURNQUIST, Claimant
Larry Bruun, Claimant's Attorney
Richard Lang, Defense Attorney

WCB 79-01686
December 14, 1981
Request for Review by Employer

Reviewed by Board Members Barnes and McCallister.

The employer seeks Board review of Referee Ail's order that set aside its denial of claimant's occupational disease claim for her psychological condition.

Claimant was employed as a secretary by the City of Portland, working primarily in the police department. Over the course of her employment she was reprimanded for tardiness, absenteeism, missing deadlines and inability to get along with fellow employees. At one point she temporarily transferred to another department and was told her police department job would be held open for her. However, upon her return to the police department her old position had been eliminated and she had to accept another job with a 3% decrease in pay. Shortly thereafter claimant sought medical attention and was diagnosed as suffering from depressive neurosis.

In Henry McGarrah, WCB Case No. 79-05440 (December 7, 1981), we concluded that an adverse psychological reaction to normal and reasonable supervision is not within the scope of employment when the percipitating event (supervision) occurred because the employee was not functioning within the scope of employment. There are elements of both reasonable and unreasonable supervision in this case. On the one hand, reprimanding an employee for tardiness, absenteeism, etc. is a classic example of what we had in mind in McGarrah: "Just as the employer must take the employee as he is, the employee must to a large extent take the job as it is." Order on Review at 4. On the other hand, the circumstances of claimant's job transfer and subsequent demotion are not entirely reasonable.

In Kay L. Murrens, WCB Case No. 79-01573 (December 7, 1981), we concluded that, when there is possible work and nonwork causation of a disease, claimant must prove that the significant preponderance of causation was work-related in order for the disease to be compensable under ORS 656.802. We said the appropriate methodology in occupational disease cases is to:

"(1) Identify possible work causation;

"(2) Identify possible off-work causation;

"(3) Determine if the claimant has sustained the burden of proving a significant preponderance of work causation (something akin to the shipyard worker who receives virtually all exposure to asbestos at work or the worker who receives virtually all exposure to radiation at work). This approach to the burden of proof will often require the claimant to prove a negative that off-work causation did not contribute more than minimally to the disease in question. We appreciate the practical difficulties of requiring proof of a negative, but see no other alternative to the legislatively mandated requirements of ORS 656.802 (1)(a)."

Order on Review at 6-7.

Applying that analysis here, we conclude:

(1) Possible work causation that arose within the scope of claimant's employment consists mainly of claimant's perception that her supervisors were spreading the rumor that she was an alcoholic and secondarily the circumstances of her job transfer and subsequent demotion.

(2) Possible nonwork causation includes: claimant's divorce; claimant's difficulties with the man with whom she was living who was an unemployed alcoholic and who had physically and mentally abused claimant; claimant's constant use of amphetamines and sedatives for over 15 years on doctor's prescription; and claimant's estranged relationship with her mother.

(3) Which possible causation preponderates? Dr. Maletsky, noting both possible work and nonwork causation, testified that claimant's job difficulties "overshadowed" her other difficulties. This could support an inference, required by Murrens, that the significant predominant causation was work related. Dr. Paveresh's testimony does not require an inference; he testified directly and without qualification that the primary cause of claimant's breakdown was her long term use of prescription drugs. We conclude that claimant has not sustained her burden of proving the negative required by Murrens -- "that off-work causation did not contribute more than minimally to the disease in question." Order on review at 7.

ORDER

The Referee's order dated July 9, 1980 is reversed.

✓ROBERT VANDALL, Claimant	WCB 80-06653
Jack Ofelt, Claimant's Attorney	December 14, 1981
Richard Lang, Defense Attorney	Request for Review by Employer

Reviewed by Board Members McCallister and Lewis.

The employer seeks Board review of Referee Gemmell's order which found the claimant's fatal heart attack compensable and remanded the claim to it for acceptance and the payment of benefits as required by law and granted claimant's attorney an attorney fee of $3,000. The employer contends that claimant's myocardial infarction is not causally related to his employment and that the attorney fee granted is excessive.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated April 23, 1981 is affirmed. Claimant's attorney is awarded $400 as a reasonable attorney's fee for services rendered at this Board review, payable by GAB.

WILLIAM VAN WINKLE, Claimant	WCB 79-06027 & 79-06516
Allan Coons, Claimant's Attorney	December 14, 1981
SAIF Corp Legal, Defense Attorney	Request for Review by SAIF

Reviewed by Board Members McCallister and Lewis.

The SAIF Corporation seeks Board review of Referee Baker's order which found that claimant had sustained a new industrial injury and remanded the claim to it for acceptance and payment of benefits as required by law.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated January 11, 1980 is affirmed.

RANDY R. WOODRUFF, Claimant
Merrill Schneider, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-11602
December 14, 1981
Request for Review by Claimant and SAIF

Reviewed by Board Members Barnes and Lewis.

SAIF and the claimant request Board review of Referee Gemmell's order which determined SAIF had a right to deny claimant's claim after it had been accepted, compensation paid and a Determination Order issued; ordered the denial reversed and the claim accepted; and granted claimant compensation equal to 32° for 10% unscheduled back disability. SAIF contends their denial should be affirmed on the basis that claimant was not an employee of the employer, but rather an independent contractor. Claimant contends SAIF has no right to deny his claim at this time after earlier accepting it and that the award granted for permanent disability is inadequate.

The Board affirms and adopts the Referee's order with the additional observation that SAIF's denial was issued within one year of the Determination Order and, although we have doubts about a denial issued later than that, we have upheld a carrier's right to change its mind and deny a claim within one year of a Determination Order. Raphael E. Newtson, 31 Van Natta 132 (1981).

ORDER

The Referee's order, dated February 27, 1981, is affirmed. Claimant's attorney is awarded $600 for services rendered on Board review, payable by SAIF.

NELLIE WRIGHT, Claimant
Dan Dziuba, Claimant's Attorney
Keith D. Skelton, Defense Attorney

WCB 80-8998
December 14, 1981
Request for Review by Employer
Cross Appeal by Claimant

Reviewed by Board Members McCallister and Lewis.

The employer/insurer appeals Referee Howell's order which awarded claimant 50% unscheduled low back and neck disability. A Determination Order, issued March 7, 1980, awarded claimant 15% low back and neck disability. The employer/insurer appeals the Referee's award as being excessive. Claimant cross-appeals, claiming that she is permanently and totally disabled.

The Board affirms and adopts the order of the Referee.

ORDER

The order of the Referee, dated April 27, 1981, is affirmed.

Claimant's attorney is hereby granted as a reasonable attorney's fee a sum equal to $450, payable by the employer/insurer.

GARLAND J. ARNAUD, Claimant WCB 79-10623
Galton, Popick & Scott, Claimant's Attorneys December 18, 1981
SAIF Corp Legal, Defense Attorney Request for Review by SAIF

The SAIF Corporation seeks Board review of Referee Gemmell's order which set aside its denial and found claimant's cardiac condition to be compensable.

Claimant's brief applauds the Referee's order as one of the "best organized and cogent...this office has encountered." We agree that the Referee's detailed summary of all the evidence is impressive. However, we find errors in the facts as stated by the Referee and omissions in the Referee's findings of fact.

Claimant was employed as a line foreman for Pacific Power and Light. The incident that gave rise to this claim occurred June 27, 1979. The prior evening, at dinner time, claimant experienced some generalized physical discomfort. The next day, June 27, while at work he was hoisted to the top of a 60-foot electrical tower and pryed loose some hooks in the tower. He then drove to a nearby location and walked down an incline to locate some survey stakes. There are various versions of claimant's symptoms while working on the tower and looking for the survey stakes. In any event, claimant's physical distress, apparent the prior evening, became more acute while searching for the survey stakes, and he was ultimately taken to the hospital.

No single diagnosis emerged. It became clear in the course of claimant's treatment that he had significant pre-existing coronary artery disease with 100% occlusion of the right coronary artery and 70% occlusion of the posterior lateral ventricular branch. Claimant was first treated or examined by Drs. Reynolds, Walker and Daniel. Their reports are inconclusive with diagnoses that run the range of chest pain, angina pectoris, unstable angina pectoris, coronary insufficiency and possible minor myocardial infarction. All these diagnoses, except perhaps that of possible infarction, are consistent with a spontaneous onset of symptoms caused by claimant's pre-existing coronary artery disease.

As we view this case, the question thus becomes whether claimant's work activities of June 27, 1979 worsened his underlying condition within the meaning of Weller v. Union Carbide, 288 Or 27 (1979). If, on that day, claimant suffered a myocardial infarction which, by definition, means death of heart tissue, there would be a firm foundation for an affirmative answer.

The best evidence of whether claimant suffered an infarction at work on June 27, 1979 comes from Drs. Griswold and Kloster, both of whom became involved in this case only after it was in litigation, but both of whom had the benefit of all data generated earlier on which to base their opinions. Dr. Griswold thinks claimant suffered an infarction. He bases his opinion primarily on comparison of EKG results from June 27, June 28 and September 11, 1979 with primary reliance on the latter EKG. Dr. Kloster thinks claimant did not have an infarction. He bases his opinion on serum enzyme tests done after claimant was hospitalized, and a subsequent ventriculogram. The serum enzymes were normal. The ventriculogram showed normal heart wall motion.

The ensuing debate between Drs. Griswold and Kloster raised questions about the relative diagnostic value of the various diagnostic procedures upon which each relied. Is a September EKG, relied upon by Dr. Griswold, reliable in determining whether there was an infarction in June? Are serum enzyme tests, relied on by Dr. Kloster, really able to document necrosis of just a few grams of heart tissue? This was truly a battle of titans of the Oregon medical community, each with impressive credentials, each with plausible reasons to support their respective opinions. If we had to choose, we would find Dr. Kloster's reasoning supporting his opinions to be more persuasive. But we do not have to so choose; suffice it to say that from a consideration of all of the evidence, we are not persuaded that claimant sustained his burden of proving he suffered a myocardial infarction on June 27, 1979.

We are then left with the unquestionable facts that:
(1) Claimant had pre-existing coronary artery disease; and
(2) he suffered chest pain/angina pectoris symptoms on June

27, 1979. To be compensable, however, the June 27 chest pain would have had to involve a worsening of the underlying coronary artery disease which had probably been symptomatic the prior evening at dinnertime. We find no persuasive evidence that claimant's work activities on June 27 or any other date worsened his underlying coronary artery disease.

ORDER

The Referee's order, dated March 10, 1981, is reversed and the denial issued December 3, 1979 is approved.

KAREN V. BINDER, Claimant
Steven C. Yates, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-08841
December 18, 1981
Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

Claimant seeks Board review of Referee Mannix's order which affirmed SAIF's denial of claimant's psychological condition and modified temporary total disability award by a Determination Order dated November 3, 1980. Claimant contends her psychological condition is the result of a compensable injury and that the Refereee erred in modifying the temporary total disability award.

ORDER

The Referee's order dated May 27, 1981 is affirmed.

ANTONIO CASORIO, Claimant
Vincent G. Ierulli, Claimant's Attorney
Steven R. Reinisch, Defense Attorney

WCB 80-6974E
December 18, 1981
Request for Review by Employer

Reviewed by Board Members McCallister and Lewis.

The employer seeks Board review of Referee Pferdner's order which affirmed the August 16, 1980 Determination Order whereby claimant was granted compensation for permanent total disability.

The Referee found claimant was "too physically disabled to be considered as an 'odd lot' worker and . . . "that motivation, or lack thereof, was not a factor to be considered. The employer argues that claimant is not permanently and totally disabled based on physical disability alone and that his motivation must be considered. We agree that the medical evidence alone does not support a total disability award. However, when combined with claimant's social/vocational factors, we do reach the same conclusion as did the Referee. Dock A. Perkins, WCB Case No. 78-09922 (June 25, 1981). The order of the Referee should be affirmed.

ORDER

The Referee's order dated May 8, 1981, is affirmed. Claimant's attorney is awarded $300 as a reasonable attorney's fee for services rendered at this Board review, paybable by United Pacific.

RAY C. CHILDRESS, Claimant
Douglas L. Minson, Claimant's Attorney
Cosgrave, Kester et al, Defense Attorneys

WCB 80-5663
December 18, 1981
Request for Review by Employer

Reviewed by Board Members McCallister and Lewis.

The employer seeks Board review of Referee Pferdner's order which granted claimant compensation for permanent total disability for his injury of July 29, 1974. The employer contends this award is excessive.

The Board affirms and adopts the order of the Referee.

ORDER

The order of the Referee dated April 21, 1981 is affirmed. Claimant's attorney is granted as a reasonable attorney's fee a sum equal to $350, payable by the carrier.

WARREN DONOVAN, Claimant
Welch, Bruun & Green, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

Own Motion 81-0310M
December 18, 1981
Own Motion Determination

Claimant's claim for own motion relief was reopened by a Board's order, dated October 31, 1979. Claimant underwent surgery on April 18, 1979, on June 18, 1979 and on November 15, 1979. The last surgery was for the amputation of claimant's left foot and ankle. Claimant's leg claim is now ready for closure. We find, based on the report of the Orthopaedic Consultants, that claimant's condition was medically stationary on September 24, 1981 and his time loss benefits should terminate as of that date.

The last award of compensation was a stipulation which granted claimant an award for 85% loss of function of the left leg. Assuming, but not agreeing, that claimant's disability is to the leg radical, we conclude claimant is entitled to compensation for at least 100% of the foot [ORS 656.214(c)(d)]. This equates to 90% of the leg, or 135°.

ORDER

The claimant is hereby granted compensation for temporary total disability from April 17, 1979 through September 24, 1981, less time worked. Claimant is also granted compensation equal to 135° for 90% loss of the left leg. This award is in lieu of all previous awards for permanent partial disability. Claimant's attorney has been granted a fee by the October 31, 1979 Own Motion Order.

PHYLLIS A. HANKINS, Claimant — WCB 80-4836
Emmons, Kyle et al, Claimant's Attorneys — December 18, 1981
Bullivant, Wright et al, Defense Attorneys — Request for Review by Employer

Reviewed by Board Members Barnes and McCallister.

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

Claimant sustained a compensable injury to her back on October 4, 1978. At the time, she was employed as a receptionist and medical secretary for Dr. Baier. Claimant has not worked full time since February 1979. In September 1979 she began teaching evening adult-education classes on a part-time basis. Her teaching load consisted, at most, of two three-hour classes per week.

Claimant's injury has resulted in significant complaints of pain. Claimant indicates that after any sustained activity, whether it be walking, sitting, bending, etc., she has pain. Although the objective findings are not consistent with the extent of claimant's complaints, Dr. McGee has said that claimant cannot work a full eight-hour day. He feels she could perform light sedentary work for two to three hours a day. He left the decision of how much work to undertake to her judgment based on her pain.

The Board is not persuaded that claimant is permanently and totally disabled. First of all, claimant is working (or was at the time of the hearing). Claimant is highly skilled in secretarial/receptionist-type work, which is light sedentary work. She also is qualified to teach these skills to others. Both jobs are flexible--allowing her freedom to stand and sit when necessary. At first glance, it would appear that claimant is motivated, because she went to work teaching night classes on her own initiative. However, when she was offered a third class by the college, which was well within the limitations placed on her by Dr. McGee, she turned it down. When her classes ended in the summertime, she refused offers of job placement assistance from a rehabilitation specialist. She advised the specialist that she spends so much time on her walking and swimming program that she would not have time to work any additional hours. The specialist reported claimant seems to expect workers' compensation to provide for her. The claimant's vocational rehabilitation file was closed due to lack of cooperation.

Based on the guidelines set forth in OAR 436-65-600, et seq, we make the following findings:

	+	-0-	-
Impairment (including pain)	20		
Age (56)	10		
Education (high school and 3 years college)			15
Work Experience (over two years)	10		
Adaptability (heavy to light)	10		
Mental Capacity (average)		-0-	
Emotional and Psychological Findings (Some unwillingness to adjust)			5
Labor Market Findings (47%)			25

When plus factors are combined, the number 42 is reached. When minus factors are combined, we reach -39. 42 x .39 = 16.38. 42 - 16.38 = 25.62 or 25% unscheduled disability for injury to claimant's back. We conclude that claimant would properly be compensated for her disability with an award equal to 80° for 25% disability. This is an increase of 10% over the award granted by the May 6, 1980 Determination Order.

ORDER

The order of the Referee, dated June 9, 1981, is modified.

Claimant is hereby granted compensation equal to 80° for 25% unscheduled disability for her back injury. This award is in lieu of that granted by the Referee which, in all other respects, is affirmed.

Claimant's attorney is allowed 25% of the increased compensation granted by this order over that granted by the May 6, 1980 Determination Order as and for a reasonable attorney fee.

This case is before us on remand from the Court of Appeals for further consideration pursuant to the Supreme Court's decision in James v. SAIF, 290 Or 343 (1981).

We have considered and resolved the policy issues contemplated by the Court's remand in Henry McGarrah, WCB Case No. 79-05440 (December 7, 1981), and Kay L. Murrens, WCB Case No. 79-01573 (December 7, 1981). All that remains is application of those doctrines.

So much has been written about this case already that we find it unnecessary to again repeat all the facts. See James v. SAIF, 44 Or App 420 (1980), revised 290 Or 343 (1981), decision on remand 51 Or App 201 (1981).

As the Supreme Court noted, the record would support an inference that the predominant cause of claimant's psychological condition was work related and would also support a contrary inference. 290 Or at 351. We have to, in effect, render the workers compensation equivalent of a comparative negligence verdict. In a borderline situation, like this one, we can only do so by relying on a large dose of our insight and intuition, see Kay L. Murrens, supra, Order on Review at 7, just as a jury would do in a comparative negligence context.

Suffice it to say that our insight and intuition lead us in this case to conclude that work causation significantly predominated in producing claimant's psychological disability. By way of the limited possible elaboration, we can only say that we find the suggested nonwork causation satisfactorily explained in the record as to only have contributed, at most, minimally to claimant's psychological problems.

ORDER

On remand and reconsideration, the Board adheres to the conclusions stated in its Order on Review dated May 17, 1979; the Referee's order dated November 22, 1978 is again affirmed.

The carrier has moved for reconsideration of the Board's order denying the carrier's motion to dismiss claimant's request for Board review. The Board has reconsidered its former order and adheres thereto.

The carrier cites Albiar v. Silvercrest Industries, 30 Or App 281 (1977), in support of its motion. The court there held that "the time within which notice of the request for Board review is required to be given, i.e., served on the opposite parties is an 'irreducible hardcore of necessary function that cannot be dispensed with in any orderly investigation of the merits of the case,'" citing 3 Larson, § 78.10 (1973), and Nollen v. SAIF, 23 Or App 420, 423 (1975). In a departure from prior appellate decisions which liberally applied statutory notice requirements in the workers compensation context, see Stroh v. SAIF, 261 Or 117 (1972), the court held that the claimant's request for Board review in Albiar was properly dismissed because he had failed to serve the opposite parties with copies of the request for review within 30 days of the date of the Referee's order.

Our research reveals no subsequent appellate court decision citing Albiar or which reaches the same result. By the same token, we have not discovered any decision to the contrary.

We are concerned that the Court of Appeals' decision in Albiar was not made with complete understanding of Board procedures. Upon receipt of a request for review, the Board sends a computer-generated letter acknowledging the request to all parties--the claimant, the employer, the insurance carrier, if any, and all attorneys of record. This acknowledgment letter is usually mailed within 24 to 48 hours of our receipt of a request for review and, since the acknowledgment letters started being computer-generated earlier this year, in no case has it taken more than seven days for the acknowledgment letter to be mailed. Thus, if the party requesting review does not serve copies of the request on the opposite parties, the Board's acknowledgment letter supplies actual notice of the request for review.

The only possible interest the other parties have, other than trying to win on hypertechnicalities, is to know whether the Referee's order is final pursuant to ORS 656.289(3), which states the Referee's order is final 30 days after being mailed unless there is a request for review. However, the Board rules have already compromised this knowledge interest somewhat. OAR 436-83-700(2) provides, in effect, that a request for Board review is timely if postmarked by the 30th day after the Referee's order. Thus, even if served with a request for Board review, the parties' knowledge of finality can now be delayed until 30 days plus the due course of the mails.

Given the Board's almost instantaneous response to a request for review with an acknowledgment being sent to all parties, the parties' interest in knowledge of finality can be further compromised for a few more days if knowledge of the request for review comes from the Board rather than from the requestor. We simply cannot agree with the Albiar court that this possible additional delay of up to a few days amounts to "an irreducible hardcore of necessary function" that comes even close to outweighing "the thwarting of the protective functions of the act." 3 Larson, supra, § 78.10.

ORDER

Upon reconsideration, the Board adheres to its prior Order Denying Dismissal.

EDWARD MARSDEN, Claimant	WCB 80-01839
Rolf Olson, Claimant's Attorney	December 18, 1981
SAIF Corp Legal, Defense Attorney	Request for Review by SAIF

Reviewed by Board Members McCallister and Lewis.

SAIF seeks Board review of Referee Foster's order which set aside its denial of aggravation for claimant's low back condition. SAIF contends that the preponderance of medical evidence establishes that claimant suffered a separate injury, and that if any worsening occurred, it was to a non-compensable 1972 injury.

ORDER

The Referee's order dated April 28, 1981 is affirmed. Clamant's attorney is awarded $450 as a reasonable attorney's fee for services rendered at this Board review, payable by SAIF.

DANNY J. McALPIN, Claimant	WCB 80-6769
R. Ray Heysell, Claimant's Attorney	December 18, 1981
SAIF Corp Legal, Defense Attorney	Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

Claimant seeks Board review of Referee Seifert's order which affirmed the carrier's denial of his claim for aggravation.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated June 11, 1981 is affirmed.

JOHN M. REED, Claimant
Richard Butler, Attorney

WCB 80-07045
December 18, 1981
Request for Review by Claimant

Reviewed by Board Members Barnes, McCallister and Lewis.

Claimant seeks Board review of Referee Braverman's order which dismissed his request for hearing on the ground that he failed to appear for hearing.

The Board affirms and adopts the order of the Referee with the additional observation that, more than five years having passed since claimant's 1970 industrial injury, claimant has no present hearing rights other than for denial of medical services; and, as best as we can understand the large volume of material claimant has submitted, no issue about denial of medical services was raised by his request for hearing.

ORDER

The Referee's order dated February 13, 1981 is affirmed.

RICHARD E. SMITH, Claimant
Becker, Sipprell & Hunt, Claimant's Attorneys
Schwabe, Williamson et al, Defense Attorneys

WCB 79-07199
December 18, 1981
Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

Claimant seeks Board review of Referee St. Martin's order which granted him additional compensation for a total award equal to 48° for 15% unscheduled disability for injury to his neck and upper back. Claimant contends this award is inadequate.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated May 29, 1981 is affirmed.

ROY SMYLIE, Claimant
Robert L. Chapman, Claimant's Attorney
Black, Kendall et al, Defense Attorneys

WCB 80-10714
December 18, 1981
Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Daron's order which affirmed the carrier's denial. The issue is compensability of claimant's November 5, 1980 injury.

The Board affirms and adopts the order of the Referee. [See Rogers v. SAIF, 289 Or 633, 642-43 (1980).]

ORDER

The Referee's order dated February 4, 1981 is affirmed.

CONNIE J. STEFFEN, Claimant	WCB 79-08967
KAY E. ACUNA, Claimant	WCB 79-9668
Guy A. Randles, Claimants' Attorney	December 18, 1981
SAIF Corp Legal, Defense Attorney	Request for Review by Claimants

Reviewed by Board Members McCallister and Lewis.

The claimant seek Board review of Referee Ail's order which affirmed SAIF's denial of responsibility for claimant's alleged occupational disease. The claimants contend that the preponderance of evidence proves that time loss was sustained due to heavy metal intoxification.

ORDER

The Referee's order dated May 22, 1981 is affirmed.

LORENA E. TUCKER, Claimant	WCB 80-2944
D. Keith Swanson, Claimant's Attorney	December 18, 1981
SAIF Corp Legal, Defense Attorney	Request for Review by SAIF

Reviewed by Board Members McCallister and Lewis.

The SAIF Corporation seeks Board review of Referee Peterson's order which granted claimant compensation for permanent total disability, allowing it to credit a temporary total disability overpayment against the increased award.

The Board affirms and adopts the order of the Referee.

ORDER

The order of the Referee, dated December 31, 1980, is affirmed. Claimant's attorney is granted as a reasonable attorney's fee a sum equal to $400, payable by the employer/carrier.

SHARON S. WEBSTER, Claimant
Peter Hansen, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 79-10543
December 18, 1981
Order on Remand

The Court of Appeals, on June 29, 1981, issued an Opinion on Judicial Review of the Board's Order on Review (entered November 20, 1980), reversing that portion of the order which affirmed the denial of a claim for an aggravation of claimant's compensable psychiatric condition and remanding this claim for further proceedings;

The Board has now received the Court's Judgment and Mandate issued October 5, 1981; accordingly,

The SAIF Corporation's denial of claimant's aggravation claim is overturned, and the claim is remanded to SAIF for processing and for the provision of all benefits to which claimant is entitled under the Act;

Furthermore, claimant's attorney is entitled to an award of attorney fees for services rendered at the Hearings and Board levels; accordingly, claimant's attorney is awarded $1,000.00 as a reasonable attorney's fee therefor.

IT IS SO ORDERED.

HOWARD YEAGER, Claimant
Edward C. Olson, Claimant's Attorney
Edwin Harnden, Defense Attorney

WCB 79-4381E
December 18, 1981
Request for Review by Employer

Reviewed by Board Members Barnes, McCallister and Lewis.

The employer requests Board review of Referee Seifert's order affirming the Determination Order of March 28, 1979 which awarded the claimant 52.5° for 35% loss of the left leg and affirming another Determination Order also issued on March 28, 1979 which awarded the claimant permanent total disability.

The Board affirms and adopts the Referee's order and adds the following additional comments in response to the points raised by the parties in their respective briefs.

The essence of the employer's first contention revolves around certain films made of the claimant performing various physical tasks around his home. The employer argues that these films demonstrate that the claimant is not permanently and totally disabled. The mere fact that a claimant remains capable of performing some physical activity does not necessarily imply that the claimant is not permanently and totally disabled. Swanson v. Westport Lumber Co., 4 Or App 417 (1971). As the Referee correctly noted, the films as presented are not sufficient to overturn the extensive medical evidence in support of the claimant's status as permanently and totally disabled.

The employer also contends that the claimant has failed to make reasonable efforts to obtain regular and gainful employment as required by ORS 656.206(3). The record indicates that neither the claimant's employer before his injury nor his union were able to find a position for him. A private vocational organization was unable to assist him. The Callahan Center felt that it would be a waste to send the claimant through an assessment. We conclude that the record demonstrates an adequate attempt to obtain employment had been made under the circumstances.

The employer contends as a second issue that if the claimant were entitled to an award for permanent total disability, he would not be entitled to an additional award for permanent partial disability. That is not what the Referee held.

Whether or not a claimant may receive simultaneous awards of permanent total disability and permanent partial disability for the same injury was not in issue here. The scheduled award for the claimant's leg was based on an injury which he sustained in 1974. The award of permanent total disability was based on the injury sustained by the claimant in 1977. There is no explanation in the record why the 1974 claim was not submitted for closure until nearly two years after the claimant was medically stationary. That being the case, however, we find that the award for permanent partial disability made by the Determination Order of March 28, 1979 to be a much belated receipt of benefit which was due and owing the claimant. Since each award was based on a separate injury, we find no error on the part of the Referee in upholding both awards.

ORDER

The Referee's order dated April 2, 1981 is affirmed. Claimant's attorney is awarded a fee of $550.00 for services on this appeal.

EMILE H. EULER, Claimant	WCB 79-10877
Don A. Olowinski, Claimant's Attorney	December 24, 1981
SAIF Corp Legal, Defense Attorney	Order on Reconsideration

The Board issued its Order on Review in the above case on December 14, 1981. SAIF Corporation has requested us to reconsider the attorney fee granted which they contend is excessive. After reconsideration, we conclude a more appropriate fee would be $450. OAR 438-47-075. The December 14, 1981 Order on Review should be modified to so indicate.

IT IS SO ORDERED.

JOHN REED, Claimant
Richard Butler, Attorney

WCB 79-07045
December 24, 1981
Denial of Motion to Reconsider

The Board has received a motion for reconsideration of its Order on Review dated December 18, 1981.

Having considered the motion, it is hereby denied.

IT IS SO ORDERED.

ALVIN E. ALLENSWORTH, Claimant
Milo Pope, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-11070
December 28, 1981
Request for Review by SAIF

Reviewed by Board Members McCallister and Lewis.

SAIF requests review of Referee Menashe's Order issued July 10, 1981 which set aside their denial.

The sole issue or appeal is the compensability of claimant's low back strain; specifically whether claimant was within the course and scope of his employment when he was injured.

We affirm the order of the Referee.

ORDER

The Referee's order dated July 10, 1981 is affirmed as is the Order on Reconsideration dated July 30, 1981. Claimant's attorney is awarded $400 as a reasonable attorney's fee for services rendered at this Board review, payable by SAIF.

MARK A. AYERS, Claimant
Charles Colett, Claimant's Attorney
Frank Moscato, Defense Attorney

WCB 80-5968
December 28, 1981
Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

Claimant requests Board review of Referee Ail's order which approved the carrier's denial of his claim for a low back injury.

We affirm the Referee's order.

ORDER

The Referee's order dated June 4, 1981 is affirmed.

RALPH L. BAER, Claimant
James P. O'Neal, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Lindsay, Hart et al, Defense Attorneys

WCB 80-2528
December 28, 1981
Request for Review by SAIF

Reviewed by Board Members McCallister and Lewis.

SAIF seeks Board review of Referee Daron's order which designated it responsible for claimant's occupational disease. SAIF contends that EBI was the insurer during the last injurious exposure and is therefore responsible. SAIF also contends it did not unreasonably delay payment of compensation.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated June 2, 1981 is affirmed. Claimant's attorney is hereby granted as a reasonable attorney's fee a sum equal to $300, payable by SAIF.

ROBIN LEE BARRONG, Claimant
J. David Kryger, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-08730
December 28, 1981
Request for Review by SAIF

Reviewed by Board Members McCallister and Lewis.

The SAIF Corporation seeks Board review of Referee Danner's order which remanded claimant's claim for aggravation to it for acceptance and payment of compensation to which claimant is entitled.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated June 2, 1981 is affirmed. Claimant's attorney is awarded $500 as a reasonable attorney's fee for services rendered at this Board review, payable by SAIF.

THEODORE H. BECK, Claimant
Thomas Reeder, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 79-05947
December 28, 1981
Request for Review by SAIF

Reviewed by Board Members McCallister and Lewis.

The SAIF Corporation seeks Board review of Referee McCullough's order which remanded claimant's aggravation claim to it for acceptance and payment of compensation to which he is entitled.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated June 30, 1981 is affirmed. Claimant's attorney is awarded $200 as and for a reasonable attorney's fee, payable by the SAIF Corporation.

TIMOTHY A. ERICKSON, Claimant
Brown, Burt & Swanson, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney
Allen, Stortz et al, Defense Attorney

WCB 79-06812 & 80-08849
December 28, 1981
Request for Review by SAIF

Reviewed by Board Members McCallister and Lewis.

SAIF seeks Board review of Referee Foster's order which set aside its denial of aggravation from a December 18, 1978 injury (WCB Case No. 79-06812), and affirmed its denial of aggravation from a December 16, 1977 injury (WCB Case No. 80-08849). SAIF contends that there is an intervening injury and that claimant has failed to prove a compensable worsening of his knee condition.

The Board affirms and adopts the order of the Referee.

ORDER

The order of the Referee dated March 13, 1981 is affirmed.

Claimant's attorney is granted, as and for a reasonable attorney's fee a sum equal to $400, for his services at Board review.

SUSAN GARRISON, Claimant
SAIF Corp Legal, Defense Attorney

WCB 80-11150
December 28, 1981
Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

The claimant requests Board review of Referee Braverman's order which affirmed the carrier's denial of her claim for a lumbo sacral strain and a right leg condition.

We affirm the Referee's order.

ORDER

The Referee's order dated May 7, 1981 is affirmed.

JOHN GARY GEIGLEIN, Claimant
Charles Paulson, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-03408
December 28, 1981
Request for Review by SAIF

Reviewed by Board Members McCallister and Lewis.

SAIF Corporation requests review of Referee Mongrain's order which set aside its denial of claimant's left wrist condition.

We affirm the Referee's order.

ORDER

The Referee's order dated June 11, 1981 is affirmed. Claimant's attorney is awarded $350 as a reasonable attorney's fee for services rendered at this Board review, payable by SAIF.

ROBERT HOLLINGSWORTH, Claimant — WCB 80-11433 & 80-8197
Richardson, Murphy et al, Claimant's Attorneys — December 28, 1981
Gary Hull, Defense Attorney — Request for Review by Claimant

Reviewed by Board Members Barnes and McCallister.

Claimant has requested the Board review Referee Mulder's order which upheld the carrier's denial of benefits on the basis that the claimant was not a subject worker within the jurisdiction of the Oregon Worker's Compensation Act. The single issue presented is purely legal, whether or not the claimant is a subject worker under Oregon Worker's Compensation law.

The Board, after de novo review, affirms and adopts the well-reasoned order of the Referee.

ORDER

The order of the Referee dated March 30, 1981 is affirmed.

JAY HOOVER, Claimant — WCB 80-09200
Douglas Green, Claimant's Attorney — December 28, 1981
Steven Reinisch, Defense Attorney — Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Menashe's order which, based upon the Court of Appeals decision in Rivers v. SAIF, 45 Or App 1105 (1980), affirmed the carrier's denial of out-of-state chiropractic treatment.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated June 4, 1981 is affirmed.

ROBERT G. JOHNSON, Claimant — WCB 80-07324
John Stone, Claimant's Attorney — December 28, 1981
SAIF Corp Legal, Defense Attorney — Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Ail's order which affirmed the Determination Order of August 1, 1980 wherein claimant was granted an award of 15% loss of the right leg. Claimant contends that the award is inadequate.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated March 20, 1981 is affirmed.

LARRY D. KEYS, Claimant
David W. Hittle, Claimant's Attorney
Robert E. Joseph, Defense Attorney

WCB 81-00495
December 28, 1981
Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

Claimant requests Board review of Referee Seifert's order dated May 19, 1981 and Order on Reconsideration dated June 23, 1981.

We affirm the Referee's order.

ORDER

The Referee's order dated May 19, 1981 and Order on Reconsideration dated June 23, 1981 are affirmed.

FRANCIS J. KNOBLAUCH, Claimant
Michael Strooband, Claimant's Attorney
R. Ray Heysell, Defense Attorney

WCB 81-01293
December 28, 1981
Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

The claimant requests Board review of that portion of Referee Daron's order which 1) denied his claim for additional temporary total disability 2) granted him an award of permanent partial disability of 13.5° for 10% loss of the right hand and 13.5° for 10% permanent partial disability of the left hand.

The claimant filed no brief so we know only that claimant does not agree with the Referee's order but we do not know any particulars as to why.

ORDER

The Referee's order dated June 29, 1981 is affirmed.

CHARLES A. KNOWLAND, Claimant
John Hemann, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-06592
December 28, 1981
Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Seifert's order which granted claimant an award of 7.5° for 5% loss of the left leg. Claimant contends that the award is inadequate.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated May 7, 1981 is affirmed.

J.B. LEDFORD, Claimant
Michael Strooband, Claimant's Attorney
Paul Bocci, Defense Attorney

WCB 80-09204
December 28, 1981
Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

Claimant requests Board review of Referee Seifert's September 28, 1981 Order of Dismissal.

We affirm the Referee's Order of Dismissal.

ORDER

The Order of Dismissal dated September 28, 1981 is affirmed.

LINDA D. MACKAY, Claimant
Gary Allen, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-02371
December 28, 1981
Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Mannix's order which affirmed the SAIF Corporation's denial of compensability for an alleged fall occurring on November 17, 1980.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated July 24, 1981 is affirmed.

CHARLES MADDOX, Claimant
Rolf Olson, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 79-09937
December 28, 1981
Order on Reconsideration

THE SAIF Corporation's motion for reconsideration complains that the Board's Order on Review dated December 7, 1981 failed to address its jurisdictional argument. Its jurisdictional argument is: When in litigation a claim has been found compensable, but that decision has been appealed and is not yet finally resolved, the Board and its Referees lack jurisdiction to enter orders rating extent of disability.

SAIF's argument that extent hearings be deferred until compensability is finally determined is attractive, and it may well be that the Board should consider adopting a rule that so provides. Unless and until the Board adopts such a rule, however, we address SAIF's jurisdictional argument by stating we are not persuaded. ORS 656.313(1).

SAIF's motion for reconsideration is denied.

IT IS SO ORDERED.

JOSEPH MILBURN, Claimant
Robert Muir, Claimant's Attorney
Steven Reinisch, Defense Attorney

WCB 79-09940
December 28, 1981
Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Johnson's order which affirmed the Determination Order of November 9, 1979. Claimant contends that his claim was prematurely closed; or that his condition became nonstationary within one year of the Determination Order; in the alternative, claimant requests a rating on extent of permanent partial disability.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated June 9, 1981 is affirmed.

MARIA M. MOREHEAD, Claimant
Cash Perrine, Claimant's Attorney
James Larson, Defense Attorney

WCB 80-08715
December 28, 1981
Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Peterson's order which dismissed claimant's request for hearing on the ground that her request for hearing was untimely filed and no good cause was shown for that late request.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated April 29, 1981 is affirmed.

RICHARD A. MORGAN, Claimant
Curtis D. Kinsley, Claimant's Attorney
John L. Klor, Defense Attorney

WCB 79-09470
December 28, 1981
Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

Claimant requests Board review of Referee Leahy's order which approved the Determination Order dated September 25, 1979.

We affirm the Referee's order.

ORDER

The Referee's order dated June 4, 1981 is affirmed.

DAVID NELSON, Claimant
Gregory Parker, Claimant's Attorney
R. Ray Heysell, Defense Attorney

WCB 80-03537
December 28, 1981
Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Mongrain's order which reopened claimant's claim for further compensation for temporary total disability commencing as of May 8, 1980. Claimant contends he is entitled to compensation for temporary total disability from December 1, 1979 to September 1, 1980.

The Board affirms the order of the Referee.

ORDER

The Referee's order dated May 18, 1981 is affirmed.

ANDREW L. PRESTON, Claimant
Michael Strooband, Claimant's Attorney
R. Ray Heysell, Defense Attorney

WCB 80-10184
December 28, 1981
Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

The claimant requests review of Referee Nichol's order that claimant is not entitled to any additional award of permanent partial disability.

We affirm the Referee's order.

ORDER

The Referee's order dated June 25, 1981 is affirmed.

CLEMON A. ROACH, Claimant
Gary Allen, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-10092
December 28, 1981
Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Fink's order which granted claimant an award of 20% loss of the right leg. Claimant contends that this award is inadquate.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated May 11, 1981 is affirmed.

DONALD SAWYER, Claimant
Daniel Dziuba, Claimant's Attorney
Paul Roess, Defense Attorney

WCB 81-01955
December 28, 1981
Request for Review by SAIF

Reviewed by Board Members McCallister and Lewis.

The SAIF Corporation seeks Board review of Referee Foster's order which remanded claimant's claim to it for acceptance and payment of compensation as due.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated June 19, 1981 is affirmed. Claimant's attorney is awarded $450 as and for a reasonable attorney's fee, payable by the SAIF Corporation.

REBECCA STERN, Claimant
Bill Bailey, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-418
December 28, 1981
Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

Claimant seeks Board review of Referee Gemmell's order which affirmed SAIF's denial of medical services for claimant's low back condition. Claimant contends that the medical evidence relates her low back condition to a compensable thoracic injury.

The Board affirms and adopts the order of the Referee.

ORDER

The order of the Referee dated April 24, 1981 is affirmed.

ROBERT G. THOMPSON, Claimant
Grant, Ferguson & Carter, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 80-7288
December 28, 1981
Request for Review by SAIF

Reviewed by Board Members McCallister and Lewis.

SAIF seeks Board review of Referee Mannix's order which awarded 15° (10%) loss of function of the right forearm and increased claimant's unscheduled award to 35% (112°) for low back disability. SAIF contends that the award is excessive and that the Determination Order dated June 19, 1980 should be reinstated.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated May 11, 1981 is affirmed. Claimant's attorney is awarded, as and for a reasonable attorney's fee, the sum of $400, payable by the carrier.

JAMES VEDEN, Claimant
Robert E. Brasch, Claimant's Attorney
Paul L. Roess, Defense Attorney

WCB 80-9615
December 28, 1981
Request for Review by SAIF

Reviewed by Board Members McCallister and Lewis.

SAIF seeks Board review of Referee Braverman's order which set aside its denial of aggravation for claimant's right ankle condition. SAIF contends claimant's condition is an occupational disease and that claimant was exposed to other possible causes.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated July 7, 1981 is affirmed. Claimant's attorney is granted as a reasonable attorney's fee a sum equal to $350, payable by SAIF.

MEL VERHOEF, Claimant
SAIF Corp Legal, Defense Attorney

WCB 80-09567
December 28, 1981
Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

Mr. Verhoef has requested the Board review Referee Mulder's order dated June 26, 1981. Referee Mulder ordered the State Accident Insurance Fund Corporation (the insurance carrier) to pay Mr. Verhoef compensation equal to 10% unscheduled disability for the injuries to his low back and hip.

We have reviewed all of the evidence presented at the hearing and read what Mr. Verhoef had to say at the hearing.

We agree with Referee Mulder and affirm (approve) his order.

ORDER

The Referee's order dated June 26, 19881 is affirmed.

SUSAN WALTON, CLAIMANT
Peter McSwain, Claimant's Attorney
Paul Roess, Defense Attorney

WCB 81-04278
December 28, 1981
Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Braverman's order which affirmed the Determination Order's award of 10% unscheduled permanent partial disability. Claimant contends she is entitled to 20% disability.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated July 7, 1981 is affirmed.

JOYCE WISE, Claimant
Michael Brian, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-09610
December 28, 1981
Request for Review by SAIF

Reviewed by Board Members McCallister and Lewis.

The SAIF Corporation seeks Board review of Referee Wolff's order which remanded claimant's aggravation claim to it for acceptance and payment of compensation as due.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated May 21, 1981 is affirmed. Claimant's attorney is awarded $200 as and for a reasonable attorney's fee, payable by the SAIF Corporation.

CARLA ARATA, Claimant
J. David Kryger, Claimant's Attorney
Keith D. Skelton, Defense Attorney

WCB 81-01436
December 31, 1981
Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

Claimant requests Board review of Referee Johnson's order that awarded her 16° for 5% unscheduled disability.

The issues are:

1. Whether the claimant is entitled to additional temporary total disability.
2. Whether claimant is entitled to penalties and attorney fees for the carrier's unilateral termination of temporary total disability on Junuary 30, 1981.
3. Whether the claimant is entitled to an increased award of permanent partial disability.

We affirm the Referee's order.

ORDER

The Referee's order dated June 30, 1981 is affirmed.

JOHN ARRIGONI, Claimant
Bonita L. Maplethorpe, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-03211
December 31, 1981
Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

The claimant requests Board review of Referee Neal's order which affirmed SAIF's denial of a right hip condition (osteonecrosis of the femoral head).

The Referee approved SAIF's denial because "claimant has not shown medical causation . . . ". We agree.

Dr. Vigeland, orthopedic surgeon, on March 30, 1981 reported in part:

> "The etiology of osteonecrosis of the hip is difficult, if not impossible, to prove. . . . there is no definite etiology known in this particular case."

Dr. Martins, on April 30, 1981, writes:

> "In regards to my opinion as to the cause . . . I would have to defer to Dr. Ted Vigeland's judgement in this regard since he indeed is the specialist in this area of medicine."

The medical experts, including SAIF's consultant, Dr. Wayne Norton, were unwilling to speculate as to a specific cause of this complex medical problem. The Referee properly refused to speculate and so do we.

ORDER

The Referee's order, dated June 24, 1981, is affirmed.

DOUGLAS D. BARGER, Claimant
John D. McLeod, Claimant's Attorney
Lawrance L. Paulson, Defense Attorney

WCB 80-10253
December 31, 1981
Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

The claimant requests Board review of Referee Fink's order which affirmed the carrier's denial of his claim.

We affirm the Referee's order.

ORDER

The Referee's order dated June 10, 1981 is affirmed.

LARRY J. BARNETT, Claimant
L. Leslie Bush, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 79-00387
December 31, 1981
Request for Review by Claimant

Reviewed by Board Members Barnes and McCallister.

Claimant has requested review of Referee Fink's Order to Defer entered on December 18, 1980. A hearing had been scheduled in response to a request for hearing filed by claimant, who contests the adequacy of a Determination Order awarding him 96° of unscheduled low back disability. After filing the request for hearing, claimant became enrolled in a program of vocational rehabilitation. Approximately two weeks prior to the date that the claim was scheduled for a hearing, SAIF submitted a written motion requesting that the hearing be deferred until a post-rehabilitation redetermination of permanent disability was made pursuant to ORS 656.268(5). The Referee found that "[e]fficiency and justice for all parties would be served by allowing the requested deferral," and that the holding in Minor v. Delta Truck Lines, 43 Or App 29 (1979) did not prevent deferral of the hearing.

A threshold determination that must be made is whether the Board has jurisdiction to review this order, which may properly be considered an interim order, as opposed to a final order. For the following reason, we conclude that the Referee's order is not a final order, the Board is without jurisdiction to review the order, and, therefore, claimant's Request for Review must be dismissed.

An order of the Board is not appealable to the court unless it is a final order. Hammond v. Albina Engine & Mach., 13 Or App 156, 509 P2d 56 (1973); Mendenhall v. SAIF, 16 Or App 136 (1974). The Board has applied this principle to review of Referee's orders, with the result that an interim order will not be reviewed. Denial D. Kelley, 28 Van Natta 793 (1980); John P. Swearinger, 29 Van Natta 269 (1980); Richard Wehr, 29 Van Natta 656 (1980); David Bartell, 29 Van Natta 876 (1980).

A final order is one which "...determines the rights of the parties so that no further questions can arise before the tribunal hearing the matter." Mendenhall v. SAIF, supra., 16 Or App at 138; Richard Wehr, supra.

An order deferring a hearing is the functional equivalent of an order of postponement pursuant to OAR 438-83-300, which is an interim order not reviewed or reviewable by the Board under current law. Perhaps the Board should amend its rule to provide for the possibility of review of interim orders, but that possibility does not now exist.

An argument might be made that this Order to Defer in fact does adjudicate claimant's right to an expeditious hearing, ORS 656.283(3), and is therefore a final order; however, we decline to attempt to make a distinction between an order postponing a hearing and one which "defers" a hearing for some reason.

Although we are constrained to dismiss the Request for Review, we are of the opinion that a hearing should be held, and by copy of this order we so advise the Presiding Referee.

Inasmuch as claimant's permanent disability may be subject to redetermination and modification upon completion or termination of claimant's vocational rehabilitation program, ORS 656.268(5), it would be expedient to defer hearing claimant's extent case until the program has been completed or terminated, thereby avoiding the possibility of two hearings. A strong argument can be made that in the interest of quasi-judicial economy the Board should so provide by rule. It has previously been determined, however, that absent such a Board rule a worker in claimant's situation has a right to a hearing for purposes of determining the extent of his permanent disability as it presently exists. Leedy v. Knox, 34 Or App 911, 921 (1978); Minor v. Delta Truck Lines 43 Or App 29, 32 (1979) cf. Gettman v. SAIF, 289 Or, 614-615 (1980).

ORDER

The claimant's Request for Review is dismissed.

ROBERT A. BARNETT, Claimant
Rick Roll, Claimant's Attorney
Jerry McCallister, Defense Attorney
Delbert Brenneman, Defense Attorney

WCB 79-11012 & 79-07210
December 31, 1981
Request for Review by Employer

Reviewed by Board Members Barnes and McCallister.

The employer, and its carrier EBI, seeks Board review of Referee Neal's order which remanded claimant's occupational disease claim for a peptic ulcer to it for acceptance and the payment of benefits as provided by law.

Claimant was employed by Tillamook Creamery on two separate occasions. The first commenced in July, 1976; claimant's job was manual labor and he was number three helper. He had stomach problems the fist time in July, 1977. He became self-employed with a snack route in August, 1977 and returned to th creamery around May, 1978 as number two helper. Claimant contends that his job was stressful and that he worked irregular hours. He testified he would go to work at 3:00 a.m. one night and 4:00 or 5:00 a.m. the next night, never knowing in advance what the schedule was. This caused irregular sleep patterns and eating of meals on an irregular basis. On cross-examination claimant was asked whether or not it was true that during April, 1979 and May, 1979 that he would work six straight days on the very same time schedule and claimant's response was that he could not remember. It is hard to believe claimant's testimony about the irregularity of his work schedule when he can not remember the schedule well enough to respond to questions on cross-examination.

Claimant was separated from his wife in 1975 and divorced in 1978. Claimant also had marital problems over visitation rights and his ex-wife accused him of threatening her with physical abuse both in person and on the phone. Claimant denied this at hearing and testified there was no emotionalism involved in the divorce.

Drs. Heinonen and Adamo found that the work environment was the cause of claimant's ulcer condition but their opinions seem based on the history claimant gave to the doctors of his irregular work schedule which we do not accept. Dr. Cole opined that claimant's work was only one of several stressful situations that claimant experienced. Dr. Frink opined that stress can cause the condition but so can aspirin and to blame claimant's condition on his work was "none too reasonable."

Work causation must be the significant predominant cause in order for an occupational disease claim to be compensable. Kay L. Murrens, WCB Case No. 79-01573 (December 7, 1981). Even if we were to accept claimant's testimony about his irregular work schedule, which we do not, the most that can be said on this record is that work was a material contributing cause. That is insufficient. Murrens, supra.

ORDER

The Referee's order dated October 28, 1980 is modified. The Referee's finding that this claim is compensable and the responsibility of EBI, and associated award of attorney fees, is reversed. The remainder of the Referee's order is affirmed.

LESLEY BELLINGER, Claimant
Pozzi, Wilson et al, Claimant's Attorneys
Paul Roess, Defense Attorney

WCB 80-8545 & 81-5344
December 31, 1981
Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Foster's order which affirmed a Determination Order issued on a 1979 left leg injury for an award of 20% loss of the left leg; but granted claimant a total award of 60% loss of the right leg in lieu of the award of 30% by the Determination Order of June 27, 1980 for a November 1978 injury. Claimant contends that he is permanently and totally disabled; or, in the alternative, that he is entitled to a greater award for the left and right legs and also to an unscheduled award for his left hip condition.

The Board affirms and adopts the Referee's conclusion with an additional comment. A fracture of the femur and subsequent surgery into the hip is still a leg disability. See the Order on Review in Chester Clark, 79-09297 (May 5, 1981).

ORDER

The Referee's order dated Juen 15, 1981 is affirmed.

JEFTY BOLDEN, Claimant
W.D. Bates, Jr., Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-00669
December 31, 1981
Request for Review by SAIF

Reviewed by Board Members Barnes and Lewis.

The SAIF Corporation requests Board review of Referee Foster's order which awarded claimant temporary total disability benefits calculated at a rate of $8.00 per hour, eight hours per day, forty hours per week until claim closure. SAIF contends that temporary total disability should have been calculated on the minimum federal hourly wage, which in January of 1981 was $3.35 per hour.

Claimant was employed by New Oregon Forest Management on December 17, 1980 as a tree planter. Approximately twenty minutes after arriving at the job site on December 17, 1980, claimant sustained a fracture of his proximal tibia while crushing cardboard. Claimant was to be paid at the federal minimum hourly wage if he planted thirty trays of trees or less per day. Each tray contained thirty trees. If claimant planted more than thirty trays per day, he was to be paid at a rate of $1.00 to $1.90 per tray, the rate depending on the type of trees planted, the type of terrain encountered, and other factors. Claimant was injured before he planted a single tree.

OAR 436-54-212(2)(b) directs the method to be used in calculation of temporary total disability benefits in this case: "(b) Employed Piecework: Use average as in (a)". OAR 436-54-212(2)(a) provides: "(a) Employed on call basis: Use average weekly earnings for past 26 weeks, if available, unless periods of extended gaps exist, then use no less than last 4 weeks of employment to arrive at average. For workers employed less that [sic - than] 4 weeks use intent at time of hire as confirmed by employer and worker."

Since there is no employment history, there is no basis for determining "average weekly earnings". Therefore, we are required to rely upon "intent at time of hire".

The rule requires that both the employer's and the employee's intent be utilized as the basis for wage determination. It was the employer's intent to pay minimum wage if thirty or less trays of trees were planted per day, and to pay $1.00 to $1.90 per tray if more than thirty per day were planted. The claimant credibly testified that it was his intent to earn a minimum of $85.00 per day, considering the type of planting methods used on this particular job.

The employer's intent was to pay for as much work as the claimant was able to perform. The claimant testified that it was his intent to earn approximately $10.63 per hour. We agree with the Referee, that considering the claimant's experience and the conditions under which he would have been working, that it would be reasonable to find a figure of $8.00 per hour to be more in line with the likely expectations of the parties. The Referee's decision was reasonable and equitable.

ORDER

The order of the Referee dated May 5, 1981 is affirmed. Claimant's attorney is granted as a reasonable attorney's fee a sum equal to $75, payable by SAIF.

LARRY W. BROWN, Claimant	WCB 80-04542
Cash Perrine, Claimant's Attorney	December 31, 1981
George Goodman, Defense Attorney	Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Peterson's order which denied claimant relief, in essence affirming the award granted by the Determination Order of August 30, 1979, claimant having a total award to date of 25% unscheduled disability.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated June 23, 1981 is affirmed.

LEONARD CAIN, Claimant
Bloom, Ruben et al, Claimant's Attorneys
Rankin, McMurry et al, Defense Attorneys

WCB 78-5150
December 31, 1981
Request for Review by Employer
Cross Appeal by Claimant

Reviewed by Board Members Barnes and Lewis.

The employer seeks Board review of Referee James' award of 20% unscheduled low back disability spreading from claimant's 1975 scheduled leg injuries, and the award of additional time loss benefits from August 14, 1978 to March 15, 1979. Claimant cross-appeals, seeking an increased award of scheduled disability for loss of the left leg.

Claimant's legs were crushed by a falling piece of wood while he worked on a log dock. His right leg was amputated, at first below the knee, later above the knee. He now uses an artificial leg. At the time the claim was initially closed in August 1978, claimant was awarded 100% loss of the right leg and 5% loss of the left leg.

Claimant began having low back pain in May of 1978. Although the employer has not refused treatment for claimant's back condition, it contends that claimant has not proven entitlement to an unscheduled permanent disability award under the test established in Woodman v. Georgia Pacific, 289 Or 551 (1980) or to related time loss benefits. Claimant responds that the medical evidence presented in Dr. Edwin Kayser's report of September 26, 1980 and his subsequent testimony meets the Woodman test.

The three-pronged test established by the Supreme Court in Woodman, supra., in determining whether an injured worker is entitled to an award for unscheduled disability arising from a scheduled injury, is that: (1) claimant must suffer some independent disability to an unscheduled part of the body; (2) the resulting disability must be at a minimum, common, or probable result; and (3) the probability that an independent and unexpected disability would result must be applied to the general population of working men and women, rather than to one or another individual.

Claimant's back condition has been diagnosed as spondylosis bilaterally and Grade I spondylolisthesis. Although his doctor doubts that the condition was actually caused by the industrial injury, the doctor believes the injury aggravated or worsened it to the point it became disabling. Dr. Kayser testified that back pain with an above the knee amputation is not common, and that he believes claimant's changed gait significantly contributed to the back pain. In his September 26, 1980 report, the doctor stated:

> "First of all, there is approximately a 5% to 7% incidence of a spondylosis in the population at large. Secondly, those patients with a AK amputation usually do not have low back pain secondary to the amputation per se; however, if one combined

the two circumstances, i.e. an asymptomatic person with spondylosis and created a secondary leg amputation situation, I would anticipate that a significant, but probably not over 50% of that group would end up with symptomatic low back pain.

"I think in Leonard's situation, his low back pain has been materially contributed to because of the amputation of his leg and the resultant stress is on his lumbar spine. I would give an estimate that probably 3/4's of his back pain is related to his abnormal gait, secondary to the loss of his leg - perhaps 1/4 of the back pain is contributed to because of his obesity.

"Assuming that he did not have lower back spondylosis, I would say the chances would be significantly less that he would have low back pain even in the face of an AK amputation and obesity. I am unaware of any medical statistics that document the incidence of low back pain with spondylosis and AK amputees.

" . . . As to the extent of his impairment or limitations I feel he has a moderate impairment related to his back and his leg as a result of his injury - and his limitations are obviously those of restricted bending, lifting and walking. I believe the extent of his disability would have to be related as moderate."

We conclude, from our review of the evidence, that claimant's low back problems are independent disabilities which would not be expected from the amputation of a leg in the general population of working men and women. Claimant is therefore entitled to an award for unscheduled low back disability arising from his scheduled injuries.

We do not agree, however, with the Referee's evaluation of the extent of claimant's unscheduled disability. The promary factor in favor of claimant's retained earning capacity is his age, 27 at the time of the hearing. In view of his limited educational achievement level--fifth grade reading skills, inability to spell, poor writing skills, and limited math ability--his limited work experience or sellable skills, we find that claimant is entitled to 40% of the maximum allowable by law for an unscheduled disability. We do, agree, however with the Referee's conclusion that claimant has failed to establish entitlement to more than 5% loss of the right leg, as previously awarded. The award of additional time loss benefits should be affirmed.

ORDER

The Referee's order, dated March 26, 1981, is modified to increase the award to 40% unscheduled permanent partial disability of the low back. The Referee's order is affirmed in all other respects. Claimant's attorney is allowed 25% of the increased compensation awarded by this order as and for a reasonable attorney fee.

LOLA M. CARTER, Claimant
S. David Eves, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-10461
December 31, 1981
Request for Review by SAIF

Reviewed by Board Members McCallister and Lewis.

The SAIF Corporation seeks Board review of Referee McCullough's order and his Order on Reconsideration which granted claimant an award of 35% unscheduled disability. It is SAIF's contention that in order for the Referee to modify an award granted by the Evaluations Division, pursuant to OAR 436-65-000 to 436-65-998, he must find those rules inconsistent with existing law or show that they were improperly applied.

We affirm and adopt the Referee's order and Order on Reconsideration. Whether or not the Evaluations Division applied OAR 436-65-600, we disagree with their result. Nevertheless the medical evidence indicates the injury residuals produced minimal impairment and work restrictions which preclude claimant's return to her regular occupation. Taking into consideration the other relevant factors of age, education and vocational/social factors, the Determination Orders in this case granted no permanent partial disability. By applying the guidelines set forth in OAR 436-65-600, we find that the Referee's award is a proper reflection of claimant's loss of wage earning capacity.

ORDER

The Referee's order dated May 29, 1981 and the Order on Reconsideration dated June 17, 1981 are affirmed. Claimant's attorney is awarded $300 as and for a reasonable attorney's fee for services rendered at this Board review, payable by the SAIF Corporation.

RICHARD A. CASTNER, Claimant
Jan Wyers, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-04083
December 31, 1981
Request for Review by Claimant

Reviewed by Board Members Barnes and McCallister.

Claimant seeks Board review of Referee Leahy's order which upheld the denial of compensation by the SAIF Corporation for claimant's right inguinal hernia. The only issue is compensability.

Claimant worked as a crankshaft grinder. That work required him frequently to lift crankshafts that weighed 60 - 80 pounds, occasionally more. Claimant testified that while working in December of 1980 he lifted something particularly heavy and felt immediate pain in his lower abdomen. The hernia was discovered shortly thereafter and subsequently surgically repaired.

The Referee's order, though hard to understand, appears to rule against claimant on credibility grounds:

> "Claimant was indefinite and prefaced many of his answers with probably, I think, and I picked up 'something', I might have been grinding, it was 100 pounds or whatever, everybody in the plant knows, and so on makes it difficult to rely on him."

The referee had the advantage of seeing the witness. The Board has the advantage of having a transcript, which was not available to the Referee. If a Referee makes a credibility finding based on demeanor, the Board necessarily usually must defer. If a Referee makes a credibility finding based on what a witness said, which the Referee did in this case as best as we can understand, the Board is in a superior position to make that judgment.

From our review of the transcript, we do not find claimant's testimony to have been evasive or qualified. Instead, we find claimant consistently stuck to his story in simple, direct and unqualified terms despite aggressive cross-examination by SAIF's attorney.

The Referee also noted "so many discrepancies" in the evidence. Although the Referee's order never clearly identifies any, the "so many" discrepancies boil down to two problem areas.

First, in Exhibit 3, a cryptic handwritten note, Dr. Metz reports that claimant told the doctor that he (claimant) had been diagnosed as having a hernia in 1979. This flies in the face of a 1980 medical examination that found no hernia. This flies in the face of claimant's testimony that he never so stated to Dr. Metz. And this flies in the face of the circumstances of this case.

Claimant's work as a crankshaft grinder required him to frequently lift 60 - 80 pounds, occasionally more. He performed that work throughout 1980. If claimant had an inguinal hernia in 1979 we cannot believe that he could have performed his job throughout 1980 until the date of this claim without any suggestion of physical discomfort, and there is no such evidence in this case.

Based on claimant's testimony, the 1980 medical finding of no hernia and the fact that claimant continued to perform heavy labor with no known problem, we conclude Dr. Metz's report in Exhibit 3 is in error. There is thus no discrepancy.

The second "discrepancy" involves dates. Various forms and reports identify the date of claimant's at-work lifting incident as December 23, 1980; others identify the date as December 30, 1980. Claimant testified that the accurate date was December 23 and he had been in error in reporting December 30. It is hard to imagine how such a petty discrepancy standing alone could raise a reasonable doubt about the credibility of a witness. In any event, however, we find that "discrepancy" adequately explained here. Claimant testified that when filling out his claim form and talking to doctors he remembered the at-work incident was either just before Christmas or just before New Years, and in selecting December 30 as the date he guessed wrong. Perhaps it is partly because we are reviewing this case during the holiday season, but right now that explanation has a ring of distinct plausability.

ORDER

The Referee's order dated June 30, 1981 is reversed and claimant's hernia claim is remanded to SAIF Corporation for acceptance and processing as required by law.

Claimant's attorneys are awarded $800 for services rendered at the hearing level and $600 for services rendered on Board review as and for reasonable attorney fees, all payable by the SAIF Corporation.

DOUGLAS D. CAUDELL, Claimant
W.D. Bates, Claimant's Attorney
G. Howard Cliff, Defense Attorney

WCB 80-2716
December 31, 1981
Request for Review by Claimant

Reviewed by the Board en banc.

Claimant requests review of Referee McSwain's order awarding claimant 22.5° or 15%, scheduled permanent partial disability for injury to his left hand. Claimant contends that the Referee erred by failing to apply the administrative rules for rating disability and that the award is inadequate. We agree and increase the award to 52.5° for a 35% loss of the claimant's left hand.

Claimant sustained a crushing injury to his left hand while at work on April 20, 1979. The effective date of Chapter 436, Division 65 of the Oregon Administrative Rules, the rules governing the rating of disability, was April 1, 1980. Claimant's injury preceded the effective date of these rules; however, the Board has previously determined that these rules apply retroactively. Dennis Gardner, WCB Case No. 79-04289, Order Of Remand (June 30, 1981).

The original Determination Order closing this claim awarded claimant 3.6° for 15% loss of the left index finger. On reconsideration, the Evaluation Division awarded claimant 7.5° scheduled permanent partial disability for 5% loss of his left hand. The Referee increased this award as mentioned above.

The evidence indicates that one of the residual effects of claimant's hand injury is a 15° rotational angulation of the index finger. Two physicians examined claimant for strength loss. Both measured claimant's left hand grip strength to be about 50% of his right hand. One of the two physicians measured claimant's left hand pinch strength to be slightly more than 50% of that of his right hand. Although claimant's dominant hand is his right, we assume that both hands were of equal strength prior to the injury.

The majority of the Board finds claimant's loss of strength due to the injury to his left hand to be in the moderate range. This is consistent with claimant's testimony to the effect that he lost approximately 50% of his left hand grip strength. According to OAR 436--65-530(5)(a), claimant is entitled to an award of 30% loss of the forearm.

The majority of the Board finds that claimant's disability due to the rotational angulation of his index finger is equivalent to 3.6° of scheduled permanent partial disability, for 15% loss of his left index finger. In combining this disability with the disability of claimant's hand, it is necessary to convert the 15% loss of the finger to a hand value. This loss is equivalent to 3% of a hand. OAR 436-65-515(2).

When the two values are combined, claimant's total disability is 35% loss of the left hand, or 52.5° of scheduled permanent partial disability. See OAR 4367-65-500(6).

ORDER

The Referee's order dated February 3, 1981 is modified. Claimant is awarded 52.5° of scheduled permanent partial disability for 35% loss of his left hand. This award is in lieu of, and not in addition to, all previous awards.

Claimant's attorney is awarded as a reasonable attorney's fee 25% of the increased compensation granted claimant by this order, not to exceed the maximum allowable by law. OAR 438-47-040(1).

BOARD MEMBER LEWIS, DISSENTING:

I respectfully dissent for the reasons expressed in my dissenting opinion in Dennis Gardner, WCB Case No. 79-04289 (Order of Remand, June 30, 1981). I am of the opinion that the Referee was correct in not applying the administrative rules to rate this injury which preceded the effective date of the rules.

I would affirm the Referee's order.

BRIAN S. CLEVENGER, Claimant
W.D. Bates, Claimant's Attorney
Mildred Carmack, Defense Attorney

WCB 80-07862
December 31, 1981
Request for Review by Employer

Reviewed by Board Members Barnes and Lewis.

The employer seeks Board review of Referee Mannix's order which ordered it to pay claimant compensation for temporary total disability from August 18, 1980 through November 12, 1980 and an additional sum of 5% as and for a penalty for its unreasonable refusal to pay compensation for that period of temporary total disability.

The majority of the Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated May 27, 1981 is affirmed. Claimant's attorney is awarded $300 as a reasonable attorney's fee for services rendered at this Board review, payable by the employer.

Board Member McCallister, dissenting in part:

I agree with the majority in part and disagree in part. I find by a bare minimum of requisite proof claimant is entitled to temporary total disability from August 18, 1980 through November 12, 1980. I do not agree the employer's actions in this case were unreasonable, so I would reverse the award of 5% penalty and the attorney's fee awarded on the penalty issue.

Considering the reluctance of the claimant to cooperate with the employer in its efforts to return him to modified work, it may be said nonpayment of the disputed temporary total disability was wrong, but considering all the evidence it was not unreasonable.

LARRY COCHELL, Claimant
Jeff Gerner, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Reviewed by Board Members Barnes and McCallister.

WCB 80-04312
December 31, 1981
Request for Review by SAIF

The SAIF Corporation requests Board review of Referee Nichols' order which overturned its denial of claimant's right foot injury claim, ordered SAIF to pay a 25% penalty on compensation that was ultimately paid prior to its denial, and awarded claimant's attorney a fee of $850.00 SAIF contends that claimant has failed to establish that treatments for his foot condition were a result of his alleged injury, and additionally attacks the claimant's credibility.

The Board adopts as its own the facts as recited by the Referee, but comes to a different conclusion.

The claimant contends that he suffered an industrial injury to his right foot when he jumped off a loading dock at work and, upon landing, fell. This alleged incident occurred on the claimant's last day on the job. The first medical report is a form 827 of Dr. John Burr, dated April 24, 1980. Dr. Burr diagnosed tenderness, swelling, minor redness over the MP joint of the right great toe with metatarsus primus varus and hallux valgus. The June 2, 1980 report of Dr. Robert Anderson found:

> "congential deformity of his right foot in the form of a metatarsus primus varus, which by the nature of this problem developed a bunion."

Dr. Anderson further noted:

> "Any causal relationship between the present complaints and the injury which the patient relates on the 21st of April, 1980 relied completely on the subjective information given by the patient."

Dr. Anderson on August 4, 1980 reported that the April 21 injury did not change the fundamental pathology of the claimant's pre-existing condition, but probably increased the pain. Dr. Burr reported on August 1, 1980 that the continued pain necessitated surgery, which was performed apparently between June 23, 1980 and July 9, 1980.

If the inquiry into this claim were to end at this point, there seems little question that it would be compensable. To do so however would be to ignore the other factors which cast doubt upon the validity of this claim. The Referee stated:

> "The credibility of the claimant in this matter is important but not controlling."

Considering the facts previlusly related by the Referee in her order, we infer that this statement amounts to finding that the claimant is somewhat less than credible. If that is the case, the Referee was being overly generous.

Dr. Anderson in his extensive June 2, 1980 report states that the claimant denied any injury to the right foot. Dr. Burr in his letter of August 1, 1980 likewise relates that the claimant stated that he had had no previous right foot problems. The histories which the claimant related to these physicians are directly contrary to his signed statement of May 15, 1980 where he relates that he injured his right foot in December 1979 after a panel was dropped on it, and again in March of 1980 when he claims he slipped on a ladder, again injuring his right foot. The claimant's explanation for this discrepancy is that his foot was not bothering him at the time of the alleged incident of April 21, so he did not relate the previous injuries to the physicians. This explanation seems somewhat expedient at best.

The claimant called Ken Dalke as a witness at the hearing. Dalke testified that the claimant, who was aware of his impending layoff, stated to him that he was going to have his foot worked on, and wanted SAIF to pay for it in order for him to get time loss benefits. Dr. Anderson's June 2, 1980 report indicates that claimant had been aware of his congential right foot condition for some time. This claimant, who was aware of his right foot condition, who had previously had his left foot problem corrected, then jumps off a 4' - 4 1/2' loading dock, an activity somewhat risky for a person with such foot problems, on his last day of work, and claims he suffered an injury.

There are further discrepancies in the record. Tom Dalke testified that he discussed the April 21 claim with the claimant over the telephone, but that the claimant indicated to him that the claim was for the December panel incident. Claimant, when questioned about his May 15, 1980 signed statement related that the statements contained therein were only "halfway" correct. Claimant explains this by stating he was "...upset over having a denied claim and talking to the people denying it."

Claimant produced what the Referee termed an "independent witness" who saw the claimant fall and limp afterwards. This witness, James Shannon, was working for another company at the construction site at the time of the alleged incident. This witness testified that he was acquainted with the claimant prior to the alleged injury, although he denied that he was or became friends with him. We believe, based on our intuition and insight, that this witness was not as "independent" as the Referee suggested. Be that as it may, however, it is not essential to our disposition of this case.

We believe, viewing the record as a whole, that the claimant is not credible. This lack of credibility permeates the entire record. We are not convinced that the claimant ever sustained the injury which he alleges of April 21, 1980. As previously noted, Dr. Anderson stated that any relation between claimant's condition at the time of his examination, and the April 21 incident was based only on the history related by the claimant. Based on these considerations, we find it impossible to determine what actually caused the claimant's foot to swell and create the problems complained of.

With regard to the issue of the 25% penalty assessed by the Referee against SAIF for untimely payment of time loss, we reverse. "Delay of a day or two is too inconsequential to justify any penalty". Zelda M. Bahler, WCB Case No. 79-07095 (June 15, 1981). The Form 801 was filed on May 5, 1980. Claimant was paid temporary total disability benefits on May 21, 1980. Since the delay was only two days, a penalty is not justified.

ORDER

The Referee's order dated January 27, 1980 is reversed.

KELLY G. DAVIS, Claimant	WCB 80-04022
Daniel Dziuba, Claimant's Attorney	December 31, 1981
SAIF Corp Legal, Defense Attorney	Request for Review by Claimant

Reviewed by Board Members Barnes and Lewis.

Claimant seeks Board review of Referee Fink's order which upheld the SAIF Corporation's denial of claimant's back strain claim and rejected his request for penalties and attorney fees. The issues are compensability and entitlement to interim compensation.

Both issues are complicated by the fact that several months after the events that gave rise to this claim, claimant was discovered to have a very serious medical problem that required two operations. There is no suggestion that this more serious problem was work-connected, but the fact that it arose somewhat clouds what would otherwise be a very simple back strain claim.

The Referee upheld SAIF's denial of compensability on the ground that claimant was not credible. Claimant of course argues we should make a contrary credibility finding. We find no comfortable basis in the record that outweighs the Referee's advantage in seeing the witnesses.

Claimant also argues we must accept the uncontroverted back strain diagnoses of Drs. Miller and Hutchinson. We disagree. These diagnoses were based on the history claimant gave the doctors, and claimant has been found to be an unreliable historian. Also, the symptoms initially diagnosed as back strain are generally consistent with having been instead manifestations of claimant's more severe health problem that was not correctly identified until a few months later.

The record is quite limited on the interim compensation issue with most of counsels' attention understandably focusing on the compensability issue. Apparently the last day claimant worked was December 21, 1979. Apparently he would have been released to return to work on January 10, 1980. The Referee concluded claimant was not entitled to interim compensation during this period because claimant's claim "was based on misrepresentation."

That is not the law. Regardless of whether a claim is meritorious or a total fabrication, a carrier must either pay interim compensation or deny. Jones v. Emanual Hospital, 280 Or 147 (1977). Claimant will be awarded interim compensation from December 22, 1979 to January 9, 1980, inclusive.

SAIF's first payment of interim compensation was made on February 20, 1980--significantly after it had notice or knowledge of the claim in early January. In Zelda M. Bahler, WCB Case No. 79-06095 (Order on Reconsideration, October 30, 1981), we held that unexplained delay greater than 25 days in initiating payment of interim compensation warrants up to the maximum 25% penalty. The delay is not explained in this case, but a minor mitigating factor is that all claimant's more severe (and noncompensable) medical problems that surfaced in early 1980 may have made investigation of claimant's back strain claim more difficult. A 20% penalty will be imposed.

A carrier-paid attorney fee will also be imposed under ORS 656.382(1). Zelda M. Bahler, supra, holds that an ORS 656.382(1) carrier-paid attorney fee is mandatory when there has been a refusal to pay compensation and discretionary when there has been a delayed payment of compensation. The record is so cryptic on the interim compensation issue that we cannot tell whether this is a delay or a refusal case, i.e., was the compensation due from December 21, 1979 to January 10, 1980 all paid in the February 20, 1980 installment? Here that does not really matter. Even if a carrier-paid fee is here discretionary, we here exercise discretion to grant a fee because claimant's attorney was not otherwise allowed or awarded fees in this case. Zelda M. Bahler, supra.

ORDER

The Referee's order dated April 29, 1981 is modified. Claimant is granted compensation for temporary total disability from December 22, 1979 to January 9, 1980, inclusive, less sums paid, and 20% of that compensation (before subtracting sums paid) as and for a penalty. Claimant's attorney is granted a carrier-paid ORS 656.382(1) attorney fee in the amount of $400. The balance of the Referee's order is affirmed.

HETTIE M. EAGLE, Claimant
David W. Hittle, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 79-07148
December 31, 1981
Request for Review by SAIF

Reviewed by the Board en banc.

The SAIF Corporation seeks Board review of Referee Peterson's order which required SAIF to accept claimant's treatment at the Psychology Center for the period from August 1, 1978 through February 2, 1979 as compensable, to promptly pay the outstanding bills totalling $1,890. The Referee also assessed penalties and attorney fees against SAIF.

The argument presented by SAIF seem capable of reduction to a single issue. SAIF is alleging that the doctrines of res judicata and/or collateral estoppel should have been applied by the Referee at the second hearing in order to prevent claimant from "relitigating" the issue of compensability of her treatments at the Psychology Center. SAIF contends the issue was or could have been litigated in a prior hearing.

The doctrine of res judicata has been considered by the courts in a number of recent cases. In Dean v. Exotic Veneers, 271 Or 188 (1975), the Supreme Court adopted the "cause of action" test, stating:

> "If in the present case we apply Clark's concept of "cause of action" for res judicata purposes, it becomes apparent that there is but a single occasion for judicial relief, even though there are alternative contentions concerning the circumstances under which they were rendered and thus alternative grounds or theories for recovery. To the extent that a given state of facts is susceptible to alternative interpretation and analysis, plaintiff must seek and exhaust all alternative grounds or theories for recovery in one action." 271 Or at 194. (Emphasis added.)

In Million v. SAIF, 45 Or App 1097 (1980), the claimant sought compensation for shoulder surgery on the theory that it was caused by a previous work-related injury. The insurer's denial was affirmed at the hearing. Claimant thereafter sought compensation for the surgery on the theory that it was caused by the job. The Referee ordered the claim paid after finding that the precise issue was not decided at the prior hearing. The court held claimant barred from bringing the second claim on the grounds of res judicata. The court stated that:

> "It is clear that claimant in the claim could have asserted both grounds of causation as a basis for compensability." 45 Or App at 1102. (Emphasis added.)

In Taylor v. Baker, 279 Or 139 (1977), the court stated:

> "Res judicata applies not only to every claim included in the pleadings but also to every claim which could have been alleged under the same aggregate of operative facts which compose a single occasion for judicial relief." 279 Or at 144. (Emphasis added.)

It becomes clear after examining the above cases that res judicata involves two basic concepts. One concept relates to relitigation of the same claim under an alternative theory that could have been alleged in the first action. The second concept requires a party to litigate every separate claim he may have if they arise out of the same transaction or occurrence; otherwise the party is said to have split his cause of action. See also Gittelsohn v. City of Cannon Beach, 44 Or App 247 (1980); Bankston v. Hooper, 46 Or App 431 (1980).

Applying these concepts to the present case, we conclude that the Referee was correct in holding that res judicata did not apply to prevent claimant from litigating the issue of compensability of her psychological treatments.

SAIF first alleges that the issue of compensability could have been raised at the original hearing since the unpaid bills were in existence at the time of the hearing. SAIF cites several Referee and Board decisions as support for this argument. The argument and cited cases are not convincing.

The major weakness in this argument is that so far as claimant was aware, SAIF was paying these bills, just as it paid for previous bills for psychological treatment. SAIF received the first bill from the Psychology Center on December 28, 1978 and a second bill on February 1, 1979, two weeks prior to the original hearing. SAIF failed to inform claimant whether it was accepting or denying responsibility for these bills. Moreover, the record seems to indicate that SAIF made no decision to deny until well after the hearing. Since claimant was unaware that SAIF was denying compensability until well after the hearing, it was not a matter that could properly have been determined at the hearing. Elfreta Puckett, 8 Van Natta 158 (1972).

SAIF also argues that its failure to promptly pay the bills amounted to a "de factor denial," and thus automatically put the compensability of the bills in issue at the hearing. We have previously stated we have "serious doubts about the continuing vitality of the 'de facto denial' concept." Gerald E. Oar, 31 Van Natta 170, 171 (1981). We will not extend that concept as SAIF asks us to do here. Also, that concept "has come to mean a carrier's failure to respond to a claim one way or the other within 60 days as required by ORS 656.262(5)." Ibid at 170. Here less than 60 days passed between the Psychology Center billings to SAIF and the hearing.

It is clear from the above that res judicata should not apply to prevent claimant from raising the issue of compensability of her psychological treatment at the second hearing. It was not an issue that could properly have been raised since only SAIF personnel were aware of it as a potential issue, and they preferred to keep it a secret. Further, this is not a situation involving alternative theories of recovery for the same injury.

SAIF argues in the alternative that claimant should be collaterally estopped from raising the issue of compensability since, SAIF alleges, it was actually litigated in the original hearing. As noted by the Referee, however, the issues at the original hearing were (1) premature closure and (2) extent of claimant's disability. Collateral estoppel applies only to material issues and facts actually or necessarily adjudicated in the prior action. Jones v. Flannigan, 270 Or 121 (1974). Since the issue was not litigated, claimant is not collaterally estopped from raising it at the second hearing. SAIF cites some rather ambiguous quoted material from its closing brief from the first hearing to support its argument that compensability was in issue at the original hearing. As noted by the court in Anderson v. West Union Village Square, 44 Or App 685 (1980), raising an issue for the first time in closing argument is precluded by basic fairness.

SAIF finally contends that the Referee erroneously assessed attorney fees and penalties. As noted by the Referee, SAIF's rejection of the Psychology Center billings was unreasonable, both on the merits and procedurally. The penalty assessment was therefore proper under ORS 656.262(8) as was the $600 penalty attorney fee. The Referee properly treated this as a denied claim for compensation; therefore, the additional $1,000 attorney fee was required by statute was proper and not unreasonable in amount.

ORDER

The Referee's order dated April 22, 1981 is affirmed. Claimant's attorney is awarded a fee of $350 in connection with this appeal, to be paid by the SAIF Corporation.

RAYMOND W. EKMAN, Claimant	WCB 81-01267
Joseph E. Penna, Claimant's Attorney	December 31, 1981
SAIF Corp Legal, Defense Attorney	Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

Claimant requests Board review of Referee Shelbey's Order of Dismissal which dismissed the Request for Hearing with prejudice.

We affirm the Referee's order.

ORDER

The Order of Dismissal dated July 14, 1981 is affirmed.

DANNY W. FARIES, Claimant
Doug Vande Griend, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-10917
December 31, 1981
Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Danner's order which affirmed the SAIF Corporation's denial of claimant's claim.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated June 24, 1981 is affirmed.

RAY FUTRELL, Claimant
Pozzi, Wilson, et al, Claimant's Attorneys
Charles Holloway III, Defense Attorney

WCB 80-2723 & 80-2724
December 31, 1981
Request for Review by Employer

Reviewed by Board Members Barnes and McCallister.

The employer/carrier seeks Board review of Referee McSwain's order that affirmed a time-loss-only Determination Order for claimant's June 24, 1979 injury and awarded 60% permanent partial unscheduled disability arising from claimant's September 19, 1976 injury. No party questions the Referee's decision regarding the 1979 injury; the issue is the extent of claimant's disability as a result of the September 19, 1976 injury.

At that time claimant was working as an airline mechanic. Claimant suffered a twisting injury to his low back trying to free himself from bus doors that closed on him. The bus was used to transport airport employees.

Claimant came under the care of Dr. Poulson who performed a laminotomy at the L4-5 level in April 1977. After recovery, claimant returned to his airline job on light duty. However, back pain prevented claimant from climbing and crawling into small places, as was required by his job. On referral from Dr. Poulson, claimant attended the Pain Clinic at Good Samaritan Hospital starting in August 1978. Despite that treatment, claimant is physically unable to return to full-duty status with his employer and there are no permanent light-duty jobs available.

In the fall of 1979 claimant began operating a used bookstore. He did so for about a year, working in the store for six to seven hours a day, six days a week until he sold the venture. The Referee noted that claimant's considerable and varied job experiences equipped him with numerous transferrable skills, and suggested that management or sales opportunities within the airline industry were jobs for which claimant would be qualified. We agree and think claimant's operation of the bookstore for a year shows that such jobs would be within his physical abilities. On the other hand, we also agree with the Referee's comment that claimant's age (57) and lack of formal training (GED) may preclude some employment opportunities.

OAR 436-65-600 et. seq. provides the formula for reconciling these conflicting considerations. The starting point is physical impairment. See OAR 436-65-615. Dr. Poulson rated claimant's impairment, after recovery from surgery, at 9%. It is not completely clear whether Dr. Poulson was considering claimant's pain. If not, impairment could be as high as 15%.

Impairment is a plus value. Other plus values are age (OAR 436-65-602), work experience (OAR 436-65-604) and adaptability (OAR 436-65-605). Minus values are emotional/psychological (OAR 436-65-607) and labor market (OAR 436-65-608).

As just one illustration of this methodology, as far as claimant's earning capacity is his age a greater liability than the available work which he could be expected to obtain and hold? No. His age produces a plus 10. Available work produces a minus 25.

When all of these factors are run through the computations required by OAR 436-65-601, the result is a 30% loss of wage earning capacity.

ORDER

The Referee's order, dated December 31, 1980, is modified. Claimant is awarded 30% unscheduled permanent partial disability for his loss of earning capacity caused by his September 19, 1976 injury; this award is in lieu of all prior awards. The remainder of the Referee's order is affirmed.

EDWARD GEER, Claimant
Daniel C. Dziuba, Claimant's Attorney
Paul Roess, Defense Attorney

WCB 80-10975
December 31, 1981
Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

Claimant requests Board review of Referee Foster's order which affirmed an August 7, 1980 Determination Order.

The sole issue is extent of claimant's unscheduled permanent partial disability.

At the time of the hearing claimant had been awarded 20% unscheduled permanent partial disability. The Referee found insufficient evidence to justify any increase in that award. We agree.

ORDER

The Referee's order dated June 18, 1981 is affirmed.

ALLEN GIESBRECHT, Claimant
Olson, Hittle et al, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 80-8237
December 31, 1981
Request for Review by SAIF

Reviewed by Board Members Barnes, McCallister and Lewis.

SAIF seeks Board review of Referee Knapp's order which set aside its denial of claimant's occupational disease claim. SAIF contends that claimant's work did not worsen his underlying condition and that claimant was exposed to similar causal conditions off the job. The majority of the Board reverses the Referee's order.

The majority of the Board adopts the facts as set forth in the Referee's Opinion and Order but reaches a different conclusion.

Dr. Swank, treating physician, stated,

> "It seems most likely that this hot atmosphere in which he worked did contribute to his symptoms since they developed during and shortly after the exposure to the heat and continued from then on. I suspect there will be some remission from this, but also believe that some degree of permanent damage will have resulted."

Drs. Snodgrass, Wilson, Rich and Dow, all neurologists, testified that exposure to high temperatures would temporarily worsen claimant's symptoms but not his underlying multiple sclerosis.

The Referee resolved this conflict in the evidence by apparently reasoning that in Abbott v. SAIF, 45 Or App 657 (1980), the Court of Appeals found Dr. Swank "to be the leading expert in the diagnosis and treatment of multiple sclerosis" and therefore having offered the more persuasive opinion in this case -- and presumably, carrying the Referee's reasoning to its logical conclusion, having as a matter of law, Abbott, the

most persuasive opinion on any issue about multiple sclerosis. We cannot accept the Referee's reading of Abbott. Four neurologists, all with experience in the diagnosis and treatment of multiple sclerosis, all testified in this case that medical science does not now know the factors that cause or aggravate multiple sclerosis. We acknowledge Dr. Swank's interest in multiple sclerosis, but his theories of causation are not in accordance with the mainstream of medical thought in Oregon or the United States. We are not persuaded that claimant's heat exposure at work caused a worsening of his underlying disease within the meaning of Weller.

ORDER

The Referee's order dated April 22, 1981 is reversed.

I would respectfully dissent from the majority opinion. After reviewing the evidence I reach the same conclusion as the Referee for the same reasons as stated in his well reasoned Opinion and Order. I would affirm and adopt his order.

George Lewis, Member

ROY GONZALES, Claimant
Emmons, Kyle et al, Claimant's Attorneys
Keith D. Skelton, Defense Attorney

WCB 79-06053
December 31, 1981
Request for Review by Employer

Reviewed by Board Members McCallister and Lewis.

The employer seeks Board review of Referee Baker's order which granted claimant compensation equal to 64° for 20% unscheduled disability. The employer contends this award is excessive.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated June 8, 1981 is affirmed. Claimant's attorney is granted a fee equal to $400, payable by the carrier.

SHIRLEY GORDON, Claimant
Kenneth Colley, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 79-10162
December 31, 1981
Request for Review by Claimant

Reviewed by Board Members Barnes and McCallister.

The claimant seeks Board review of that portion of Referee Igarashi's order which terminated compensation for temporary total disability on March 26, 1980 and granted an award of 48° for 15% unscheduled disability. Claimant contends that she was not medically stationary on March 26, 1980 and that she is entitled to a greater award of unscheduled disability.

The SAIF Corporation contends that the Referee erred in disapproving the Determination Order of November 16, 1979 and granting claimant compensation for temporary total disability from April 14, 1979 to October 24, 1979, contends that the award granted was excessive, and that SAIF should not not be responsible for claimant's water bed which the Referee ordered paid for under ORS 656.245.

Claimant was employed by a pet shop when, on April 14, 1979, she was standing on a mop which a co-worker pulled out from beneath her, causing her to fall backwards landing on her back and neck. Prior to this industrial injury claimant had suffered from headaches whenever she lifted too much or overworked. She had previously seen a chiropractor for this condition.

After this injury, claimant was treated by Dr. Erkkila. He found no neurological reason for claimant's problems. He felt she should avoid heavy work and overhead work but was capable of medium to light employment. Claimant was examined by the Orthopaedic Consultants in September, 1979 and they diagnosed cervical and dorsolumbar strain syndrome and muscle contraction headaches. They felt she was medically stationary but would benefit from a period of physical therapy. They found the total loss of function in the lower limits of minimal.

On October 4, 1979 Dr. Erkkila found claimant's condition was medically stationary. The claim was closed by a Determination Order of November 16, 1979 with compensation for temporary total disability only through September 11, 1979.

Claimant commenced working with vocational rehabilitation personnel and also began a job search. On February 23, 1980 claimant was hospitalized for overdose of medication or a reaction to it. Dr. Knox indicated that claimant was to discontinue her job search for one month. By March 26, 1980 examination, Dr. Knox found claimant's condition much improved with no neurological findings. On May 15, 1980 Dr. Knox reported claimant's condition was not stable and she was not released for work from September 11, 1979 to the present. Dr. Knox had not seen claimant at all during 1979.

At the time of the hearing claimant was no longer seeking employment. She was taking an art course and hoped someday to make art her career.

Was the claimant's claim prematurely closed? We find it was not. Both the Orthopaedic Consultants and Dr. Erkkila, the treating physician at that time, found her condition medically stationary. Thereafter, she remained medically stationary until the time of her hospitalization in February, 1980 for the reaction to or overdose of her medication. We conclude claimant was entitled to compensation for temporary total disability for the period of February 23, 1980 through March 26, 1980.

What is the extent of claimant's permanent partial disability? On this issue we agree with the Referee. The medical evidence indicates claimant's impairment is minimal without objective medical findings except for claimant's cnronic pain complaints.

On the issue of the carrier's responsibility for purchasing claimant a water bed, we reverse the Referee's order. The only support for claimant's position on this issue is from Dr. McBride, in the form of a prescription, which states:

"Water bed for correction of low back condition."

We find Dr. McBride's "prescription" is insufficient under OAR 436-69-335 which requires a medical report which clearly justifies the need for articles of household furniture such as a bed. See Wayne M. Evenden, WCB Case No. 80-00700 (July 16, 1981); Barbara Dill, WCB Case No. 80-08714 (September 15, 1981).

ORDER

The Referee's order dated September 17, 1980 is modified.

The Referee's order awarding claimant compensation for temporary total disability from April 14, 1979 to October 24, 1979 and finding premature claim closure is reversed, except that claimant is entitled to temporary total disability from February 23, 1980 to March 26, 1980.

That portion of the Referee's order which orders SAIF to pay for a water bed pursuant to ORS 656.245 is reversed.

The remainder of the Referee's order is affirmed.

JOAN M. GREEN, Claimant
Catherine Riffle, Claimant's Attorney
Ridgway Foley, Defense Attorney

WCB 79-10880
December 31, 1981
Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

Claimant requests Board review of Referee Mongrain's order which awarded her 6.75° for 5% permanent partial disability for loss of function of her right foot. The issues on review are extent of scheduled permanent partial disability of the right foot and whether temporary total disability benefits were properly terminated.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated June 25, 1981 is affirmed.

RALPH F. GUERRA, Claimant
Pozzi, Wilson et al, Claimant's Attorneys
Rankin, McMurry et al, Defense Attorneys

WCB 80-8629
December 31, 1981
Request for Review by Claimant

Reviewed by Board Members Barnes and McCallister.

The claimant has requested Board review of Referee Mulder's order which found the claimant's aggravation claim to be barred by res judicata, and therefore approved the employer's denial. The only issue on review is the propriety of the Referee's application of res judicata.

Claimant was originally injured in 1974. In 1975 he received an award of 50% unscheduled permanent partial disability. This award was increased to permanent total disability status after a hearing on the matter. On review, the 50% award was reinstated. On appeal, the Circuit Court reinstated the permanent total disability award. On appeal to the Court of Appeals, the original 50% determination was reinstated.

This is the claimant's third attempt to assert an aggravation claim since the decision by the Court of Appeals. On February 1, 1978, following claimant's first aggravation hearing, Referee Pferdner found no aggravation, but allowed another 10% unscheduled permanent partial disability award. The propriety of that award is questionable, but the order was never appealed. A second claim for aggravation was filed and on September 6, 1979 denied by the employer. Following a hearing, Referee Fink found that no aggravation had occurred. There was no appeal. On September 19, 1980, claimant's attorney requested reopening of the claim on the basis of aggravation. Referee Mulder's order, which is the subject of this appeal, found that the aggravation claim was barred by res judicata.

We agree with the decision of the Referee. Referee Fink, in his opinion, noted that Dr. Elmer Specht, M.D., had advised the claimant that a myelogram and scan would be necessary in order to obtain an appropriate diagnosis, but that the claimant had refused. Based on the results of his examination without the benefit of the myelogram and scan, Dr. Specht diagnosed lumbar spinal stenosis, which he defined as a progressively degenerative disease process, and unequivocally stated that the claimant's present physical condition was not accelerated by the 1974 injury.

Following the denial of his aggravation claim, the claimant was examined by Dr. Curtis Hill M.D. Dr. Hill recommended a myelogram, which the claimant then consented to; the myelogram revealed degenerative arthritic changes and significant midline bulging of the L4-5 disc. There is no evidence that the bulging disc occurred subsequent to the second aggravation hearing, or that it has any relation to the 1974 injury.

Whether or not Referee Fink's order related only to the claimant's degenerative disease process, or was broad enough to include the claimant's entire physical condition at that time, whatever it may have been, is not the main reason for finding the current claim for aggravation barred. The claimant chose to proceed to his second aggravation hearing of his own free will, without the benefit of the evidence later made available by the myelogram, which could have been performed at that time had he chose to do so. It was only after denial of his aggravation claim, that he decided to undergo that diagnostic procedure. Any contention that the claimant felt that the myelogram was unreasonable must be viewed with strict scrutiny in view of these facts. The claimant may not now, after the fact, attempt to relitigate his aggravation claim based on the evidence that would have been available to him at the time of the previous hearing had he chose to undergo the suggested tests. Alternatively, the claimant could have requested that the Referee, at the time of the second hearing, keep the record open for submission of additional evidence of myelogram results. Having failed to do so, and failing to appeal the Referee's decision, the claimant is barred from a second determination of that decision. See Wilburn v. SAIF, 430 Or App 611 (1979), Hamlin v. Roseburg Company, 45 Or App 581 (1980), and Taylor v. Baker, 279 Or 139 (1977).

ORDER

The Referee's order, dated April 30, 1981, is affirmed.

DAVID E. GUTHMILLER, Claimant
Michael Strooband, Claimant's Attorney
Ray Heysell, Defense Attorney

WCB 81-00903
December 31, 1981
Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Foster's order which (1) affirmed the carrier's denial of a claim for a back condition, (2) awarded claimant interim compensation for temporary total disability from November 25, 1980 to January 9, 1981 plus 10% penalty for the carrier's failure to pay compensation within 14 days, and (3) awarded claimant's attorney a fee of $300 for prevailing on the penalty issue.

The Board affirms and adopts the order of the Referee.

ORDER

The order of the Referee dated July 28, 1981 is affirmed.

BERNICE HAMS, Claimant
Ringo, Walton, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney
Bullivant, Wright, et al., Defense Attorneys

WCB 80-4835 & 80-5263
December 31, 1981
Request for Review by SAIF

Reviewed by Board Members McCallister and Lewis.

The SAIF Corporation seeks Board review of Referee Knapp's order which remanded claimant's claim to it for acceptance and payment of compensation to which claimant was entitled, and found the denial issued by Fred Meyer, Inc. proper.

Claimant developed a condition diagnosed as right thoracic outlet syndrome while employed by Fred Meyer in 1975. After a period of treatment, claimant's condition became basically asymptomatic. She was off work between 1975 and 1979 with no recurrence of symptoms. In May of 1979, claimant went to work for Westbrooks Restaurant, who is insured by SAIF. Within five weeks, she suffered a remission. Recurrent thoracic outlet compression syndrome was diagnosed.

The main issue in this case is responsibility for the claimant's current condition. The Referee found that the claimant's work activities in 1979 caused a worsening of her underlying condition which caused disability, pain and a need for medical services, thus meeting the requirements of the test established by the Court in Weller v. Union Carbide, 288 Or 27 (1979). Accordingly, SAIF was found responsible.

We agree with the Referee that responsibility for the claimant's recurrent thoracic outlet compression syndrome should be assigned to SAIF, but do so based on different reasoning. The test enunciated by the Court in Weller is only applicable to cases where the claimant's underlying condition is symptomatic, and the work activity results in a worsening of that condition. Lorena Iles, WCB Case No. 79-0445 (April 6, 1981). As previously noted, the claimant was asymptomatic following her initial treatment, and remained so until after beginning employment with Westbrooks Restaurant. Weller is therefore not applicable. Even if Weller were applicable, we believe claimant would have sustained her burden of proof.

Since Weller is not applicable, this claim is more properly determined under the principles of the Oregon aggravation statute ORS 656.273, without consideration of that case. Under this statute, the claimant is entitled to additional compensation for worsened conditions resulting from the original injury. Accordingly, Fred Meyer would remain responsible for the claimant's condition unless the activity on the claimant's second job constituted a new exposure, Fossum v. SAIF, 52 Or App 769 (1981), and Westbrooks Restaurant would assume responsibility if that employment environment "could have" contributed to the disease or condition. Inkley v. Forest Fiber Products Co., 288 Or 337, 344 (1980). We agree with the Referee that the evidence establishes that claimant's work activities at Westbrooks Restaurant not only "could have" contributed to, but did cause a worsening of her condition.

Fred Meyer additionally raises the issue of the timeliness of the claimant's request for hearing following the issuance of its denial letter. Fred Meyer contends "good cause" has not been established for the late filing. Our decision holding SAIF responsible renders this issue moot. However, we will briefly comment here.

Fred Meyer issued its denial letter on February 6, 1980. Claimant's request for hearing on that denial was not received until May 29, 1980. It is obvious that claimant requested a hearing on Fred Meyer's denial prior to receipt of the denial by SAIF, which would arouse some suspicion of her argument raised at the hearing. Claimant contended that she demonstrated good cause for her failure to request a hearing within sixty days of receipt of Fred Meyer's denial because she thought SAIF had accepted her claim due to the fact that they were paying benefits. Fred Meyer admits that this explanation is plausible under certain circumstances, but feels that it is implausible here. We note, however, claimant's request for hearing which states:

". . . However, I am advised that the State Accident Insurance Fund has not paid any medical expenses and they have also informed me that they are denying benefits . . . ".

It is entirely feasible that SAIF could have advised claimant of their intent to deny prior to the issuance of the denial letter. We conclude that claimant has shown good cause for not dismissing her claim as untimely.

ORDER

The order of the Referee dated March 13, 1981 is affirmed. Claimant's attorney is awarded a fee of $100 to be paid by SAIF.

RUTH HARMON, Claimant	WCB 79-08273
January Roeschlaub, Claimant's Attorney	December 31, 1981
SAIF Corp Legal, Defense Attorney	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 with a cross-request by claimant's attorney, and said requests 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.

DONALD HART, Claimant WCB 80-3943
Roll, Roll & Westmoreland, Claimant's Attorneys December 31, 1981
MacDonald, McCallister & Snow, Defense Attorneys Request for Review by SAIF

Reviewed by Board Members Barnes and McCallister.

SAIF requests Board review of that portion of Referee Leahy's order, as corrected, which granted claimant an award of 101.25° for 75% loss of the right foot in lieu of a 1976 Determination Order award of 40.5° for 30% loss of the right foot. The issue is extent of scheduled permanent partial disability to claimant's right foot.

The claimant injured his right foot and ankle on February 23, 1975 when he fell from a "yarder" machine. The injury was diagnosed as a fracture of the medial malleolus. Claimant was on temporary total disability for over a year and by Determination Order, dated April 22, 1976, was awarded 40.5° for 30% permanent partial disability of the right foot. The question is whether the claimant has proved by a preponderance of evidence a right lower leg disability greater than that awarded by the Determination Order. We find that he has but not to the extent awarded by the Referee.

The medical evidence establishes that claimant's loss of use is as follows. Claimant has lost 20° of dorsiflexion; under OAR 436-65-545(3)(a) this translates to a 7% loss of the foot. Claimant has lost 10° of plantar flexion; under OAR 436-65-545(3)(c) this translates to a 4% loss of the foot. Claimant has lost virtually all inversion; under OAR 436-65-545(2)(a) this translates to a 5% loss of the foot. Claimant has lost virtually all eversion; under OAR 436-65-545(2)(c) this translates to a 4% loss of the foot. Some of these figures are added; others are combined. But even resolving all doubt in claimant's favor, his loss of use of his right foot would appear to be in the neighborhood of 20%, not the 75% awarded by the Referee.

Dr. Pasquesi and Orthopaedic Consultants both opined that claimant's loss of use was 20% greater because of chronic moderate to severe pain. This brings the total to 40%. Claimant's brief suggests that the Referee was entitled to grant a greater award based on claimant's testimony at the hearing about the extent of his pain. We will not indulge in the assumption that claimant's description of his symptoms for the Referee was more complete or reliable than claimant's description of his symptoms for his doctors.

ORDER

The Referee's order, dated January 14, 1981, as corrected, is modified. Claimant is awarded 40% loss of the right foot in lieu of all prior awards. The remainder of the Referee's order is affirmed.

DENNIS HEDRICK, Claimant
Wesley Franklin, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
George Goodman, Defense Attorney

WCB 81-00415 & 81-02625
December 31, 1981
Request for Review by Carrier

Reviewed by Board Members McCallister and Lewis.

Farmers Insurance requests review of Referee Knapp's order which approved SAIF's denial and remanded the claim to them for acceptance.

The sole issue on appeal is which of two carriers providing workers' compensation insurance coverage for the employer is responsible for claimant's back condition; Farmers Insurance or SAIF?

The Referee found Farmers Insurance responsible under the last injurious exposure rule. We agree and affirm the Referee's order.

ORDER

The Referee's order dated July 14, 1981 is affirmed.

Claimant's attorney is granted $250 as a fee for his participation in this appeal.

ELEANOR IMBER, Claimant
Rolf Olson, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-01789
December 31, 1981
Request for Review by SAIF
Cross Appeal by Claimant

Reviewed by Board Members McCallister and Lewis.

SAIF Corporation requests review of that portion of Referee Baker's order which disapproved their denial of compensability of a right arm condition. Claimant cross requests review of that portion of the Referee's order which approved SAIF's denial of a right carpel tunnel syndrome.

We affirm the Referee's order.

ORDER

The Referee's order dated May 22, 1981 is affirmed. Claimant's attorney is awarded $400 as and for a reasonable attorney's fee, payable by the SAIF Corporation.

DORIS SUE INESS, Claimant
January Roeschlaub, Claimant's Attorney
Keith D. Skelton, Defense Attorney

WCB 77-6947
December 31, 1981
Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

Claimant seeks Board review of Referee Wolff's order which affirmed the October 25, 1977 Determination Order which granted her compensation equal to 32° for 10% unscheduled permanent partial disability.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated May 27, 1981 is affirmed.

HOPE JENTIS, Claimant
Merri L. Souther, Claimant's Attorney
Gary Allen, Defense Attorney

WCB 80-09988
December 31, 1981
Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of the Referee's order which reopened claimant's claim by finding her medical condition not stationary, but which did not order any further payments of temporary total disability.

On July 23, 1980, claimant sustained a low back injury while working as a cabinet assembler when she backed into a chain saw bar. The company doctor, Dr. C. C. Miller, adjusted her back and she returned to finish her shift.

That night, claimant visited her family doctor, Dr. Charles Schultz, who took X-rays, prescribed muscle relaxers and pain medication and advised claimant to stay home the rest of the week. Claimant attempted to return to work the following Monday, but had to go home because the pain caused by standing was too great. She has not worked since (at least up until the December 3, 1980 hearing).

Dr. Schultz referred claimant to Dr. John Stevens, orthopedic surgeon, who examined claimant on August 14, 1980. He noted reduced range of motion in her back and accompanying pain diagnosed as a lumbosacral contusion. He prescribed physical therapy three times a week.

Dr. Stevens saw claimant again on September 11, 1980. He noted that her sacrum continued to be tender and that she could only bend forward 50%. This limited range of motion was accompanied by midback pain. He recommended she consider returning to work at least on a limited basis.

On September 22, 1980, Dr. Stevens stated that claimant was essentially medically stationary and the only further treatment should be for her to finish up her prescribed physical therapy program (which she did on September 25). He formally released her for work as of September 29, 1980. He stated that her impairment was minimal.

On September 26, 1980, claimant began receiving treatment three times a week from Dr. Roger Popp, chiropractor. As of the hearing, Dr. Popp had not released claimant for work, nor did he believe her medical condition to be stationary.

On October 6, 1980 a Determination Order awarded temporary, total disability inclusively from July 29, 1980 to September 11, 1980. It awarded no permanent disability compensation.

At the insurer's request, claimant saw Dr. Stevens again on November 21, 1980. He reported claimant had completely recovered from the sacral contusion with no residual disability. He recommended no further treatment and authorized no time loss beyond September 29, 1980. He also reported claimant's complaints of back pain at the thoracolumbar junction which accompanied a limited range of motion.

Claimant testified that she can not stand or walk more than fifteen minutes at a time without considerable pain. She does not bend or squat down, although Dr. Stevens felt she could do that occasionally. She testified she no longer engages in leisure activities such as major housework, dancing and hiking. A nephew that lived with claimant at the time of her injury verified that claimant no longer engaged in those activities. He testified, "...she couldn't do any heavy lifting or stand around for any amount of time. She would complain that her back hurt and she would have to sit down or lie down."

TEMPORARY TOTAL DISABILITY

The record reveals that claimant was medically stationary and released for work on September 29, 1980. Dr. Stevens did not authorize time loss beyond that date. The chiropractic treatments after that date were palliative rather than curative in nature. The manipuulations have brought only intermittent relief of claimant's back pain and no sustained improvement in her lower back range of motion. We affirm the Referee's order in that temporary total disability is only payable to September 29, 1980.

UNSCHEDULED PERMANENT PARTIAL DISABILITY

Although Dr. Stevens stated on November 21, 1980 that claimant had no residual disability from the injury, in that same report and earlier reports he noted claimant's pain and limited range of motion. A letter and work release filled out September 22, 1980 noted claimant has a minimal impairment. He imposed a lifting restriction that claimant should never lift over twenty pounds, and a carrying restriction that claimant should never carry over fifty pounds. He did not impose any standing or walking limitations.

Taking into consideration claimant's physical impairment, age, education, training, skills, work experience and OAP 436-65-600 et seq. we find claimant has suffered a 32° (10%) unscheduled permanent, partial disability as a result of her low back injury.

ATTORNEY'S FEE

The Referee's award of 25% of any permanent partial disability claimant may receive in the future was improper. An award for those services may only be made once it is actually determined that permanent disability compensation is due.

Claimant's attorney will be awarded a fee of 25% of the increase of permanent partial disability compensation awarded in this order.

ORDER

The Referee's order dated December 24, 1980, as amended January 12, 1980, is modified:

(1) We affirm the Referee's order of temporary total disability payable from July 29, 1980 only to September 29, 1980;

(2) We order claimant awarded 32° (10%) unscheduled permanent partial disability for decreased range of motion in her lower back and accompanying chronic pain;

(3) We order claimant's attorney be awarded a fee of 25% out of the permanent partial disability compensation herein awarded claimant for services rendered before the Board, payable out of and not in addition to said award of permanent disability.

ROGER J. KARASCH, Claimant WCB 80-08567
Malagon, Velure & Yates, Claimant's Attorneys December 31, 1981
Minturn, Van Voorhees, et al., Defense Attorneys Request for Review by SAIF

Reviewed by Board Members Barnes and McCallister.

SAIF seeks Board review of Referee Foster's order which reversed its denial of compensation for claimant's hypertensive condition. SAIF contends the preponderance of medical evidence does not show claimant's condition is the result of a compensable industrial injury. We reverse the Referee's order.

Claimant was compensably injured in 1972 and had subsequent surgery. On May 26, 1978, an amended hearing order awarded claimant 208° for 65% unscheduled back permanent partial disability and 10% (19.2°) scheduled left arm permanent partial disability. In a stipulated agreement approved on February 25, 1980 SAIF accepted responsibility for claimant's resulting psychological condition. Dr. Carter, treating psychiatrist, referred claimant to Dr. Taggart for examination and investigation of claimant's high blood pressure. On May 14, 1980, Dr. Carter opined:

> "My own impression is that the hypertension may well be a psychophysiological stress outcome of his various injuries and surgeries and rehabilitation frustration and loss of his 90 acre farm and home stemming from the magnificently uncoordinated medical-surgical treatment regime and rehabilitation program that followed his injuries. Nevertheless, even if the hypertension could be demonstrated not to have its origin in these things, it is, in my opinion, a major obstacle to Mr. Karasch' [sic] smooth current rehabilitation. He is choosing to enter the field of heavy equipment operation, particularly large crane and/or bucket operator.
>
> From all points of view that I can perceive at this time, this goal seems to me to be most appropriate in view of his motivation, his general personality, and it seems to me, his physical abilities. The hypertension, however, as far as I can perceive it, is a factor which could precipitate events that would abort all of his retraining if untreated in the form of cardiorenal disease, small strokes, etc., yet, to treat the hypertension by restricting salt, using diuretics and any other hypertensive agents will require that Roger be able to discipline himself to the proper use of these things, particularly in a work setting where there may be rather large temperature change and accompanying dehydration and salt loss."

On June 16, 1980, Dr. Taggart reported:

"In summary, Mr. Karasch does have essential hypertension with no presently detectable and organ damage. It is very difficult to isolate Mr. Karasch's hypertension as being due to the stress around his previous neck injury. His 3-5 pack per day smoking habit, his poor physical condition and his obesity are all contributing factors."

On July 21, 1980, SAIF referred claimant to Dr. Gore who stated:

"Since the patient flattly [sic] denies ever having had hypertension prior to his injury, I have no way of ascertaining whether or not this was a pre-existing condition. However, it would seem the only way by which to determine conclusively whether or not any elevated blood pressure preceded his injury would be to obtain the records from his previous physician's and actually observe these for any elevated readings. Should you be able to obtain this information I would be happy to review it for you and make any comment which may be appropriate."

On August 29, 1980, Dr. Inahara conveyed his previous findings:

"This patient was initially seen in this office on January 19, 1971 for a problem with pain involving the neck, shoulder and the upper extremities. At that time his blood pressure was recorded at 150/110 in the right arm and the same in the left arm. Both radial and ulnar pulses were present and normal."

On September 12, 1980, Dr. Winkler reported:

"Mr.Karasch was seen by me for a long period of time in regards to his injury. He was treated for hypertension by me for a long period of time. The first time that I have in my notes that medication was started was on November 20, 1973 at which time his blood pressure was 130/94 and on a couple previous occassions [sic] it had been elevated, so he was started on Aldochlor 250mg, bid. This was continued to December 21. His blood pressure was still elevated, 140/102 and Aldochlor was increased to tid. His blood pressure remained high over the next several visits and we continued on the Aldochlor at two to three times a day and on October 25, 1974 his blood pressure was still 140/102. January 13, 1975

his blood pressure was 150/96 and the Aldochlor was increased to 250 mg tid. Over the next several visits his blood pressure remained high and the medications stayed the same. In November 5, 1976 his medication was changed to Minipress 1mg, two tablets tid and Hygroton 50mg daily. His blood pressure did drop down to 140/80 on December 16, 1976. On January 6, 1977 his blood pressure medication was changed to Minipress 5mg. bid, Hygroton 50mg daily, and his blood pressure dropped to 140/90. Over the next several office visits, his blood pressure remained at 110-140/90-100. As far as I can determine, he was taking his medication regularly. I do not have any notes as to how often he was taking it or how regularly but his blood pressure remained at a fairly normal level at each office visit. He was last seen by me on June 7, 1979. His blood pressure was 130/90."

On September 22, 1980, Dr. Gore reported in light of Dr. Inahara's findings that:

"The additional information which was obtained from Dr. Inahara leads me to conclude that beyond any reasonable doubt, Mr. Karasch's hypertension preexisted his injury. In addition, there seems to be negligible liklihood [sic] that the blood pressure condition was aggravated by his injury, since his readings since the injury have actually been less than the pre-injury readings."

The Board cannot determine where claimant's hypertensive condition began or what the cause is. There appears to be many possible and no probable causes. Claimant has the burden of proving his condition is the result of a compensable injury. Claimant has failed to carry his burden of proof.

ORDER

The Referee's order dated March 20, 1981 is reversed.

BEVERLY P. KINNAMAN, Claimant WCB 80-05082
Henry Kane, Claimant's Attorney December 31, 1981
Bullivant, Wright, et al., Defense Attorneys Request for Review by Claimant

Reviewed by Board Members Barnes and Lewis.

Claimant seeks Board review of Referee Mulder's order which granted awards for increased permanent partial disability to claimant's arms and found claimant had no compensable shoulder condition and therefore concluded claimant was not entitled to an additional award for unscheduled disability. Claimant attacks that latter finding.

Claimant has submitted additional evidence to the Board that was not introduced before the Referee. We have made that evidence part of the file, but have not considered it on Board review. See Brown v. SAIF, 51 Or App 389 (1981).

There are numerous references to claimant's shoulder pain in the medical reports on her course of treatment for her accepted arm tendinitis and epicondylitis. By far the clearest and most specific statement of diagnosis and causation was made by Dr. Fry:

> "X-ray examination of the shoulder shows no evidence of calcification. There is acromioclavicular degenerative joint disease in the shoulder which causes the shoulder pain.
>
> "I believe the patient continues to have evidence of tennis elbow (lateral epicondylitis) involving the left elbow. I believe this due to the type of work that she has been doing and the work has exacerbated this to some degree. She also has evidence of acromioclavicular degenerative arthritis and this is giving her some shoulder type pain. I do not believe the two are related. The shoulder pain is not related to her work induced injury". Exhibit 33

As did the Referee, we find Dr. Fry's explanation of causation more persuasive than the numerous other cryptic (and generally unexplained) medical references to claimant's shoulder pain.

ORDER

The Referee's order, dated April 10, 1981, is affirmed.

THOMAS A. KYZER, Claimant WCB 80-06017
Malagon, Velure & Yates, Claimant's Attorneys December 31, 1981
SAIF Corp Legal, Defense Attorney Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

Claimant requests Board review of Referee Neal's order which granted him 20% unscheduled permanent partial disability for an increase of 10% over that awarded by the Determination Order dated June 5, 1980.

The sole issue on review is whether claimant has proved entitlement to a greater award.

The claimant injured his low back in August 1978 while employed as an irrigation ditch tender. In January 1979 he had low back surgery. His condition became medically stationary in May 1980 and the June 1980 Determination Order followed.

The claimant has a long history of back problems. We are persuaded by the medical evidence and claimant's testimony that he had made a good recovery from his prior surgeries. He had been able to return to moderate to heavy work and in fact the work as an irrigation ditch tender we find was moderate to heavy. The surgery after the August 1978 injury was claimant's fourth major low back operation. After this fourth surgery his treating physician found that his impairment should preclude him from a return to heavy work. The record indicates that it was only after the fourth surgery that claimant's impairment precluded him from heavy work. We find that claimant's physical impairment is severe enough that a reasonable inference can be drawn (based on the medical evidence and claimant's testimony) that claimant is permanently precluded from performing any moderate to heavy work on a regular and sustained basis. Claimant has returned to work as a truck operator (owner-driver). His employment as a truck driver has been limited but we conclude from his testimony that this is more due to the poor state of the economy than to his physical impairment.

We evaluate claimant's disability based on his situation at the time of the hearing. We have already found that the medical evidence and claimant's testimony establish a physical impairment which precludes him from moderate and heavy work. Taking the impairment and combining it with the other relevant factors of disability and using as a guideline OAR 436-65-600 et seq, we find claimant is entitled to 35% (112°) unscheduled permanent partial disability.

ORDER

Claimant is awarded an additional 15% unscheduled permanent partial disability for loss of wage earning capacity due to the injury of August 12, 1978.

Claimant's attorney is awarded as a fee 25% of the increased compensation granted by this order, payable out of said compensation, not to exceed $3,000. -694-

SHARON G. LAMBERT, Claimant
Rolf Olson, Claimant's Attorney
Marshall C. Cheney, Defense Attorney

WCB 79-03855
December 31, 1981
Request for Review by Claimant

Reviewed by Board Members Barnes and McCallister.

Claimant seeks Board review of Referee McCullough's order which affirmed the carrier's denial of two aggravation claims.

Subsequently, in another proceeding, WCB Case No. 80-01836, another Referee found the incident that gave rise to the aggravation claims here in issue was compensable as a new injury. The Referee's order in WCB Case No. 80-01836 was not appealed. Therefore, this appeal may now be moot.

In any event, the Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated January 24, 1980 is affirmed.

ANITA A. LAMOTHE, Claimant
Richard Sly, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-07474
December 31, 1981
Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

The claimant requests Board review of Referee Ail's order which approved the carrier's denial of her claim for a demyelinating disorder.

The sole issue on review is compensability.

We agree with the Refree. There is no proof of a causal relationship between claimant's condition of employment and the condition(s) for which she filed her claim.

ORDER

The Referee's order dated June 16, 1981 is affirmed.

PAMELA L. LANGA, Claimant
Hayes P. Lavis, Claimant's Attorney
Jerry K. McCallister, Defense Attorney

WCB 80-6944
December 31, 1981
Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

Claimant requests Board review of Referee Mulder's order which approved SAIF's denial.

Sole issue is compensability of claimant's claim for "sore hands".

We accepted the facts recited by the Referee. The Referee questions claimant's credibility based on her inconsistent statements about her symptoms. He found that "one or more of her jobs over the last few years may have contributed to the problem." We agree and find that claimant has failed to prove compensability against this employer.

ORDER

The Referee's order dated June 23, 1981 is affirmed.

BETTY E. LARSEN, Claimant
Robert Muir, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-08432
December 31, 1981
Request for Review by Claimant

Reviewed by Board Members Barnes and Lewis.

The claimant seeks Board review of the Referee's order which granted her a total award of 40% unscheduled disability. Claimant contends she is entitled to a separate scheduled award and a greater award of unscheduled disability.

The Board adopts the facts as recited by the Referee as its own.

The Referee concluded, regarding scheduled left leg impairment, that the left leg symptoms resulted exclusively from her back injury and surgery; that the evidence failed to establish claimant suffers from an independent impairment of her leg; and that, therefore, she was not entitled to a separate scheduled award. We agree. See Woodman v. Georgia Pacific Corp., 289 Or 551 (1980).

On the issue of unscheduled disability, we would modify. Claimant is 50 years of age with a high school education and past work experience as a retail sales clerk, oil delivery truck driver, potato sorter and one year's experience in electronic assembly. Claimant had retraining after this injury into the electronic assembly work program which was completed around April 1981. At injury, claimant was a custodian, a job to which she is now precluded from returning.

Based on the above and the criteria set forth in OAR 436-65-600, et seq., we find claimant is entitled to an award of 160° for 50% unscheduled disability to compensate her for her loss of wage earning capacity.

ORDER

The Referee's order dated May 28, 1981 is modified. Claimant is hereby granted an award of 160° for 50% unscheduled disability. This award is in lieu of all prior awards.

Claimant's attorney is hereby awarded as and for a reasonable attorney's fee 25% of the increased compensation granted by this order; however, the total fee for services rendered before the Referee and the Board shall not exceed $3,000.00.

JESUS A. LOPEZ, Claimant	WCB 79-07806
Jeff Mutnick, Claimant's Attorney	December 31, 1981
Ronald Atwood, Defense Attorney	Request for Review by Employer

Reviewed by Board Members Barnes and McCallister.

The employer seeks Board review of Referee Ail's order which granted claimant compensation equal to 64° for 20% unscheduled disability for injury to his low back. The employer contends that the Determination Order which granted claimant no compensation for permanent disability should be affirmed.

Claimant sustained a compensable injury to his low back on January 5, 1977. During the course of claimant's recovery, vocational rehabilitation was recommended, but as claimant continued to improve it was determined that retraining was unnecessary. Dr. Balsiger released claimant for work with no restrictions in July 1978. He stated:

> "It is my opinion, based upon this last examination, that Mr. Lopez has fully recovered from this injury and I am unable to detect any residual weakening of the area of injury. I believe that he is physically capable of performing any work that might normally be required of any man of similar build and strength."

Claimant's claim was closed by a Determination Order dated November 15, 1978 which granted him no compensation for permanent disability.

On December 18, 1979 Dr. Armbruster indicated that claimant had no problem with his back. He stated claimant had no neurological deficits and had full range of motion of the lumbosacral spine. The x-rays showed minimal narrowing of the L5-S1 disc space which was felt to be developmental. At that time claimant was asymptomatic but should avoid work requiring repetitive bending, twisting and lifting in excess of 60-70 pounds. Based on the medical evidence to this point in time, we do not find any support for an award of permanent disability. Claimant testified at the hearing that he was symptom-free until a couple months after starting work for Continental Can in August 1978. The medical evidence indicates that claimant was symptom-free up to at least June 1980, one and one-half years after the issuance of the last Determination Order. On June 9, 1980 Dr. Torres indicated claimant was unable to work due to the severity of his symptoms. He stated claimant wanted to have his claim reopened. This report is the only report which even attempts to justify permanent impairment. Two major factors are missing: (1) An accurate history from Dr. Torres and (2) a causal relationship between claimant's current symptoms and his 1977 industrial injury. We are not persuaded that claimant has shown by a preponderance of the evidence that he is entitled to any compensation for permanent partial disability as a result of his January 5, 1977 injury. We conclude the November 15, 1978 Determination Order should be affirmed.

ORDER

The Referee's order dated August 11, 1980 is reversed. The November 15, 1978 Determination Order is affirmed.

JOHN MARDIS, Claimant	WCB 80-07720
Allen Murphy, Claimant's Attorney	December 31, 1981
SAIF Corp Legal, Defense Attorney	Request for Review by SAIF

Reviewed by Board Members Barnes and Lewis.

SAIF Corporation seeks Board review of Referee Ail's order which set aside its denial of compensation for claimant's neck injury. SAIF contends that claimant's claim was untimely filed and, therefore, not compensable.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated April 17, 1981 is affirmed. Claimant's attorney is awarded $100 as and for a reasonable attorney's fee, payable by the SAIF Corporation.

LEE M. McBRIDE, Claimant
Evohl Malagon, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-05943
December 31, 1981
Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee James' order which affirmed the SAIF Corporation's denial of aggravation. Claimant contends he has sustained his burden of proof.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated June 10, 1981 is affirmed.

GERALD D. McCLANAHAN, Claimant
Frank Mowry, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-09849
December 31, 1981
Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee James' order which affirmed the SAIF Corporation's denial of medical bills.

Claimant, 51 years of age, was employed as a drywaller and construction carpenter, and in February 1979 he experienced pain in his right arm. Claimant had a prior right arm problem in 1973 for which he underwent surgery. That injury was diagnosed as medial epicondylitis, right arm. The injury before us was diagnosed by Dr. Ho as right lateral epicondylitis.

Claimant testified he returned to work in a supervisory capacity and avoided doing any heavy work using his right arm. Claimant quit this employer, Harver, in June 1979 and went to work for two other employers for very short periods of time--a couple days for one and a couple weeks for the other. In July 1979 claimant went to work for Pacific Interiors and worked there until August 1980 when he went to work for Herman Fisher where he is still employed.

Claimant testified that when he first went to work for Pacific Interiors in July 1979, he was "a worker", but after a couple months he again had a supervisory position.

In late May 1980 claimant, due to a gradual increase of pain in his right arm, sought medical attention from his treating physician, Dr. Ho. Dr. Ho again diagnosed right lateral epicondylitis. Claimant was off work from June 13 through July 14, 1980, and SAIF paid all compensation for temporary total disability.

The SAIF issued its denial on September 9, 1980 wherein it stated it denied responsibility for medical care because claimant's 1979 injury was an aggravation of a prior injury and no longer their responsibility.

Dr. Ho has the only medical opinion in the record. He has treated claimant over the years. Dr. Ho indicated that claimant's lateral epicondylitis was not related in any way to claimant's prior right arm injury which was medial epicondylitis. In response to a letter from SAIF, Dr. Ho, by report of December 29, 1980, opined that claimant's symptoms in May 1980 represented a recurrence of the February 1979 injury.

When his symptoms increased and required medical attention, claimant filed a claim against his then-employer, Pacific Interiors. No one at the hearing made any inquiries of claimant concerning this claim. Pacific Interiors has never responded to the claim.

Claimant testified that he mows his lawn, has gone fishing (trolling) and dug holes with a holedigger. He also built a pole barn 15x30 feet which is still not completed. However, he did not start this construction, according to his testimony, until September 1980 after the period of aggravation which is before us.

The Referee found that Dr. Ho was not familiar with claimant's activities and that this lack of familiarity was fatal to claimant's case and affirmed the denial. We disagree.

The Referee made no finding on claimant's credibility. The only history we have is the testimony of claimant and the medical opinion of Dr. Ho based on the history as related to him by the claimant. The Referee found significant claimant's participation in the construction of a pole barn even though this occurred after the period of disability in question. Claimant's activities throughout July 1979 until his aggravation of late May 1980 do not rise to a new industrial exposure. Claimant testified he was still a supervisor and limited the use of his right arm but that the symptoms just gradually increased. Dr. Ho found the condition in May-June 1980 to be the same condition for which he treated claimant from the 1979 injury and opined that they were related.

Based on the above, we find the medical bills of Dr. Ho are the responsibility of SAIF.

ORDER

The Referee's order dated May 28, 1981 is reversed. The denial of September 9, 1980 is reversed, and the SAIF Corporation is ordered to pay the bills of Dr. Ho.

Claimant's attorney is awarded, as and for a reasonable attorney's fee at the hearing and before the Board, the sum of $800, payable by the SAIF Corporation.

RAY McDANIEL, Claimant
Evohl Malagon, Claimant's Attorney
Ridgway Foley, Defense Attorney

WCB 79-11076
December 31, 1981
Request for Review by Employer

Reviewed by Board Members McCallister and Lewis.

The employer seeks Board review of Referee Igarashi's order which awarded claimant 96° for 50% scheduled disability for loss of use of his right arm, and 240° for 75% unscheduled permanent partial disability for injury to his cervical spine. Weyerhaeuser contends the award is excessive.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated March 26, 1981 is affirmed. Claimant's attorney is awarded $400 as and for a reasonable attorney's fee, payable by the employer.

NEIL R. MILLER, Claimant
A.J. Morris, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-09803
December 31, 1981
Request for Review by Claimant

Reviewed by Board Members Barnes and McCallister.

Claimant requests Board review of Referee Nichols' order which affirmed the SAIF Corporation's denial of his aggravation claim. The sole issue is compensability of an aggravation claim.

The claimant was injured in April 1979 when he twisted his low back. Dr. Rasmussen diagnosed lumbosacral strain. The claimant's lost time from work was less than 14 days, and he returned to his regular work. He continued to receive conservative treatment from Dr. Rasmussen into the late fall of 1979 and went on to a full recovery. In January 1980 a Determination Order was issued awarding appropriate temporary total disability. No permanent partial disability was awarded. In December 1979, shortly before the Determination Order was issued, the plant where claimant worked was closed. He went on unemployment compensation interrupted occasionally by part time, temporary employment.

The claimant's recreational hobby is physical fitness to the extent he has a "gymnasium" in his home. Part of his fitness program has included weight lifting.

In July 1980 claimant experienced an acute episode of low back difficulty. He testified that while driving his pickup, his low back began to hurt. The pain increased until by day's end the problem had become a full-blown acute low back sprain/strain situation (i.e., muscle spasm, pain, muscle strapping, etc.). Dr. Rasmussen again treated him, and within a short time claimant had again become completely asymptomatic. Dr. Rasmussen requested SAIF to reopen claimant's April 1979 claim, SAIF denied and claimant requested a hearing. The Referee approved SAIF's denial on the following basis:

> "Dr. Rasmussen relates the aggravation to the April 1979 injury basically because he knows of no other intervening incident to which it could be related. This reasoning is, however, partly faulty because the claimant was doing some pretty strenuous weight lifting during the time.
>
> "The claimant missed only a few days from work because of the original injury. He returned to work and worked for several months without any problems. He lifted weights for six months before the aggravation. I do not find the claimant has carried his burden of proof in showing the aggravation to be work-related where his evidence is basically the doctor's opinion."

We agree and add the following comments.

Neither the Referee nor this Board is compelled to accept the opinion of any expert, medical or otherwise, solely on the basis of the fact it is the only opinion in the record. Edwin A. Bolliger, WCB Case No. 78-09001 (Order Denying Reconsideration, November 27, 1981). In this case, Dr. Rasmussen's opinion is based on a very different understanding of claimant's physical fitness activities than the inference we draw from the testimony. In addition we believe any expert opinion, medical or otherwise, must, at least, stand the test of simple logic and/or basic common sense. We find Dr. Rasmussen's opinion defective not only on the history; it also fails this test.

ORDER

The Referee's order dated July 21, 1981 is affirmed.

PHYLLIS J. MOORE, Claimant
John Svoboda, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 78-06372
December 31, 1981
Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

Claimant resuests Board review of Referee Seifert's order which denied claimant's motion which sought an order approving terms of a settlement and also denied claimant's request for penalties and attorney fees for SAIF's unreasonable refusal to pay compensation persuant to the term of the purported agreement.

This case involves a "disagreemant" over an "agreement". Claimant contends she and SAIF had agreed to settle her claim on a disputed claim basis. She further contends the terms of that settlement had been "worked out" and agreed. She says the proof the her contentions is the memorialization of the settlement agreement on the record at a prior hearing. Her contention might be proof of what she contends and the basis for granting the relief she requests except for the following facts. After the first hearing claimant was to draft the settlement document and submit it to SAIF on signature. This was done but, SAIF took exception to one of the terms of the settlement as written in the claimant's document. SAIF submitted to claimant their version of the terms of the settlement as they remembered them. Claimant and SAIF could not agree as between their respective understandings

Claimant requested a hearing seeking an order of enforcement from the Referee plus penalties and attorney fees.

The Referee denied claimant's motion on the grounds and for the reason he lacked jurisdiction.

We agree with the Referee's disposition but believe he lacked <u>authority</u> rather than jurisdiction.

First, we find the Referee had no <u>authority</u> to order either of the parties to comply with one of the parties version of the terms of a purported settlement agreement. The fact the claimant and SAIF disagreed over the terms of the settlement as reduced to writing is good evidence there never was an agreement.

Second, as for as this agency is concerned there is no settlement of this or any case except and until the "settlement" is approved by a Referee or the Board. Implicit in Referee or Board approval is the obvious requirement that the parties have previously worked out any disagreements over the terms of the settlement.

ORDER

The Referee's order dated July 31, 1981 is affirmed.

JEFF B. MURPHY, Claimant
Dale A. Rader, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-09085
December 31, 1981
Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

Claimant requests Board review of Referee Neal's order which approved SAIF's denial of his aggravation claim.

We affirm the Referee's order.

ORDER

The Referee's order dated June 11, 1981 is affirmed.

ANDREW L. NAYLOR, Claimant
Allen T. Murphy, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-07340
December 31, 1981
Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

Claimant requests Board review of Referee Fink's order which affirmed the last Determination Order on the claim.

We affirm the Referee's order.

ORDER

The Referee's order dated April 29, 1981 is affirmed.

BILL PAINTER, Claimant
Welch, Bruun & Green, Claimant's Attorneys
Marcus Ward, Defense Attorney

WCB 80-05271
December 31, 1981
Order on Reconsideration

Claimant has requested reconsideration of the Board's order entered February 17, 1981 which found that the Board was without jurisdiction to review Referee McSwain's Interim Order. By an order dated December 16, 1980 the Referee postponed a hearing requested by claimant. One of the issues raised was the extent of permanent partial disability awarded by a Determination Order for injury to claimant's low back. After requesting a hearing on extent of disability, claimant entered a program of vocational rehabilitation. The Referee sua sponte decided to postpone the hearing until claimant completed his vocational rehabilitation program. Claimant requested review of the Referee's Interim Order, indefinitely postponing the hearing.

In a companion case the Board has ruled that an order deferring a hearing in this situation is an interim order not subject to review. Larry J. Barnett, WCB Case No. 79-00387 (decided this date). We have also determined that a hearing should be held, and by copy of this order we so advise the Presiding Referee.

ORDER

On reconsideration, the Board adheres to its former order.

JOANNE PALMQUIST, Claimant — WCB 81-00774
Malagon, Velure & Yates, Claimant' Attorneys — December 31, 1981
SAIF Corp Legal, Defense Attorney — Request for Review by SAIF

Reviewed by Board Members McCallister and Lewis.

SAIF Corporation seeks Board review of Referee Williams' order which required it to pay for medical services notwithstanding its pending request for review on the question of whether claimant's condition was compensable. The issue is whether the 1979 amendment to ORS 656.313 is retroactive.

We have previously ruled that it is not. Robert Condon, WCB Case No. 80-05218 (March 26, 1981).

Claimant moves to remand for further proceedings. We conclude that the suggested basis for remand is beyond the scope of this case and more properly a matter to take up pursuant to a new request for hearing.

ORDER

The Referee's order dated September 25, 1981 is affirmed. Claimant's motion to remand is denied. Claimant's attorney is awarded $600 as a reasonable attorney's fee for services rendered on this Board review, payable by the SAIF Corporation.

STANLEY PARISH, Claimant — WCB 80-03872
Jerome Bischoff, Claimant's Attorney — December 31, 1981
SAIF Corp Legal, Defense Attorney — Request for Review by SAIF

Reviewed by Board Members Barnes and McCallister.

The SAIF Corporation seeks Board review of Referee Peterson's order which awarded claimant 288° for 90% unscheduled permanent partial disability for his occupational disease. SAIf contends claimant's occupational disease is not permanently worsened.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated March 9, 1981 is affirmed.

STEVE PATTERSON, Claimant
Michael Hansen, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 79-10402
December 31, 1981
Request for Review by SAIF

Reviewed by Board Members Barnes and McCallister.

The SAIF Corporation seeks Board review of Referee Igarashi's order that awarded claimant compensation for permanent total disability.

Claimant compensably injured his left arm. There is some permanent impairment, but claimant was able to return to work. He has not worked since his psychological disorder, incipient paranoid schizophrenia, subsequently worsened. SAIF initially denied responsibility for claimant's schizophrenia. However, the Board's Order on Review in WCB Case No. 78-00889 concluded that the industrial injury to claimant's left arm materially worsened his schizophrenia and, therefore, the psychological condition was compensable.

There is reason to doubt the accuracy of the Board's prior conclusion. For example, in Exhibit 56 in the present record Dr. Colbach reports:

> "Essentially schizophrenia is some sort of brain disease. We are not at all certain about its causality, although there does seem to be some evidence that it is genetically inherited, or perhaps due to an early life viral illness. It usually shows itself early in a person's life, in the teens or twenties. There is no correlation between the onset of this disease and any particular environmental situation. ...the progression of the disease seems unrelated to external factors. In my experience and in my reading there is no precedent for considering schizophrenia to be a work-related illness. Such unfortunate people are just casualties of life."

But the Board's prior conclusion, right or wrong, is now res judicata.

We affirm and adopt the Referee's order finding claimant permanently and totally disabled.

ORDER

The Referee's order dated August 13, 1980 is affirmed. Claimant's attorney is awarded the sum of $450 for services rendered on Board review, payable by the SAIF Corporation.

IRENE PENIFOLD, Claimant
Evohl Malagon, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 78-09826
December 31, 1981
Request for Review by Claimant

Reviewed by Board Members Barnes and Lewis.

Claimant has requested Board review of Referee Johnson's order which denied the claim for her contact dermatitis condition.

A hearing on this claim was originally held on August 28, 1979. The Referee at that time found the claim to be compensable, remanded it for payment of benefits and awarded penalties and attorney fees. On Board review the Referee's decision was reversed. Irene Penifold, WCB Case No. 79-09826 (May 16, 1980). Pursuant to a decision by the Court of Appeals in Penifold v. SAIF, 49 Or App 1015 (1980), the matter was remanded to the Referee for the taking of additional evidence. After considering the additional evidence, the Referee found that the tests set forth in James v. SAIF, 298 Or 343 (1981), and Thompson v. SAIF, 51 Or App 395 (1981), were applicable and accordingly ruled that the claimant failed to establish a compensable claim for an occupational disease.

Claimant contends that James and Thompson, decided after the date of claimant's injury, should not be applicable under ORS 656.202. We disagree. The retroactivity argument made by the claimant is more properly applied to situations in which a newly enacted statute or rule alters the law. If the injury occurs prior to the enactment of the statute or rule, there is no question that an employer's responsibility for compensation must be measured under the law in effect at the time of the injury. Holmes v. SAIF, 38 Or App 145 (1979). Such is not the situation here. The occupational disease statute, ORS 656.802, was in effect at the time of the filing of this claim. Prior to a final determination of the matter, the courts in James and Thompson rendered their opinion on the interpretation of ORS 656.802.

The courts in James and Thompson did not announce "new law," they merely interpreted existing law, in effect at the time of the filing of this claim. The Referee applied those interpretations to the case before him, and properly so.

The claimant contends as a second issue that the March 30, 1977 Determination Order is conclusive as to whether claimant suffered from an industrial injury at the time of filing the claim, or from an occupational disease. Since the Determination Order was never appealed, the claimant argues that the classification of her contact dermatitis as an injury rather than as an occupational disease is res judicata, and that it is improper to apply the occupational disease statute at this later date.

We disagree. That portion of the Determination Order to which the claimant is referring reads as follows: "Date of Injury October 1, 1976." It is to be noted that all determination order forms contain this "Date of Injury" reference. This, in and of itself, cannot be considered to be determinative of whether the claimant suffered an injury or occupational disease. The October 1, 1976 date given in the Determination Order is actually the date given by the claimant on the Form 801 where it requests the "Date and Hour of Injury Or Exposure to Disease" (emphasis added). In order to determine whether or not the claim is one for injury or occupational disease, it is therefore more appropriate, when there is a lack of elaboration in the Determination Order, to look to the Form 801 to determine the nature of the claim. We agree with the Referee who noted in the first Opinion and Order regarding this claim that the Form 801 alleged a claim for an occupational disease.

The claimant also contends that once the Determination Order became final, SAIF may not now assert the noncompensability of the claim. Despite our misgivings on this issue, we feel constrained to rule against the claimant based on Frasure v. Agripac, 290 Or 99 (1980), and Saxton v. Lamb-Weston, 49 Or App 887 (1980). SAIF is not estopped to assert noncompensability of the claim under the occupational disease statute.

Claimant contends as a third issue that she has carried her burden in proving entitlement to compensation under the occupational disease statute. We recently held in Kay L. Murrens, WCB Case No. 79-01573 (December 7, 1981), that in order to prove entitlement to benefits under a claim for occupational disease, it is necessary to show that the work exposure was the "significant predominant cause" of the claimant's condition.

Applying this standard to the claim before us, we find that the Referee reached the proper conclusion in denying compensability. The May 9, 1980 report of Dr. Frances J. Storrs states that:

> "There is now no doubt in our minds that Mrs. Penifold's acute dermatitis which occurred during the time that she was working at the Eugene Hospital and Clinic as a nurse's aide was directly associated with her use of rubber gloves and Septisoft liquid soap."

The April 4, 1980 report of Dr. Storrs and Dr. Martin J. Safko, M.D., relates that:

> "Our final impression was that Mrs. Penifold was indeed likely allergic to her rubber gloves from work, as she did react to rubber. She also was allergic to the Septisoft antiseptic, used at her place of employment. She was given the names of companies who manufacture rubber-free gloves. If she does not come into contact with Septisoft or other detergents having the same allergen, and uses rubber-free gloves, she may do quite well."

The report goes on to state with regard to Septisoft exposure at work:

> "On a 1 - 10 scale of work relatedness, we consider this an 8. (With 1 being non-work-related and 10 being highest-work-related.)"

There is therefore no question about the work relatedness of claimant's exposure to Septisoft and her work.

It is not sufficient in establishing compensability for an occupational disease to merely establish a work connection to the exposure. ORS 656.802(1)(a) additionally requires that the condition be the result of an exposure to which an employee is not ordinarily exposed other than during employment. As the Referee noted, the claimant is sensitive to substances that she came into contact with at work but also to substances which she was exposed to off the job. During the hearing the claimant testified as follows:

> "Q. Are you exposed to other kinds of soaps off the job?
>
> A. I have been wearing gloves. I don't take that chance.
>
> Q. Okay. You have been wearing gloves off of the job?
>
> A. Right.
>
> Q. What kind of gloves are these?
>
> A. Well, I was wearing the rubber gloves until I found out that I am allergic to the rubber gloves.
>
> Q. When did you start wearing the rubber gloves?
>
> A. After I developed the skin problems.
>
> Q. So that was in the fall of '76 you started wearing the rubber gloves?
>
> A. The middle of '77.
>
> Q. Okay. You have used various kinds of hand creams at home, haven't you?
>
> A. Well, lotions."

And, later:

> "Q. When did you quit wearing rubber gloves?
>
> A. As soon as Dr. Rollins told me I was allergic to rubber.
>
> Q. When was that?
>
> A. That must have been March of this year when he did all the patch tests."

It should also be noted that claimant left her employment on November 27, 1978, thus terminating her exposure to Septisoft. As noted above, however, claimant continued to wear rubber gloves until March of 1979. Although Dr. Storrs noted in his May 9, 1980 report that people with hand eczema often require many months to resolve their difficulties, the reason for claimant's condition remaining in remission could have been assigned just as well to claimant's continued use of rubber gloves at home. There is no evidence in the record of any attempt to separate or differentiate the effects of exposure to one substance versus another. That being the case, we find that claimant has failed to establish the compensability of her claim under ORS 656.802.

ORDER

The Referee's order dated June 22, 1981 is affirmed.

WALTER C. PHILLIPS, Claimant	WCB 80-02130
Jan Baisch, Claimant's Attorney	December 31, 1981
Paul Roess, Defense Attorney	Denial of Reconsideration

The Board has received a motion for reconsideration of its Order on Review dated October 30, 1981.

Having considered the motion, it is hereby denied as being untimely filed.

IT IS SO ORDERED.

JAMES PHIPPS, Claimant
Rolf Olson, Claimant's Attorney
Ridgway Foley, Jr., Defense Attorney

WCB 81-01993
December 31, 1981
Request for Review by Employer

Reviewed by the Board en banc.

The employer seeks Board review of Referee McCullough's order which found claimant was permanently and totally disabled commencing the date of the hearing. The employer contends the Determination Order which awarded 30% unscheduled disability should be reinstated.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated May 19, 1981 is affirmed. Claimant's attorney is awarded $400 as and for a reasonable attorney's fee, payable by the carrier.

CHAIRMAN BARNES, Dissenting:

I would find that claimant has, at most, moderate physical impairment, has mental abilities, as one doctor put it, "in the superior range of intellectual functioning"; and has been retrained at community college for a sedentary job in the insurance industry. Based on those findings, I do not agree that claimant is permanently and totally disabled.

There are jobs in the insurance industry that are within claimant's physical limitations and for which he has both the general mental ability and the specific training. (One wonders why the carrier defending this claim did not just offer claimant a job and avoid this whole problem.) The reasons claimant has not been able to obtain such a job are: (1) His serious job search has been limited geographically; (2) he has applied exclusively for higher level jobs than he has yet been trained for; and (3) I suspect that current economic conditions have caused reduced hiring by insurance companies.

The first two factors, claimant's unrealistic limitations on his job search, are not reasons to grant permanent total disability. Nor is the third; the workers compensation system was never intended to protect workers from depressed economic conditions.

Applying the standards of OAR 436-65-600, et seq, I would grant claimant an award of 45% permanent partial disability.

TOM D. PORTER, Claimant
James Larson, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 79-10997
December 31, 1981
Request for Review by SAIF

Reviewed by Board Members Barnes and McCallister.

The SAIF Corporation seeks Board review of Referee Nichols' order, order on reconsideration and second order on reconsideration which cumulatively (1) affirmed an award by Determination Order of 30% loss of claimant's left forearm; (2) awarded additional temporary total disability compensation from November 26, 1979 to December 14, 1979; and (3) awarded a penalty of 25% of the unpaid time loss compensation from November 26, 1979 to April 9, 1980, the date of the Determination Order. The only issues raised involve claimant's entitlement to temporary total disability compensation and penalties, with the latter issue depending, as we see it, on our resolution of the former issue.

The essential facts are as follows:

(1) Claimant injured his left arm July 18, 1979. His treating physician was Dr. Corrigan.

(2) By letter dated November 19, 1979 the employer provided Dr. Corrigan with a job description of an available job, called moderate duty by the employer, and asked Dr. Corrigan if claimant was physically capable of performing the job.

(3) On November 26, 1979 Dr. Corrigan released claimant to return to the moderate duty job that the employer had described.

(4) The employer also corresponded with claimant, sending him the job description. Claimant responded that he would accept the job "with assistance" (this was never defined up to and including the time of hearing) and provided the job was on the day shift. In fact, the available position was on the night shift. Claimant never returned to work.

(5) On December 14, 1979 Dr. Corrigan sent a letter to claimant's attorney. The doctor's letter refers to a prior phone conversation with the attorney. Apparently based on that conversation, the doctor stated: "I would consider this...heavy work...and I would therefore rescind my release for that work." Claimant's attorney forwarded a copy of Dr. Corrigan's letter to SAIF on December 26, 1979.

(6) Dr. Corrigan's change-of-mind was not based on any symptomatology or medical findings, i.e., claimant had not tried the offered job and then reported to his doctor with increased complaints as often happens. As best as we can tell from this record, the doctor's revised opinion was the result of claimant's attorney giving him a different job description than had the employer.

(7) Claimant testified at the hearing, in essence, that in November 1979 he was physically capable of performing the offered job.

The Referee reasoned that SAIF should have reinstated claimant's time loss compensation after Dr. Corrigan's December 14, 1979 flip-flop. We do not attach the same significance to the doctor's vacillation. In general, a doctor's release-to-work should be based on a job description furnished by the employer, not by a claimant's attorney. This is not to say that claimants' attorneys cannot play some role in that medical decision. But in this case we do not know what contribution claimant's attorney made during his phone conversation with Dr. Corrigan. Absent evidence that the employer's job description was inaccurate, and none is present in this record, we conclude that a release-to-work decision based on the employer's job description is more reliable than a res- cission of that release based on an attorney's unknown job description. Moreover, and most importantly, claimant testified at the hearing that he could do the job that was offered.

A strong inference can be drawn from this record that the only reasons claimant did not return to work in November 1979 were personal, primarily his desire to work days when the offered position was at night. Workers compensation is not intended for those who admit to being capable of work, when work is offered and available, but choose not to work for personal reasons unrelated to their injury or disability.

ORDER

The Referee's order dated July 30, 1980, order on reconsideration dated September 29, 1980 and second order on reconsideration dated December 1, 1980 are modified. Those portions that award claimant additional compensation and penalties are reversed. The balance of the Referee's orders is affirmed.

JOHN M. POWELL, Claimant
Jeff Gerner, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-03380
December 31, 1981
Request for Review by SAIF

Reviewed by Board Members Barnes and McCallister.

SAIF has requested review of Referee Danner's order remanding this claim for acceptance as an occupational disease claim, effective February 13, 1980. SAIF contends that claimant has failed to establish medical causation; i.e., that claimant has failed to sustain his burden of proving that his work activity contributed to the disease. We agree and therefore reverse.

Claimant originally sustained a compensable low back injury in 1977 when a lumber truck he was driving rolled over. Claimant was treated for a low back contusion but incurred no time loss. This condition apparently resolved itself, and claimant did not find it necessary to return for treatment after an initial visit to a physician.

Claimant was subsequently without symptoms in his low back for approximately a year and a half. He then began to experience low back pain and referred pain into his hip and right leg. After living and working with this problem for approximately three or four months, claimant went to see an osteopathic physician, who diagnosed disc syndrome. Treatment given was pelvic traction, heat and osteopathic manipulation.

At the hearing, claimant contended that his current back difficulties and related symptomatology were caused by continual jarring to which he was exposed while operating a log truck he had driven for the past three and a half years. The truck had a faulty driver's seat which, as was corroborated by three fellow workers, had minimal cushioning and abolutely no "give". One witness testified that "[t]he seat beats you to death, it was like sitting on a stump. There was no more give to it than that floor has got." Claimant had started driving this truck shortly after his industrial accident in 1977, but, as previously noted, he was relatively symptom free for approximately a year and a half.

The Referee rejected claimant's contention that his current problems were an aggravation of his 1977 compensable injury but found that claimant's current condition was the result of an occupational disease caused by the repetitive trauma to which he was exposed while operating the log truck in question. We agree with the Referee's conclusion that claimant did not prove a compensable worsening of his original injury; however, we are unable to agree that claimant has adduced sufficient evidence to support a claim for an occupational disease.

On the Form 827 (Physician's Initial Report) completed by the osteopathic physician who treated claimant in February 1980, an affirmative response was given to the question "[i]s the condition requiring treatment the result of the industrial injury or exposure described?" No other information is available in this record which would establish to a medical probability that the complained-of work conditions contributed to or caused claimant's back problems.

Claimant's osteopathic physician referred him to a neurological surgeon. Much ado has been made by the parties and the Referee about this physician's report:

> "This patient probably has a protruded intravertebral [sic] disc at L5-S1 on the right. * * * He does not have a State Industrial situation. I told him I think it would be hard to sell that this problem is due to the continual jarring of his seat. He has not had a specific injury, but I told him he would have to work this out with [SAIF], and with his employer. * * * *"

The Referee regarded this physician's statements as the statement of a legal conclusion, as opposed to a medical opinion:

> "It should be noted, however, that the doctor did not say that the condition did not arise from the vibration and jarring of the truck, rather, he simply concluded that a continuous jarring and vibration would not qualify as an industrial injury, a legal opinion beyond his medical expertise."

On review, claimant contends that the physician was focusing on the lack of a specific injury, which, claimant believes, led the doctor to conclude that SAIF would not be responsible. SAIF argues that the physician's report is a clear statement that claimant's low back problems were not caused by the continual jarring of the seat.

It is unfortunate that none of the parties sought clarification from the doctor about the intended meaning of a report that can be interpreted more than one way. It is unfortunate that the adversary approach has gained so much hold on the workers compensation system that it would be regarded as heresy for the Referee or Board to ask the doctor about his intended meaning.

We find that this doctor's statement is not a clear rejection of the probability, or even the possibility, of a causal connection between claimant's work exposure and his back problems; we also find it does not, to any degree, supply the necessary nexus that would establish medical causation. Even if we agreed with SAIF that this physician meant to state in no uncertain terms that the continual jarring of claimant's seat could not have caused his current problems, this statement with nothing more would be entitled to little weight. Merely conclusory statements are generally insufficient to establish medical causation. Robert L. Green, 31 Van Natta 54 (1981). Conversely, a statement that work conditions are not responsible for a particular medical problem is likewise not necessarily persuasive in the absence of a physician's explanation for such an opinion. Cf. Robert K. Hedlund, 31 Van Natta 97 (1981). Due to the lack of any development of the osteopathic physician's reasoning which would tend to support the conclusion appearing in the Form 827--that claimant's disc syndrome was the result of an industrial injury or exposure--we are unable to find that claimant has established medical causation.

The remaining medical opinion is one contained in some chart notes of an orthopedic surgeon to whom claimant was referred by his attorney. This physician refers to an accident that claimant had in April 1980 when he ran a dump truck into a bank or ditch, "which seemed to aggravate his condition"; but no light is shed on the possible relationship between the claimant's problems prior to the April 1980 incident and the repetitive jarring in his log truck. No claim for compensation arose out of this April 1980 accident.

Considering the lack of evidence on the element of medical causation, the Board is unable to find that claimant has, by a preponderance, proven a causal connection between his work exposure and his back difficulties. This is not an uncomplicated situation, such as a simple back sprain, in which the Board would be able to reach a finding of compensability in the absence of medical proof. See Uris v. Compensation Department, 247 Or 420, 426 (1967); Madwell v. Salvation Army, 49 Or App 712 (1980). Rather, this case is of such a nature as to require skilled and professional persons to establish causation. Larson v. SIAC, 2090 Or 389, 399 (1957); accord, Jacobson v. SAIF, 36 Or App 789 (1978).

ORDER

The Referee's order dated December 12, 1980 is reversed and SAIF's denial is upheld.

PATRICIA PRUITT, Claimant	WCB 79-10619
Michael Strooband, Claimant's Attorney	December 31, 1981
SAIF Corp Legal, Defense Attorney	Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of the Referee's order which approved the denial of claimant's claim for carpal tunnel syndrome to both wrists. The Referee held that, although claimant gave notice to her employer within a matter of days of her doctor informing her on March 29, 1979 that she was suffering from an occupational disease, she did not directly file a claim with SAIF Corporation as required by ORS 656.807(1) until December 21, 1979. That was beyond the 180 day time limit allowed by the aforementioned statute for filing occupational disease claims.

The Oregon courts have interpreted the requirements for filing occupational disease more liberally than the Referee. In Inkley v. Forest Fiber Products Co., 288 Or 337 (1980), the Supreme Court discussed the relationship between the notice provisions for accidental injury and for occupational disease. ORS 656.265(4) only requires that the employer have knowledge of the injury within the applicable time limit for the notice to be effective, while ORS 656.807()1) seems to require that a written claim of the occupational disease be filed within the applicable time limit to be effective. Regarding this apparent difference, the Inkley court said:

"ORS 656.807(4) states: 'The procedure for processing occupational disease claims shall be the same as provided for accidental injuries under ORS 656.001 to 656.794.' The worker who suffers an accidental injury must notify his or her employer within 30 days of the accident. ORS 656.265(1). Notice to the employer serves the same function as filing a claim under the Occupational Disease Law. The failure to provide timely notice bars a claim, unless:

"(a) The contributing employer or direct responsibility employer had knowledge of the injury or death, or the fund or direct responsibility employer has not been prejudiced by failure to receive then notice; * * * ' [Emphasis in the original.] ORS 656,265(4).

"We can think of no reason to deny occupational disease claimant's the same excuses for late or deficient filing as are available to injured workers under the Workers' Compensation Law. The Court of Appeals in Gronquist v. SAIF, 25 Or App 27, 547 P2d 1374, rev den (1976), held ORS 656.265(4), relating to accidental injuries, was made applicable by ORS 656.807(4) to claims arising under the occupational disease law. It stated:

"* * * Any other interpretation would have to be based on the conclusion that the legislature intended to deny a worker] with an occupational disease claim the right clearly granted to a [worker] with an accidental injury claim. We find nothing in the statuatory scheme which warrants such a conclusion." 25 Or App at 31." Inkley, supra, 288 Or at 347-48.

It is clear from the record that the employer had notice of the claimant's carpal tunnel syndrome and that it was work related within days of claimant learning that she suffered from the disease and was disabled by it. Also, Dr. Maurice Renaud, claimant's treating doctor wrote that he notified SAIF of claimant's industrially related condition on April 5, 1979. This was well within the 180 day time limit.

Therefore, claimant's claim does not fail for want of proper notice of a claim within the applicable time limits.

Further, we find that claimant's carpal tunnel syndrome is compensable. The facts recited by the Referee support our finding of compensability and we adopt them as our own with one correction--the date claimant began working for the employer was September, 1978.

ORDER

The Referee's order dated February 4, 1981 is reversed. The March 14, 1980 denial of claimant's bilateral carpal tunnel syndrome is rejected. We remand this claim to SAIF Corporation for processing and payment of benefits in accordance with the Workers' Compensation Law. Claimant's attorney is awarded $1,000 for services at hearing and $500 for services before the Board as a reasonable attorney's fee payable by SAIF.

JON H. RAE, Claimant	WCB 80-09904
David W. Hittle, Claimant's Attorney	December 31, 1981
Richard W. Davis, Defense Attorney	Request for Review by Claimant

Reviewed by Board Members Barnes and McCallister.

The claimant seeks Board review of Referee Mannix's order which granted claimant an award of 24° for 7.5% unscheduled low back disability. Claimant contends that the award is inadequate.

We affirm and adopt the order of the Referee.

ORDER

The Referee's order dated June 11, 1981 is affirmed.

GRACE RANDALL, Claimant	WCB 80-10089
Douglas Green, Claimant's Attorney	December 31, 1981
SAIF Corp Legal, Defense Attorney	Request for Review by SAIF

Reviewed by Board Members McCallister and Lewis.

The SAIF Corporation seeks Board review of that portion of Referee Mulder's order which set aside their denial of claimant's aggravation claim.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated June 8, 1981 is affirmed. Claimant's attorney is awarded $350 as and for a reasonable attorney's fee, payable by the SAIF Corporation.

DONALD J. REIBOLD, Claimant
Jeffrey Mutnick, Claimant's Attorney
Paul Bocci, Defense Attorney

WCB 80-05552
December 31, 1981
Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

Claimant seeks Board review of Referee Leahy's order which awarded claimant 75% (240°) permanent partial disability. Claimant contends he is permanently and totally disabled. We modify the Referee's order.

This 57 year old truck driver injured his back in 1958, 1962, and in 1972. He was treated conservatively each time, and lost time in each instance. On September 21, 1977, claimant stumbled and fell, injuring his low back a fourth time. Dr. Hayhurst diagnosed acute back strain superimposed on degenerative disc disease. On September 11, 1978 a Determination Order awarded claimant 50% permanent partial disability and time loss. Claimant's claim was re-opened for surgery May 7, 1979. October 30, 1979 Dr. Mason, claimant's surgeon, reported he considered claimant stable. Claimant was examined by Orthopaedic Consultants April 14, 1980, and they reported: "We would estimate the loss of function of the lumbosacral spine as it exists today as moderately severe, and would attribute a moderate loss of function to the described injury in September 1977." They also stated claimant could not return to his previous occupation, but he could do sedentary work.

Originally claimant wanted to go back to work for his previous employer but was told there were no jobs available. Claimant wanted to learn radio electronics, but it was discovered claimant had poor dexterity, so that avenue was closed. Claimant was reluctant to participate in vocational rehabilitation because of experiences of acquaintances. He did not want to end up making "bird houses". He was also apprehensive about the possibility of losing benefits and financial ground if he took a lower paying job. After claimant was tested and found he could do fairly well, he participated willingly. Because claimant could not sit long and because of his age and low reading level, vocational classes were not considered reasonable. On-the-job training was investigated. Helen Accra, rehabilitation specialist, surveyed the job market for a job that claimant could do according to test results and by agreement, but she found there was no market for claimant. In testimony Ms. Accra stated she believed claimant was not employable.

The Board finds that claimant is moderately impaired due to the September 1977 injury. We also find claimant was willing to seek and did reasonably search for employment. We note that claimant made numerous attempts to re-enter the labor market, and it appears that claimant became discouraged after each attempt was terminated.

Claimant is 57 years old, has a high school diploma and relevant work experience as a truck driver. Claimant is precluded from performing his previous occupation. The medical evidence alone does not prove claimant is permanently and totally disabled; however, when social/vocational factors are considered together with the medical evidence, claimant is in fact permanently and totally disabled.

ORDER

The Referee's order dated February 27, 1981 is modified.

It is ordered that claimant is awarded permanent total disability, effective the date of the hearing, February 13, 1981.

Claimant's attorney is granted, as and for a reasonable attorney's fee, 25% of the increased award; however, the total attorney's fee for services rendered before the Referee and the Board shall not exceed $3,000.00.

The remainder of the Referee's order is affirmed.

ROBERT W. REIMER, Claimant	WCB 80-11453
James Francesconi, Claimant's Attorney	December 31, 1981
John Klor, Defense Attorney	Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Wolff's order which granted claimant an award of 52.5° for 35% loss of the right leg. The employer contends that the award granted is excessive. We agree.

Claimant's industrial injury was diagnosed as acute internal derangement of the right knee. Dr. Steele subsequently diagnosed probable acute dislocation right patella with medial patellar capsule tear and a small chip fracture. Claimant's leg was casted. Claimant didn't improve, and on June 4, 1980 Dr. Steele performed a right knee arthroscopy.

On October 21, 1980 Dr. Steele performed a closing examination. The doctor found that the knee extended fully and flexed to 145°. All ligaments were stable, and the doctor encouraged continuing exercises. He anticipated fatigue with running and climbing, but believed that it would not be permanent.

On November 20, 1980 the claim was closed with an award of 7.5° for 5% loss of the right leg.

After closure, Dr. Steele provided further reports. In January 1981 he found full extension and flexion to 135° with the ligaments stable. Claimant did have mild tenderness and mild crepitus under the patella. Dr. Steele's last report in May 1981 indicated basically no change from the January examination.

Based on claimant's loss of function, utilizing the guidelines set forth in OAR 436-65-550 and taking into consideration claimant's testimony regarding the restrictions he experiences, we find claimant is entitled to an award of 15% loss of the right leg.

ORDER

The Referee's order dated July 13, 1981 is modified. Claimant is hereby granted an award of 22.5° for 15% loss of the right leg. This award is in lieu of all prior awards.

KEN RISKIN, Claimant	WCB 80-01427
Rick McCormick, Claimant's Attorney	December 31, 1981
SAIF Corp Legal, Defense Attorney	Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Seifert's order which affirmed the Determination Order of January 23, 1980 granting compensation for temporary total disability through December 12, 1979 less time worked and an award of 30° for 20% loss of the left leg, affirmed the denials of acupuncture treatment and another denial for any further medical services as not being the responsibility of the SAIF Corporation.

The facts as recited by the Referee are adopted as our own. We concur with the Referee's affirmance of the Determination Order of January 23, 1980 in all regards.

On the issue of denied responsibility for acupuncture treatments, we find that the preponderance of evidence is that these treatments that had been provided by Dr. Oxenhandler are not of benefit to the claimant any longer and are not the continuing responsibility of SAIF.

On the denial of responsibility for any further medical treatment, we reverse. ORS 656.245 provides for the carrier to pay all ongoing medical care and services related to the industrial injury "for such period as the nature of the injury or the process of recovery requires." Even though medical services that might be provided are only palliative in nature, the law does not permit a blanket denial of any and all further medical care related to this injury. To the contrary, the law provides that an injured worker may seek medical care of his own choosing within the state of Oregon for any residuals of a compensable industrial injury provided that those medical services, by a preponderance of evidence, are reasonable and necessary to return the injured worker back to some kind of gainful and useful occupation. Claimant has permanent partial disability from this injury, and, therefore, it only follows that he may be in need of some future medical care.

The Referee's order dated May 19, 1981 is modified. The denial of further medical treatment issued on November 25, 1980 is reversed. The remainder of the Referee's order is affirmed in its entirety.

BRYAN ROBERTS, Claimant
Alan Scott, Claimant's Attorney
Dan Meyers, Defense Attorney

WCB 80-09210
December 31, 1981
Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Ail's order which, except as modified by a Stipulation, affirmed the Determination Order of September 17, 1980 which granted claimant an award of 16° for 5% unscheduled left eye disability along with an award for loss of acuity. Claimant contends that the award for unscheduled disability is inadequate.

The facts as recited by the Referee are hereby incorporated and made a part of this order.

The Referee, in concluding that the 5% unscheduled disability award granted by the Determination Order was adequate, relied on Dr. Shults's opinion that any loss of depth perception was related to loss of visual acuity. Dr. Shults reported, "This is in the scheduled area and, therefore, cannot be considered as unscheduled disability." We disagree. A scheduled eye disability is based solely on loss of visual acuity with maximum correction. Russell v. SAIF, 281 Or 353 (1978). All other impairments of the eye, not dealing with loss of visual acuity, are unscheduled disability.

Therefore, based on the record before us, we conclude that claimant suffers from depth perception problems, photophobia and headaches. These conditions preclude claimant from returning to his regular occupation as a timber faller. Therefore, the award of 5% unscheduled disability does not adequately compensate claimant for his loss of wage earning capacity.

We find claimant is entitled to an award of 64° for 20% unscheduled left eye disability. The Referee's order will be modified accordingly.

ORDER

The Referee's order dated May 13, 1981 is modified. Claimant is hereby granted an award of 64° for 20% unscheduled left eye disability. This award is in lieu of that granted by the Determination Order for unscheduled disability.

Claimant's attorney is awarded as and for a reasonable attorney's fee 25% of the increased compensation granted by this order.

ORLANDO RUSSELL, Claimant
Larry Bruun, Claimant's Attorney
Ronald Atwood, Defense Attorney

WCB 81-10049
December 31, 1981
Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Johnson's order which affirmed the Determination Order of October 27, 1980 granting him 6.75° for 5% loss of the right foot (ankle) and 48° for 15% unscheduled disability.

The Board adopts as its own the Referee's oral findings of fact stated on the record at hearing.

The evidence indicates that although the physicians felt claimant was precluded from his regular occupation and had work restrictions placed upon him, he nevertheless returned to his jitney driver job. However, the evidence indicates that the job was modified by the employer to allow claimant a physically easier occupation. We feel that without these concessions made by this employer and at claimant's age of 61 a broad field of the industrial labor market would now be precluded to him because of the residuals of this industrial injury.

Taking into consideration claimant's impairment, job restrictions, age, education and trainability, and also utilizing the guidelines set forth in OAR 436-65-600, et seq., claimant is entitled to an award of 96° for 30% unscheduled disability to adequately compensate him for his loss of wage earning capacity.

We further find that the award for the right foot granted by the Determination Order was proper at the time of claim closure. However, subsequent medical reports indicate a greater loss of function of that scheduled member than awarded. Therefore, we conclude claimant is entitled to an additional 5% loss of the right foot award for a total of 10%.

ORDER

The Referee's order dated June 2, 1981 is modified. Claimant is hereby granted an award of 96° for 30% unscheduled disability. This award is in lieu of all prior unscheduled awards.

Claimant is further granted an additional award of 5% loss of the right foot for a total right foot award to date of 13.5° for 10% scheduled disability.

Claimant's attorney is awarded as and for a reasonable attorney's fee 25% of the increased compensation granted by this order.

CAROL SAMARD, Claimant
Dwayne R. Murray, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-02227
December 31, 1981
Request for Review by SAIF

Reviewed by Board Members Barnes and Lewis.

SAIF Corporation seeks Board review of that portion of Referee Foster's order which set aside the order issued by the Workers' Compensation Department suspending claimant's temporary total disability benefits as of October 3, 1980, until the carrier received notification of agreement by the claimant to be examined by the Orthopaedic Consultants, and ordered SAIF to pay the temporary total disability benefits in dispute.

Claimant was being treated for a condition diagnosed as thoracic outlet syndrome in August of 1980. By letter of August 22, 1980, SAIF notified the claimant that it had scheduled an independent examination for her with the Orthopaedic Consultants on October 3, 1980. On September 8, 1980, Dr. Phillip Gerstner, informed SAIF that a first rib resection with distal anterior and middle scalenectomy was a possible solution to the claimant's condition. On October 3, 1980, the claimant telephoned SAIF, and informed an employee that she would be unable to keep the appointment due to the fact that she was scheduled for surgery on October 6, 1980, and that preparatory tests for that surgery had been scheduled for October 3, 1980.

At SAIF's request, an order issued on October 30, 1980 from the Workers' Compensation Department terminating the claimant's temporary total disability benefits effective October 3, 1980. A hearing on the matter was held, and the Referee found that SAIF, without authority, terminated the claimant's temporary total disability benefits prior to the issuance of the order. The Referee ordered SAIF to pay the compensation previously witheld, assessed a 25% penalty on that unpaid compensation, and found that the order terminating the claimant's temporary total disability benefits should not have been issued.

The Board affirms and adopts the order of the Referee and adds the following additional comments in response to the points raised by the parties in their respective briefs.

SAIF contends that OAR 436-69-130 grants it a legal right to request a second medical opinion before elective surgery is scheduled, and that claimant's "refusal" to submit to such an examination is sufficient justification for termination of benefits. We would agree with this statement if the facts were as related by SAIF. In actuality, however, the "Notice of Appointment" sent by SAIF to the claimant with regard to the October 3, 1980 examination, requested a medical opinion as to whether claimant's condition had worsened, the recommended treatment, possible work limitations, and whether or not the claimant suffered from a pre-existing condition. SAIF was not informed that surgery was even a consideration until September 8,

1980, well after the time the examination had been scheduled. Testimony at the hearing additionally reveals that the claimant herself was not aware that the surgery was definite until the morning of October 3rd. Since the examination was not scheduled to determine the need to perform elective surgery, OAR 436-69-130 is not applicable.

ORS 656.325(1) provides in part:

> ***"If the worker refuses to submit to any such examination, or obstructs the same, his rights to compensation shall be suspended with the consent of the director until the examination has taken place,..." (emphasis added)

We do not believe that the actions of the claimant amounted to a "refusal" to submit or that it was an "attempt" to "obstruct" the examination. Whether or not a claimant is refusing to submit may often be a question of intent. We find that claimant's cooperation with SAIF in keeping three previous appointments made by SAIF and submitting to the Orthopaedic Consultants examination following her surgery to be reflective of her intent.

ORDER

The Referee's order dated January 12, 1981 is affirmed. Claimant's attorney is awarded $100 as a reasonable attorney's fee for services rendered at this Board review, payable by SAIF.

RICHARD SANDUSKY, Claimant Allan H. Coons, Claimant's Attorney R. Ray Heysell, Defense Attorney SAIF Corp Legal, Defense Attorney John Eads, Defense Attorney	WCB 79-3294, 80-4463 & 80-5637 December 31, 1981 Request for Review by Employer

Reviewed by Board Members McCallister and Lewis.

The North Pacific Insurance Company, on behalf of Ron's Roseburg Discount, seeks Board review of that portion of Referee Seifert's order which remanded claimant's new injury claim to it for acceptance and payment of compensation as required by law.

The Board affirms and adopts the order of the Referee.

ORDER

The order of the Referee dated March 25, 1981 is affirmed. Claimant's attorney is granted as a reasonable attorney's fee a sum equal to $250, payable by North Pacific Insurance Company.

CHARLES R. SAWYER, Claimant
Mac I. Sawyer, Claimant's Attorney
John Klor, Defense Attorney
Katherine O'Neil, Defense Attorney

WCB 79-1464
December 31, 1981
Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

Claimant seeks Board review of Referee James' order which affirmed SAIF's motion to dismiss claimant's request for hearing on the grounds that claimant failed to file said request in a timely manner.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated July 25, 1980 is affirmed.

LEONA F. SINGER, Claimant
Emmons, Kyle, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 80-05952
December 31, 1981
Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

Claimant seeks Board review of Referee Howell's order dated May 22, 1981 which awarded her 10% unscheduled disability.

The sole issue is extent of permanent partial disability.

The claimant was employed as a secretary at the Department of Justice. In November 1978 she filed a claim with SAIF stating that during March 1978 "sitting in one position for many hours at a time, using dictating equipment involving use of foot pedal, typing, sitting for length of time necessary to do my work has become unbearable" causing a painful low back condition.

Dr. Richard Embick (orthopedist) diagnosed "(1) postural back strain produced by long periods of sitting associated with a rather severe degree of degenerative joint disease which had occured at the L4-L5 disc space level; (2) trochanteric bursitis on the right."

SAIF denied the claim but later accepted it by stipulation. The Orthopaedic Consultants examined claimant in December 1979 (Drs. Brown, Kimberley and McVay). The Consultants found claimant's condition medically stationary and rated her impairment as mild with injury-related impairment minimal.

In June 1980, Dr. Embick reported:

"It is my opinion that she should avoid long periods of sitting, but that she can engage in other types of light and sedentary work where some of her work

time is spent in walking and standing. It is my opinion that some permanent impairment exists here and that a portion of this impairment is related to her industrial disease." (Emphasis added.)

He reported her "claim is stationary and can be closed".

On July 28, 1980 a Determination Order was issued which awarded temporary total disability compensation only.

The claimant was 63 years old at the time of the hearing. She testified that she is a high school graduate, a graduate of a business college and has been certified by the State and Federal Civil Services as a secretary. Her work experience from about 1957 has been in the general field of clerk specialist, secretary and legal secretary. All of these jobs involved a great deal of sitting. Since about September 1979 she has held several secretarial type jobs on a part time or temporary full time basis. Her testimony regarding how her back condition effected her in the performance of these jobs is consistent with the medical evidence on work limitations.

She testified that she does not believe she would be physically able to work as a secretary full time - day in and day out - stating: "It's one thing to do a job for two or three weeks and tough it out, but it is another to have to do it year around". She has applied for temporary work and plans to take it if offered.

The Referee found that "although claimant's injury-related impairment is minimal, . . . it does limit accessibility to the labor market . . .". He concluded "that an award of 32° (10%) is appropriate".

After reviewing de novo the same evidence we will modify the Referee's order because we believe the claimant has a greater disability than awarded.

We find, based on our interpretation of the medical evidence, that claimant has a 5% physical impairment. Combining that 5% impairment with the social/vocational factors extracted from the evidence produced at the hearing and using OAR 436-65-600 (et seq.) as a guideline, we conclude the permanent partial disability is 20% unscheduled.

ORDER

The Referee's order dated May 22, 1981 is modified.

The claimant is awarded 64° for 20% unscheduled disability in lieu of all previous awards.

The remainder of the Referee's order and his amended order, dated May 27, 1981, are affirmed.

Claimant's attorney is granted as an attorney fee 25% of the increased award not to exceed $1,000.

MICHAEL SLAUGHTER, Claimant
John C. O'Brien, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-1527
December 31, 1981
Request for Review by SAIF

Reviewed by Board Members Barnes and McCallister.

The SAIF Corporation seeks Board review of Referee Williams' order which set aside its denial of claimant's claim. The issues are whether claimant established good cause for requesting a hearing more than 60 days after SAIF's denial, and whether the claim is compensable.

On the good cause issue, we agree with and adopt the relevant portions of the Referee's order.

On the compensability issue, we reverse. Claimant, a long-haul truck driver, was severely injured in a barroom fight in Indio, California on May 25, 1979. Claimant had driven an employer-owned truck into Indio earlier that evening. He was instructed to stay overnight in Indio and to call the employer's dispatcher the next morning to be told where he was to pick up a load of corn. At about 11:30 that night, local police were called to the Date Room Bar where they found claimant seriously injured and apparently intoxicated. There is scant evidence of how claimant was injured; it can be easily inferred that he lost the fight he was in. Because of head injuries, claimant has no memory of the incident.

The case closest on point is Hackney v. Tillamook Growers, 39 Or App 644 (1979). Like this case, Hackney involved a long-haul truck driver hurt while drinking and "killing time" in a bar; the court held the claim was not compensable. Because of its similarity, one would expect the parties in this case to devote considerable attention to Hackney. But claimant's brief does not even mention that case.

We find Hackney bars this claim. All possible efforts to distinguish Hackney run into the same insurmountable barrier; claimant remembers "nothing" of the events of the evening of May 25, 1979. (Emphasis added.) The Referee apparently reasoned that claimant entered the Date Room Bar to eat his evening meal. There is no support for that assumption in this record; although the only available information is hearsay of doubtful reliability in police reports and an investigator's report, all indications are that claimant was at the Date Room Bar solely to drink. All parties seem to assume that claimant was the innocent victim of an unprovoked attack; but for all we know from this record, claimant was the initial aggressor.

The admitted/uncontested facts make this case a carbon copy of Hackney. Any effort to distinguish Hackney would, on this record, be sheer speculation because virtually nothing is known about the events of May 25, 1979 other than the few admitted/uncontested facts. The most charitable thing that can be said about the Referee's effort to distinguish Hackney is that he may have believed Hackney was wrongly decided. The

Board also doubts the correctness of the holding in Hackney. But we do not feel entitled to other than follow it here. See also Rhoda Mae Collier, WCB Case No. 80-00640 (March 18, 1981), affirmed without opinion 54 Or App 779 (1981).

ORDER

The Referee's order, dated February 25, 1981, is reversed and the denial of the SAIF Corporation is reinstated.

GARY STERBA, Claimant
Robert Goodwin, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Mary Danford, Defense Attorney

WCB 81-06814, 81-01286 & 81-02970
December 31, 1981
Order of Dismissal

The carrier has moved to dismiss claimant's request for review on the grounds that the request was not filed within the statutory period. ORS 656.289(3). The Referee's order was issued August 10, 1981. Claimant's request for review was filed September 16, 1981. In order to have been timely, the request should have been filed on or before September 9, 1981. Claimant's request was seven days late.

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.

BOARD MEMBER LEWIS, dissenting:

The Referee made a hand-written entry of the month and date of his order: "Entered at Portland, Oregon this 10th day of August, 1981." "10th" and "August" are handwritten. Claimant contends that his request for review was not filed in a timely manner because the inscription of the date is not clear on claimant's copy. When claimant's attorney read the Referee's order and noted the date and month, it appeared to him to be the 16th of August. Claimant's request for review would have been timely filed if the actual date of the order had been the 16th rather than the 10th.

The statutory period in which a request for review must be filed has been characterized as "an irreducible hardcore of necessary function that cannot be dispensed with in any orderly investigation of the merits of a case." Albiar v. Silvercrest Industries, Inc., 30 Or App 281, 294 (1977).

The statute makes no provision for "good cause" which might create an exception to the 30-day requirement. Compare ORS 656.319(1)(b). However, I am persuaded by the estoppel argument posed by claimant in opposition to the carrier's motion for dismissal.

It is the duty of this agency to give effective notice of the entry of an order. ORS 656.289. If the agency is negligent by failing to effectively communicate the date of entry of an order, this constitutes a representation negligently made: The negligence lies in the lack of reasonable care in the manner of expression. Serious consequences flow from the date of entry of this agency's orders; accordingly, parties appearing before the agency are entitled to expect a certain degree of competence and skill in the manner in which the agency complies with its own obligations. If the agency falls below a certain standard of care in executing its duties, parties who have acted in reasonable reliance on the actions of the agency and who are prejudiced thereby should have available some form of relief. CF. Glover v. Adult and Family Services Division, 46 Or App 829, 835 (1980).

It is true that claimant is not entirely without fault in this case. If claimant's attorney had not waited until the very last day to file a request for review, as he did, we might not be grappling with this issue. It is equally true, however, that claimant's attorney refrained from filing a request for review in the belief that he had 30 days from the date of the order as he perceived it. From my independent observation of the entry of the date on this order, I cannot say that it was unreasonable or even negligent on the part of counsel to have read the 16th rather than the 10th. The Referee's entry is truly indefinite.

It would be unjust to deprive the claimant of a substantial right--the right to Board review and possibly judicial review--when the claimant has acted in reasonable reliance on a document which has given ineffective notice of its actual date of entry. This agency should not deny claimant this right, because such a denial would be a consequence of the agency's own previous act.

ROBERT TEEL, Claimant	WCB 80-02438
Evohl F. Malagon, Claimant's Attorney	December 31, 1981
Ridoway K. Foley, Defense Attorney	Request for Review by Employer

Reviewed by Board Members Barnes and Lewis.

The employer seeks Board review of Referee Igarashi's order which overturned the employer's denial of claimant's claim for a back injury. The Referee also assessed the maximum possible penalty against the employer for unreasonably denying claimant's claim.

The first issue, compensability, largely depends on claimant's credibility. The Referee found claimant to be credible. Arguing that we should make a contrary finding, the employer's brief presents an impressive catalog of inconsistencies in claimant's testimony. We find some of the inconsistencies were created by words being put into claimant's mouth during skillful cross-examination. Others are on collateral and relatively inconsequential matters. The employer's brief raises doubts in our minds about claimant's credibility, but not sufficient doubt to overcome the Referee's advantage in seeing the witnesses.

We disagree with the Referee's assessment of a penalty. Claimant filed claims on February 27, 1980 and March 18, 1980. Denials were issued on March 7, 1980 and April 1, 1980--both within the statutory 14 days. There was thus no duty to pay interim compensation. Nor, on this record where claimant establishes compensability by the narrowest of possible margins, can we say the employer was unreasonable to deny claimant's claims. The then available information--and, indeed, claimant's testimony months later at the hearing--was sketchy, ambiguous and somewhat conflicting. There was no basis for assessment of a penalty.

ORDER

The Referee's order dated December 3, 1980 is modified. That portion of the order assessing a penalty is vacated. The remainder of the Referee's order is affirmed.

JAMES D. TURNBULL, Claimant
Olson, Hittle et al., Claimant's Attorneys

WCB 80-01327 & Own Motion 81-0330M
December 31, 1981
Order on Review and Own Motion Order on Reconsideration

This case has turned into a procedural nightmare. Claimant was compensably injured in 1969. The matters now before the Board arose in March 1979 when claimant's request for additional medical services allegedly related to the 1969 injury was denied by the self-insured employer. Claimant's request for hearing on that denial was designated WCB Case No. 80-01327. Claimant also requested the Board to grant own motion relief. The Board referred that request to the Hearings Division for a consolidated hearing together with WCB Case No. 80-01327.

On February 13, 1981 the Referee who held the consolidated hearing (1) ruled in WCB Case No. 80-01327 that claimant was entitled to the denied medical services; and (2) recommended that the Board order own motion reopening of claimant's claim. By own motion order dated February 27, 1981 the Board adopted the Referee's recommendation and ordered own motion reopening. Subsequently, by letter dated March 2, 1981, received by the Board March 3, 1981, the self-insured employer requested Board review of the Referee's order in WCB Case No. 80-01327.

The parties argue at length about what issues are now properly before the Board. Claimant contends the Board's February 27, 1981 Own Motion Order conclusively establishes the work-connectedness of claimant's present medical problems and medical treatment. The employer contends, quite reasonably, that under the Board procedures in effect in February 1981 it had no opportunity to argue its position before the Board entered its February 27, 1981 Own Motion Order. (The Board has since changed procedures and that specific complaint could not again arise.)

We resolve the question of what issues are now properly before the Board by entering this single order that is both an order on review in WCB Case No. 80-01327 and a reconsideration of our February 27, 1981 own motion order. In other words, all issues involved in either proceeding, including the work-connectedness of claimant's present medical problems are now before the Board.

In WCB Case No. 80-01327 we affirm and adopt the Referee's order. On reconsideration of our February 27, 1981 own motion order, we adhere to the conclusions stated in that order.

ORDER

The appealable portion of the Referee's order dated February 13, 1981 is affirmed. The Board's February 27, 1981 own motion order is reaffirmed.

In WCB Case No. 80-01327 claimant's attorney is awarded an attorney fee of $400 for prevailing on Board review.

LARRY LEON TURPIN, Claimant	WCB 80-06080
Coons & Hall, Claimant's Attorneys	December 31, 1981
Lawrance J. Paulson, Defense Attorney	Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

Claimant seeks Board review of Referee Wolff's order which affirmed the carrier's denial of compensability of an alleged industrial injury of June 9, 1980.

The Board affirms and adopts the order of the Referee.

ORDER

The order of the Referee, dated June 23, 1981, is affirmed.

ARTHUR K. UECKER, Claimant
Robert L. Burns, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-08995 & 80-11047
December 31, 1981
Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review and the SAIF Corporation cross requests review of Referee Ail's order which reversed SAIF's denial and found it responsible for treatment of claimant's ankylosing spondylitis and granted claimant an award of 30% unscheduled low back disability. Claimant contends that the award of unscheduled disability is inadequate. The SAIF Corporation contends its denial of claimant's pre-existing condition should be affirmed.

We affirm and adopt with the added comment that SAIF Corporation is not responsible for the pre-existing ankylosing spondylitis per se but is responsible for the medical care and treatment of the aggravation of the pre-existing condition from the industrial injury until claimant reaches pre-injury status.

ORDER

The Referee's order dated May 4, 1981 is affirmed.

STANLEY P. VANDERZANDEN, Claimant
Galton, Popick & Scott, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 80-6147
December 31, 1981
Request for Review by SAIF
Cross Appeal by Claimant

Reviewed by Board Members Barnes, McCallister and Lewis.

The SAIF Corporation seeks Board review and claimant cross-requests review of Referee Braverman's order. The numerous issues raised fall into the general categories of entitlement to: temporary total disability compensation; medical services; increased permanent partial disability compensation; and penalties.

1. Background

Claimant was injured in a compensable fall in January 1980. The consistent diagnosis has been cervical strain and a compression fracture of the C-6 vertebrae. His recovery was unremarkable, but was complicated by two collateral considerations.

Claimant was Plant Superintendent of the City of Gresham's water treatment facility. Shortly after claimant's fall, the city contracted with Envirotech Operating Systems to take over operation of its water treatment facility. Envirotech was consistently willing to hold a position open for claimant at his old rate of pay, but claimant was not interested in working for Envirotech.

The other complicating factor was that claimant developed some psychological symptoms. The weight of the evidence is that this psychological condition was not caused by claimant's industrial injury, but rather was caused by the Envirotech take-over. Nevertheless, the psychological condition complicated some matters that followed.

2. Temporary Total Disability

The Referee upheld the July 21, 1980 Determination Order that awarded temporary total disability from January 10, 1980 through June 23, 1980 less time worked. Claimant argues he was not medically stationary on June 23. SAIF argues claimant was medically stationary on an earlier date, May 5, 1980. The medical information is conflicting, with qualified releases to return to work, releases to return to part-time work and statements that claimant cannot return to work. Claimant further complicated this situation by promptly changing doctors as soon as his original treating doctor released him to return to work. Moreover, it would appear that many of the medical opinions that claimant was unable to work that followed that change of doctors were based, at least in part, on claimant's noncompensable psychological condition. All things considered, we cannot improve on the Referee's decision on entitlement to temporary total disability benefits.

3. Medical Services

In the course of processing this claim, SAIF had claimant examined by Dr. Snodgrass, who recommended that claimant be examined by a psychiatrist. Dr. Shannon, the psychiatrist, then recommended that claimant be evaluated by Dr. Reiter, a psychologist. SAIF did not object to Dr. Reiter's evaluation, which was done. From this simple sequence of events, it seems axiomatic that SAIF would pay Dr. Reiter's bill. But no, SAIF denied responsibility for Dr. Reiter's bill.

The Referee ordered SAIF to pay Dr. Reiter's bill. We completely agree with the Referee.

4. Permanent Partial Disability

The Determination Order awarded claimant 5% unscheduled permanent partial disability. The Referee increased the award to a total of 30% permanent partial disability. We disagree with the Referee and reinstate the Determination Order.

OAR 436-65-615(1)(a) and (b) permit an impairment rating of between 3% and 13% for a fractured vertebra, with the higher rating depending upon whether there was compression resulting in 25% of more loss of vertebral height. There is no evidence that claimant's vertebral fracture resulted in such a loss of height; therefore, the Evaluator's Worksheet,

Exhibit A-41, properly assigned a plus value of 3. Claimant's age also produced a plus value. OAR 436-65-602. The most significant part of the rating process arises under OAR 436-65-608 which produces a negative value of -25 if there is "immediate and continuous demand" for the worker's services. The rule states: "Immediate and continuous demand for a worker's services is also documented by (1) a physician's release to regular work, or (2) an actual, successful return to regular work".

Dr. Ordonez reported on May 5, 1980 that claimant was capable of returning full-time to his regular plant superintendent job, which was a desk job. The fact that claimant chose not to return to this job for other than medical reasons does not affect the application of OAR 436-65-608. We do not find doctors' reports subsequent to that of Dr. Ordonez to be persuasive because they partially rely on claimant's noncompensable psychological condition.

When the computations of positive and negative values required by OAR 436-65-601 are made, there is no basis for an award other than that granted by the Determination Order.

5. Penalties

The Referee imposed a penalty on SAIF of 15% of the temporary total disability compensation due claimant from May 5, 1980 through June 23, 1980 for not having timely paid it. The Referee imposed a penalty on SAIF of 10% of Dr. Reiter's bill for having unreasonably refused to pay it. The Referee also awarded a carrier-paid attorney fee of $150 under ORS 656.382(1).

SAIF contends the penalties imposed by the Referee are unwarranted. Claimant argues for additional penalties on numerous grounds.

We conclude the Referee properly identified the only two possible grounds for imposition of penalties. We do not agree with the amount of penalty imposed. In Zelda M. Bahler, WCB Case No. 79-06095 (Order on Reconsideration, October 30, 1981), we ruled that a delay in paying compensation due of more than 25 days would, absent explanation or excuse, result in a penalty of up to 25%. SAIF's delay in paying the temporary total disability due far exceeded that 25-day standard. Both the delayed payment of temporary total disability and the denial of Dr. Reiter's bill are unexplained, unintelligible, unexcusable and wrong. The maximum penalty will be imposed and claimant's attorney's ORS 656.382(1) fee will be increased.

ORDER

The Referee's order, dated January 19, 1981, is modified. That portion granting claimant an additional 25% permanent partial disability is reversed and the Determination Order of July 21, 1981 is reinstated and affirmed. Those portions allowing penalties on the temporary total disability benefits due from May 5, 1980 to June 23, 1980 and on the amount of Dr. Reiter's bill are modified to provide that the penalty in both instances is 25%. Claimant's attorney is awarded an additional $200 in attorney fees for services rendered at the Hearings level. The balance of the Referee's order is affirmed.

TIMOTHY M. VAN OVER, Claimant
Rolf Olson, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 79-09275
December 31, 1981
Request for Review by Claimant

Reviewed by Board Members Barnes and McCallister.

Claimant seeks Board review of Referee Knapp's order and order on reconsideration that, in effect, set aside the SAIF Corporation's denial of claimant's aggravation claim. The Referee awarded about four months of temporary total disability and a 10% penalty for unreasonable denial of medical services. The Referee concluded claimant was not entitled to any permanent partial disability.

There are several errors involving dates in the Referee's order. Also, that order reflects a serious misunderstanding of the procedure by which a claim is converted from nondisabling to disabling. But none of that has any impact on the sole issue claimant raises on appeal.

Claimant argues the Referee should not have rated permanent disability but rather should have remanded to the Evaluations Division. The simple answer is that what the Referee did is permitted by OAR 436-83-525, and at the hearing claimant's attorney repeatedly asked the Referee to rate extent of disability. We will not reverse a Referee for doing what he was asked to do. The real reason this case is here is that claimant is undoubtedly unhappy with the Referee's rating--although he has raised no issue about it before the Board. The Referee's authority to make a decision is not different because of the substance of the decision made.

The Referee's penalty award is ambiguous. We understand it to apply to all medical bills submitted and unpaid from the date of claimant's request for further benefits to the date of SAIF's denial. As so understood, the penalty assessed will be affirmed.

ORDER

The Referee's order dated October 29, 1980 and order on reconsideration dated November 18, 1980 are affirmed.

SUSAN M. WATKINS, Claimant
Brian L. Pocock, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-09142
December 31, 1981
Request for Review by Claimant

Reviewed by Board Members Barnes and McCallister.

Claimant seeks Board review of Referee Danner's order which upheld the denial of the SAIF Corporation of claimant's occupational disease claim for her psychiatric condition.

The Board adopts the findings of fact set forth in the Referee's order.

The Referee applied his understanding of James v. SAIF, 290 Or 343 (1981) -- that work causation has to be the sole cause in order for an occupational disease claim to be compensable. We have since adopted a different understanding of the law in this area in Henry McGarrah, WCB Case No. 79-05440 (December 7, 1981) and Kay L. Murrens, WCB Case No. 79-01573 (December 7, 1981). McGarrah holds that an adverse psychological reaction to reasonable and normal supervision is not within the scope of employment. Murrens holds that work causation must significantly predominate over nonwork causation in order for an occupational disease claim to be compensable.

Applying McGarrah and Murrens here produces the same result as was reached by the Referee. Apparently the principal suggested at-work causation of claimant's psychiatric problems was a written reprimand she recieved for "refusal to . . . abide by departmental procedures" and "insubordination". There is no possible basis for concluding this reprimand was other than ordinary and reasonable supervision. The only other specific at-work cause suggested is claimant's long hours, for which she was allowed compensatory vacation leave, and which she apparently took all of that had accumulated before filing this claim.

The Referee's findings identify possible non-work causation: financial problems; the stress of a single parent rearing two teenage children; problems with her diabetic condition; and excessive alcohol intake. Not considering the reprimand problem, McGarrah, we cannot say that work causation significantly predominates over nonwork causation, Murrens.

ORDER

The Referee's order, dated April 22, 1981, is affirmed.

RICHARD WEIGAND, Claimant
John Stone, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-11469
December 31, 1981
Request for Review by SAIF

Reviewed by Board Members McCallister and Lewis.

The SAIF Corporation seeks Board review of Referee Wolff's order which granted claimant an award of 32° for 10% unscheduled disability to his pelvis and a total award of 37.5° for 25% loss of the left leg. SAIF contends the awards granted were excessive.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated June 8, 1981 is affirmed. Claimant's attorney is awarded $300 as and for a reasonable attorney's fee, payable by the SAIF Corporation.

LESTER J. WILSON, Claimant
J. David Kryger, Claimant
SAIF Corp Legal, Defense Attorney

WCB 80-06346
December 31, 1981
Request for Review by SAIF

Reviewed by Board Members Barnes and Lewis.

The SAIF Corporation seeks Board review of Referee Seifert's order which awarded claimant permanent total disability. SAIF contends that claimant's motivation is suspect and that the Evaluations Division of the Workers Compensation Department improperly applied the rules in a Determination Order dated July 7, 1980.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated April 27, 1981 is affirmed. Claimant's attorney is awarded $700 as and for a reasonable attorney's fee, payable by the SAIF Corporation.

STEPHEN WILSON, Claimant
James Park, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-09144
December 31, 1981
Request for Review by Employer

Reviewed by Board Members Barnes and Lewis.

The non-complying employer seeks Board review of Referee Seifert's order dismissing its request for hearing on the ground it was not timely filed.

Claimant, Stephen Wilson, made a claim against this employer. The SAIF Corporation is responsible for processing claims against non-complying employers. By letter dated September 14, 1978, a SAIF representative wrote the employer that the Wilson claim was accepted and that, if dissatisfied, the employer had a right to request a hearing. The employer filed a hearing request about 21 months later, on June 12, 1980.

The employer argues he should be able to request a hearing on SAIF's acceptance of the Wilson claim without any time limit. This Board and the Court of Appeals have previously rejected that argument. Lon E. Smith, 29 Van Natta 793 (1980), affirmed 52 Or App 233 (1981).

In addition to the reasons previously noted in Smith, for interpreting ORS 656.319 as requiring a hearing request to be filed within 60 days, we note the employer's argument here raises serious constitutional problems. A claimant clearly must request a hearing within 60 days of claim denial. If an employer must not do likewise within 60 days of claim acceptance, an unequal and probably unconstitutional classification is created.

ORDER

The Referee's order dated January 22, 1981 dismissing the employer's request for hearing on the SAIF Corporation's acceptance of the Wilson claim is affirmed.

MILLIE YOUNG, Claimant
Ringo, Walton et al., Claimant's Attorneys
Lively, Wiswall et al., Defense Attorneys

WCB 80-3005
December 31, 1981
Request for Review by Claimant

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Johnson's order which awarded 35% of the maximum allowable by statute for unscheduled permanent partial disability.

The claimant asserts that her condition is not medically stationary and that her claim should not have been closed pursuant to the Determination Order dated March 25, 1980.

Claimant further asserts that she is entitled to penalties and accompanying attorney fees for the insurer's (SAIF Corporation's) refusal to reopen her claim after receipt of Dr. Inahara's report dated May 9, 1980.

ORDER

The Referee's order, dated December 31, 1980, is affirmed.

WORKERS' COMPENSATION CASES

October-December 1981

Decided in the Oregon Court of Appeals:

Page

Batdorf v. SAIF, 54 Or App 496 (1981)----------782
Berliner v. Weyerhaeuser, 54 Or App 624 (1981)----------801
Clayton's Automotive v. Stayton Auto Supply, 54 Or App 980 (1981)---850
Colbert v. SAIF, 54 Or App 763 (1981)----------829
Cooper v. SAIF, 54 Or App 659 (1981)----------806
Eber v. Royal Globe Ins. Co., 54 Or App 940 (1981)--------847
Hamel v. Tri-Met Transportation District, 54 Or App 503 (1981)---788
Hanner v. SAIF, 54 Or App 556 (1981)----------797
Harmon v. SAIF, 54 Or App 121 (1981)----------748
Harris v. SAIF, 55 Or App 158 (1981)----------861
Hedlund v. SAIF, 55 Or App 313 (1981)----------864
Hewitt v. SAIF, 54 Or App 398 (1981)----------777
Independent Motor Transport v. Faulk, 54 Or App (1981)----741
Ivie v. SAIF, 55 Or App 60 (1981)----------857
Johns v. Utility Trailer & Equip. Co., 55 Or App (1981)--872
Johnson v.SAIF, 54 Or App 179 (1981)----------753
Johnson v.SAIF, 54 Or App 620 (1981)----------799
Larson v. Brooks-Scanlon, 54 Or App 861 (1981)----------843
Lavinv. Roseburg Lumber Co.,54 Or App 375 (1981)----------773
Lenox v.SAIF, 54 Or App 551 (1981)----------793
Lines v.SAIF, 54 Or App 81 (1981)----------744
Livesay v.SAIF, 55 Or App 390 (1981)----------868
McIntyre v. Wright and SAIF, 54 Or App 248 (1981)---------763
Mosqueda v.ESCO Corp., 54 Or App 736 (1981)----------820
Multnomah v. Hunter, 54 Or App 718 (1981)----------810
National Farmers' Union Ins. v. Scofield, 54 Or App 804 (1981)---833
Satterfield v. Satterfield, 54 Or App 184 (1981)----------757
Senger v. Risberg's Truck Line, 54 Or App 752 (1981)------823
Smith v.Chase Bag Co., 54 Or App 261 (1981)----------768
Smith v. Brooks-Scanlon and EBI, 54 Or App 730 (1981)-----733
Whitman v. Western Concrete, 55 Or App 5 (1981)----------854

(There were no Supreme Court opinions issued on the subject of workers' compensation during these months.)

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
Jimmy Faulk, Claimant.

INDEPENDENT MOTOR TRANSPORT, et al,
Petitioners,

v.

FAULK, et al,
Respondents.

(Nos. 77-3712 & 74-4505, CA 19344)

Judicial Review from Workers' Compensation Board.

Argued and submitted April 15, 1981.

Margaret H. Leek Leiberan, Portland, argued the cause for petitioners. With her on the brief was Lang, Klein, Wolf, Smith, Griffith & Hallmark, Portland.

Peter E. Baer, Gresham, waived appearance for respondent Jimmy Faulk.

Darrell E. Bewley, Appellate Counsel, State Accident Insurance Fund Corporation, argued the cause for respondents Master Chemical Corporation and State Accident Insurance Fund Corporation. With him on the brief were K. R. Maloney, General Counsel, and James A. Blevins, Chief Trial Counsel, State Accident Insurance Fund Corporation, Salem.

Before Richardson, Presiding Judge, and Thornton and Van Hoomissen, Judges.

RICHARDSON, P.J.

Affirmed.

RICHARDSON, P.J.

This workers' compensation case involves an appeal by Independent Motor Transport (IMT) and its workers' compensation carrier, Employee Benefits Insurance Company (EBI), from an order of the Workers' Compensation Board (Board) affirming and adopting a hearings referee's finding that IMT and EBI were responsible for payment of compensation benefits arising out of an injury sustained by claimant in 1973. The issues raised on appeal are: (1) did the Board have jurisdiction under ORS 656.307 to join claimant's previous employer, Master Chemical Corporation (MCC), and its compensation carrier, State Accident Insurance Fund (SAIF), as parties to the present action and err in not doing so; and (2) which employer and carrier are responsible for payment of compensation for claimant's present condition.

Because we determine that claimant suffered a new injury in 1973 while employed by IMT, we need not determine if MCC and SAIF should or could have been joined in the proceeding.

On January 10, 1971, claimant slipped and fell on his buttock during the course of his employment with MCC. In January, 1972, by a determination order, claimant was awarded five percent unscheduled disability as a result of the fall. On March 28, 1973, while employed by IMT, claimant fell on his hip. He required medical treatment for pain in his low back and neck. Claimant filed claims with SAIF and EBI and requested a hearing pursuant to ORS 656.307 to determine which carrier was responsible for compensation for the 1973 injury, i.e., whether it was an aggravation of the 1971 injury or a new injury.

The proceeding pursuant to ORS 656.307 was dismissed on claimant's motion after EBI accepted responsibility for the 1973 injury. All parties were notified of the dismissal, but no appeal was taken from the order. After the appeal time had run, there followed a protracted series of proceedings focused on EBI's request to join MCC and SAIF in any hearing to determine the extent of claimant's injury. Ultimately, the referee ruled that the Workers' Compensation Board did not have jurisdiction to join SAIF

or MCC in the extent of disability hearing and that IMT and EBI were responsible for the 1973 injury.

Most of the proceedings in the case and the arguments on appeal concern the issue of whether the Board had jurisdiction to join SAIF and MCC in the proceeding. MCC and SAIF would be responsible for compensation only if claimant's present condition were an aggravation of his 1971 injury. If the 1973 injury is a new injury, IMT and EBI are responsible, and it is immaterial whether MCC and SAIF were parties to the proceeding.

Whether claimant's disability is the result of an aggravation or a new injury is a question of fact. After *de novo* review of the extensive record, we conclude claimant's disability is the result of a new injury suffered while employed by IMT.

Affirmed.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
Marvin F. Lines, Claimant.

LINES,
Petitioner,
v.
STATE ACCIDENT INSURANCE FUND
CORPORATION,
Respondent.

(No. 77-7218, CA 19731)

Judicial Review from Workers' Compensation Board.

Argued and submitted April 15, 1981.

Hank McCurdy, Portland, argued the cause and filed the brief for petitioner.

Darrell E. Bewley, Appellate Counsel, State Accident Insurance Fund Corporation, Salem, argued the cause for respondent. With him on the brief were K. R. Maloney, General Counsel, and James B. Blevins, Chief Trial Counsel, State Accident Insurance Fund Corporation, Salem.

Before Richardson, Presiding Judge, and Thornton and Van Hoomissen, Judges.

RICHARDSON, P.J.

Affirmed.

RICHARDSON, P.J.

In this workers' compensation case the State Accident Insurance Fund (SAIF) denied claimant's claim for compensation. The referee and the Workers' Compensation Board affirmed the denial. Claimant appeals, and we affirm.

The central issue is the application of ORS 656.802(2), commonly known as the fireman's presumption. That statute provides:

> "Any condition or impairment of health arising under paragraph (b) of subsection (1) of this section shall be presumed to result from a fireman's employment. However, any such fireman must have taken a physical examination upon becoming a fireman, or subsequently thereto, which failed to reveal any evidence of such condition or impairment of health which preexisted his employment. Denial of a claim for any condition or impairment of health arising under paragraph (b) of subsection (1) of this section must be on the basis of medical or other evidence that the cause of the condition or impairment is unrelated to the fireman's employment."

The conditions described in paragraph (b) of subsection (1) are diseases of the lungs or respiratory tract, hypertension or cardiovascular-renal diseases. The fireman's presumption of compensability arises if a claimant has completed five years employment as a firefighter.

Claimant seeks compensation for disability due to a cardiac ailment and two resultant heart surgeries. Claimant, who was 56 years old at the time of the hearing before the referee, began work as a fireman for the city of Bend in 1953. In 1964 he went to work as a fireman for the city of Milwaukie, Oregon, until 1971, when he was terminated. The reason for his termination is not clearly explained in the record; however, he was reinstated with the Milwaukie Fire Department in 1974 with back pay and benefits.

In 1971, while still employed as a fireman, claimant experienced severe chest pains off the job. He was hospitalized and the subsequent diagnosis was ischemic heart disease and arteriosclerosis.

Prior to his reinstatement as a fireman in 1974, claimant had an intensive physical examination, including

a cardiac workup. The examining cardiologist concluded that claimant's work activities need not be restricted. Claimant experienced no further chest pains until May, 1977, when he had an episode of severe chest pain while carrying a fire hose up a ladder during a fire. The pain subsided after a period of rest, and he continued working that shift and the next succeeding shift. He began having recurrent episodes of pain during his off duty hours and ultimately had two open heart surgeries. He has not worked since May, 1977.

Claimant's two treating physicians concluded that he suffered from coronary artery disease. They expressed the opinion that the disease was not caused by his employment as a firefighter. They did, however, conclude that the stress of his job could have contributed to the episode of angina pectoris he experienced in May, 1977. Claimant's medical records were reviewed by Dr. Griswold, an expert in cardiology, who agreed with the conclusions of the treating physicians regarding the disease and its causes. Dr. Griswold testified that claimant's work activity produced the episode of angina pectoris, which he described as not being an injury but only a symptom of heart disease. He concluded the angina experienced by claimant did not aggravate the coronary artery disease.

Citing *Wick v. SAIF,* 37 Or App 285, 587 P2d 477 (1978), and our decision in *Wright v. SAIF,* 43 Or App 279, 602 P2d 1086 (1979), *rev'd* 289 Or 323, 613 P2d 755 (1980), the referee concluded the fireman's presumption had been overcome and that the medical evidence showed claimant's condition was not related to his employment. Claimant first argues the referee's decision, rendered prior to the Supreme Court's decision on review in *Wright,* applied the wrong standard and should be reversed. Because we review *de novo* the question of whether the referee and the Board correctly applied the law need not be addressed.

In *Wright,* the Supreme Court, discussing the fireman's presumption, said:

> "We hold that in a civil case the statutory scheme concerning disputable presumptions requires that when the basic facts giving rise to the presumption are established, the presumption binds the jury if there is no opposing

> evidence. If there is opposing evidence, the trier of fact must weigh the evidence, giving the presumption the value of evidence, and determine upon which side the evidence preponderates." (Footnotes omitted.) 289 Or at 331.

ORS 656.802(2) describes the type of opposing evidence that is required to rebut the presumption. There must be medical or other evidence that the cause of the claimant's condition or impairment is unrelated to his employment. The medical evidence here establishes that the condition which resulted in claimant's surgeries and his disability was cardiac artery disease. The medical opinions are uniform in concluding that this disease was not related to his employment as a fireman. Consequently, the presumption of compensability has been overcome.

Claimant contends that if it is determined this cardiac artery disease was unrelated to his employment, the worsening of the symptoms, including pain, is nevertheless compensable. In *Wright,* the Supreme Court interpreted the definition of occupational disease in ORS 656.802(1)(b) to include a worsening of symptoms as well as a worsening of the underlying disease. Claimant points to the opinions of all three physicians who concluded that his work activities precipitated the angina pectoris, and argues his disability is therefore compensable.

Even though the symptoms of the underlying disease are worsened by the employment, they are not compensable unless the worsened symptoms cause disability or require medical services. Claimant's surgeries were necessitated by and his disability resulted from the cardiac artery disease. That disease was not caused or aggravated by his employment activities. Following the episode of chest pain, claimant worked the balance of that shift and the following regular shift. During his days off he followed his normal routine, which included playing golf. Although he sought medical attention because of the episodes of pain, the medical services rendered were to treat the underlying cardiac disease. His present disability relates directly to that underlying disease and not to the temporary episodes of pain he experienced.

Affirmed.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
Orry W. Harmon, claimant.

HARMON,
Petitioner,

v.

STATE ACCIDENT INSURANCE FUND
CORPORATION,
Respondent.

(WCB No. 80-742, CA A20407)

Judicial Review from Workers' Compensation Board.

Argued and submitted June 15, 1981.

Noreen K. Saltveit, Portland, argued the cause for petitioner. With her on the brief was Merten & Saltveit, Portland.

Darrell E. Bewley, Appellate Counsel, State Accident Insurance Fund Corporation, Salem, argued the cause for respondent. With him on the brief were K. R. Maloney, General Counsel, and James A. Blevins, Chief Trial Counsel, State Accident Insurance Fund Corporation, Salem.

Before Gillette, Presiding Judge, and Roberts and Young, Judges.

ROBERTS, J.

Affirmed.

ROBERTS, J.

The most difficult problem in this workers' compensation case has been defining the issue. The claim has been treated variously as an appeal from a determination order pursuant to ORS 656.268(3) and ORS 656.319(2), a claim for aggravation under ORS 656.273(3) and a claim for additional medical services under ORS 656.245(1). SAIF contends in its brief, as it has from the beginning of the case, that the claim is one for aggravation; claimant has consistently maintained that aggravation is not an issue, but that the claim is an appeal from the premature issuance of a determination order. At oral argument, however, SAIF's attorney agreed that, even treating the case as an appeal from a premature determination order, the single issue is whether claimant has met his burden of proving he was not medically stationary at the time the order was issued. We are treating the claim as an appeal from a determination order.[1] We affirm the Workers' Compensation Board's (Board) denial of the claim, although for reasons different from those of the Board.

Claimant, a 28 year-old truck driver, sustained a compensable thoracic, right arm and neck strain on December 18, 1978, while doing heavy lifting at work. His claim was closed by a determination order on May 24, 1979, with payment of temporary total disability through February 11, 1979. In June, 1979, claimant suffered a recurrence of pain and was unable to work. The claim was reopened and closed again by a determination order on October 4, 1979, awarding him temporary total disability payments through August 15, 1979. In November and December, 1979, claimant was treated at University of Oregon Health Sciences Center for the same problem. Further treatment, including psychological, vocational, social work and physical therapy referrals, was recommended. The medical records from

[1] We still reserve some doubt that this is the procedural posture in which claimant originally presented his case. His request for a hearing, filed after SAIF denied what it termed his "claim for aggravation," was what appears to be a typewritten form. At the top of the form, in the portion where the claim number and date of injury are inserted to identify the claim, the words "Determination order of:" which would presumably identify the order appealed from, had been deleted, and typed in its place was "Denial letter of: 1/15/80." The denial letter referred to a claim for aggravation.

these visits were sent to SAIF on December 18, 1979, with a notation that claimant wished to reopen his claim. By letter of January 15, 1980, SAIF notified claimant that it would accept responsibility for palliative care under ORS 656.245, but denied his claim for aggravation. On January 24, 1980, claimant filed a request for a hearing.

The referee framed the issues as follows:

> "Claimant has appealed a Determination Order issued on October 4, 1979, granting temporary total disability only. Claimant has also appealed a denial of reopening of the claim issued on January 15, 1980 and a denial of responsibility for medical treatment. The issues are:
>
> "1. Whether claimant's claim should be reopened for additional temporary total disability;
>
> "2. In the alternative, what is the extent of claimant's permanent disability;
>
> "3. Whether SAIF is responsible for claimant's ongoing medical treatment;
>
> "4. Whether claimant is entitled to penalties and attorney fees."

The referee found claimant's continuing problems to be related to the 1978 injury and that, as of November 28, 1979, claimant was not medically stationary and required further treatment. She ordered the claim reopened for payment for temporary total disability from and after November 28, 1979, and for medical treatment received. Claimant was also awarded attorney's fees and a 25 percent penalty for SAIF's unreasonable refusal to pay for medical treatment after agreeing to do so. SAIF appealed. The Board treated the claim as one for aggravation and denied reopening on the ground that claimant had not shown any worsening of his condition. Claimant appeals the denial of the reopening. The Board affirmed the allowance of medical expenses, penalties and attorney fees, and this portion of the order is not appealed from.

ORS 656.268(1) provides that a worker's claim shall not be closed nor temporary disability compensation terminated if the worker's condition has not become medically stationary. ORS 656.319(2) allows a hearing on objections to a determination order finding that a worker is medically stationary when the request for the hearing is

filed within one year of the order. Claimant's final determination order in this case was dated October 4, 1979. His request for a hearing was filed January 24, 1980, and was thus timely.

"Medically stationary" is defined in ORS 656.005(21) to mean "no further material improvement would reasonably be expected from medical treatment, or the passage of time." The question of whether claimant was medically stationary at the time of the determination order is a matter of medical evidence, which can be "circumstantial" as well as direct. *Austin v. SAIF*, 48 Or App 7, 12, 615 P2d 1188 (1980). We said in *Austin* that claimant's burden is not carried, for instance, only by a physician's report stating in so many words that claimant is not medically stationary. However, in the case before us, all the evidence indicates that claimant's problems in November and December of 1979 were symptomatic of a chronic condition and that, while there was perhaps some slight worsening of his condition, there had been no significant change in his condition since the accident.

The only medical evidence subsequent to closure of claimant's claim is the chart notes sent from the University of Oregon Health Sciences Center to SAIF on December 18, 1979. These notes, dating from November 28, 1979, to December 11, 1979, were apparently sent at SAIF's request. They were accompanied by a form cover letter to that effect, which included an express disclaimer of support for reopening of the claim. Typed in was the notation: "Mr. Harmon-claim #DE 43049 would like to reopen claim. Because we did not see him in 1978 we are unable to make a recommendation."

Because there is no physician's report indicating a need for reopening or that claimant was not, at the time of claim closure, medically stationary, we must determine whether the chart notes, coupled with the initial medical reports from Kaiser Hospital, show *circumstantially* that claimant's condition was not medically stationary as of August 16, 1979. We find they do not. The pertinent medical evidence is summarized as follows:

Following his injury on December 18, 1978, claimant was treated at Kaiser Permanente Hospital and released for work as a truck driving instructor on January 23, 1979. The treating physician by letter to SAIF of April 25, 1979, declared claimant medically stationary as of February 12, 1979. About June 22, 1979, claimant suffered a "recurrence" of cervical strain and was treated again at Kaiser by a different doctor. Treatment was medication, heat and a cervical support collar. The doctor noted no improvement from June 22 to July 27, 1979, and referred claimant to a physiatrist.[2] The physiatrist released claimant for work and found him medically stationary as of August 16, 1979.

Following these medical reports and the determination order of October 4, 1979, the next medical evidence is the chart notes from the Health Sciences Center. There are four entries all by different persons. The notes indicate that on November 28th, claimant said he had not worked in three months. Claimant still experienced numbness in his right hand; his back pain, which was initially sharp and "catching," had become dull and continuous. X-rays and vocational rehabilitation were recommended. Claimant was said to be suffering from "chronic neck pain." He complained that his right arm had "given out" a number of times and felt weak. The examiner's report found his elbow joints stable and the strength in his arms equal. On December 5, "mild degenerative changes" were noted in the radiologist's report, and the examining physician's report stated, "Patient is without change" and diagnosed chronic pain with a psychological component. Therapy, social work referrals and a psychological evaluation were requested. The physical therapy report, dated December 11, 1979, found claimant's thoracic pain "no better or worse than 1 year ago." A home exercise program and swimming were recommended.

The repeated conclusions of claimant's examiners were that his medical condition is chronic and stationary. The treatment prescribed was clearly designed to assist

[2] A physiatrist is a physician who specializes in "physical medicine," i.e., a physician who treats with the use of heat, cold, electricity, radiation or other physical means.

claimant in coping with his condition and not to create any material improvement in that condition. The order of the Board denying reopening of claimant's claim is affirmed.

Affirmed.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Darrell C. Johnson, Claimant.

JOHNSON,
Petitioner,
v.
STATE ACCIDENT INSURANCE FUND CORPORATION,
Respondent.

(WCB No. 79-2615, CA A20266)

Judicial Review from Workers' Compensation Board.

Argued and submitted July 24, 1981.

S. David Eves, Corvallis, argued the cause for petitioner. With him on the brief was Ringo, Walton, Eves & Gardner, P.C., Corvallis.

Darrell Bewley, Appellate Counsel, State Accident Insurance Fund Corporation, Salem, argued the cause for respondent. With him on the brief were K.R. Maloney, General Counsel, and James A. Blevins, Chief Trial Counsel, State Accident Insurance Fund Corporation, Salem.

Before Richardson, Presiding Judge, and Thornton and Van Hoomissen, Judges.

THORNTON, J.

Reversed and remanded with instructions.

THORNTON, J.

The sole issue presented in this workers' compensation appeal is the compensability of claimant's aggravation claim. Claimant appeals from the Order on Review of the Workers' Compensation Board which affirmed the denial of the claim by the hearings referee.

The essential facts are as follows:

Claimant is a 58 year old auto body and paint specialist previously employed by Stoddard Chevrolet in Albany. On September 1, 1976, while so employed, claimant suffered a disabling compensable injury to his lower back while closing the door of the paint room. By determination order dated May 18, 1977, claimant received temporary total disability, temporary partial disability, and an award of compensation equal to 48 degrees for 15 percent unscheduled disability. Claimant appealed to the board from this determination order, and on October 10, 1977, settlement was reached by stipulation awarding claimant an additional 64 degrees unscheduled disability for injury to his low back.

In November, 1977, claimant returned to work and continued working for the same employer until February, 1979. Claimant testified that on or about January, 1978, in the course of his employment, claimant again hurt his back while removing a windshield. The medical expenses for this injury were apparently accepted as part of the original claim.

Claimant testified that his condition has progressively deteriorated since September, 1977, with the most significant deterioration occurring since February, 1979. Claimant asserts that his ability to work was limited after his original injury, and his performance continued to decline until he was released from his employment in February, 1979. At the time of the hearing on April 3, 1980, claimant testified that while working he was required to take rest periods of as long as two hours; that he still experienced extensive muscle spasms and was forced to lie on a heating pad for one to two hours every day; that he could sit or stand for only ten to fifteen minutes before experiencing severe pain which forced him to lie down; and

that he had difficulty sleeping and often arose around 3 a.m. to lie in the bathtub or on a heating pad because of severe back pain.

On February 12, 1979, claimant returned for examination to his physician, Dr. Bassinger. Dr. Bassinger noted decreased range of motion of his back and subjective evidence of deterioration and referred claimant to Dr. Chen Tsai for neurosurgical consultation. Dr. Bassinger, in his report dated February 14, 1979, stated as follows:

> "A review of my records for comparison of these findings prior to 9-77 note no change on his physical examination except for the fact that there has been some decreased range of motion of his back. * * *
>
> "In summary this patient has a chronic low back sprain associated with a hyperlordosis and osteoporosis. The back strain and hyperlordosis in turn are exacerbated by poor posture and poor muscle tone of the abdominal muscles. There is essentially no objective evidence of increase of this patient's incapacitation since the settlement of 9-77. * * *"

On August 30, 1979, Dr. Tsai examined claimant and found that "the patient's condition has deteriorated as evidenced by my findings on August 30, 1979, related to his industrial injury on 9-6-76." Dr. Tsai's impression was as follows:

> "Left L5 and S1 radicular irritation, most likely due to herniation of the nucleus pulposus at L5-S1, to rule out that of L4-5 on the left side related to the injury of 9-1-76 from history."

In support of his opinion, Dr. Tsai identified two major changes in claimant's condition: Weakness of the plantar flexion of the left foot and sensory dermatoma of L5 and S1 on the left side. He stated that claimant's symptomology had been progressive and that claimant's symptoms were consistent with his findings. Prior to the last award of compensation the diagnosis was chronic low back sprain. There was no indication of any nerve involvement.

Following denial of his claim of aggravation by SAIF claimant requested a hearing. The referee after reviewing the above evidence chose not to accept Dr. Tsai's opinion linking the 1976 accident to claimant's neurological deficit first reported in August, 1977. He concluded that

the evidence did not show that claimant's condition was materially aggravated after the last arrangement of compensation.

The case before us boils down to whether to accept the earlier medical opinions of Dr. Bassinger and Dr. Fitchett or the contrary and more recent opinion of Dr. Tsai.

Based upon our *de novo* review of this record, we conclude that claimant has established by a preponderance of the evidence that, since the last arrangement of compensation, he has suffered an aggravation of his previous injury in two respects: 1) weakness of the plantar flexion of the left foot, and 2) a sensory dermatoma of L5 and S1 on the left side. Further he has established that the worsened condition is causally related to the original injury. SAIF introduced no expert opinion to contradict the testimony of Dr. Tsai, which was based on an examination later than the other medical experts. Furthermore, he found two changes in his condition. As we pointed out in *Mattson v. Roseburg Lumber Co.,* 43 Or App 497, 499, 603 P2d 1192 (1979):

> "* * * It may well be that if employer had produced any medical evidence refuting that of claimant, the ultimate result might have been what the employer argues for. The employer did not, and thus the uncontroverted medical evidence is that claimant's underlying condition was made somewhat worse by his employment." (Footnote omitted.)

Accordingly, we reverse and remand with instructions to determine the extent of claimant's present disability and to award compensation therefor. ORS 656.273(1).

Reversed and remanded with instructions.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In Banc

SATTERFIELD,
Respondent,
v.
SATTERFIELD,
Appellant,
WAUSAU INSURANCE COMPANY,
Respondent.

(No. 30221, CA 19757)

Appeal from Circuit Court, Coos County.

Richard L. Barron, Judge.

Argued and submitted March 9, 1981; resubmitted in banc October 7, 1981.

Al J. Laue, Assistant Attorney General, Salem, argued the cause for appellant. With him on the brief were Dave Frohnmayer, Attorney General, John R. McCulloch, Jr., Solicitor General, and William F. Gary, Deputy Solicitor General, Salem.

No appearance for respondent John Satterfield.

David Horne, Beaverton, argued the cause and filed the brief for respondent Wausau Insurance Company.

THORNTON, J.

Reversed and remanded.

Gillette, J., dissenting opinion.

THORNTON, J.

The sole issue involved in this appeal is whether worker's compensation benefits due an injured worker are subject to attachment and garnishment for the benefit of the worker's dependent children. The worker's former wife appeals from an order by the Circuit Court dismissing garnishment proceedings brought to reach the worker's compensation benefits due her former husband from his employer's insurance carrier, Wausau Insurance Company (Wausau).

The sole assignment of error is the dismissal of her petition for attachment and garnishment of the above benefits. The essential facts are not disputed.

In November, 1979, Satterfield sustained an industrial injury while in the employ of Production Crusher, whose workers' compensation carrier was Wausau. On July 22, 1980, the Workers' Compensation Department issued a Determination Order finding that as a result of the industrial injury claimant had sustained a 100 percent loss of use of the right forearm and awarded claimant the statutory maximum of 150 degrees for loss of use. This award was in the total sum of $15,000, payable in monthly installments of $1,136.74. The first such installment was paid on or about July 30, 1980. On or about September 1, 1980, a writ of garnishment was served on Wausau by the Support Enforcement Division, Department of Justice, State of Oregon on behalf of claimant's ex-wife. The writ of garnishment sets forth a judgment debt in the form of delinquent child support in the amount of $13,825.18. No further payments have been made to Satterfield following receipt of the Writ. As of the present date, the balance owed Satterfield is $13,863.26.

On this appeal the Support Enforcement Division of the State of Oregon appears for wife and argues that the question presented in this case is identical to the question before this court in *Calvin v. Calvin,* 6 Or App 572, 487 P2d 1164, 489 P2d 403 (1971). There the court stated:

> "The legislature was concerned about the care and support of the injured workman and his dependent family; for this reason the workmen's compensation system was created. This being so, it is illogical to think that the

benefits of the Act were intended to be withheld from the dependents of an injured workman who refuses to accept the legal obligation to support them." *Ibid.*, 6 Or App at 577.

Wausau argued below that at the time of *Calvin* the number of claimant's dependents was considered in determining the amount of benefits and that subsequently the computation of benefits has been amended to depend upon the claimant's actual earnings. As the Attorney General points out, however, although this is true, *Calvin* did not rest upon this consideration but instead was founded upon the language of the preamble to the Worker's Compensation Act.

"* * * [W]e find the following language expressive of one of the overriding purposes for the Act:

"'* * * [T]he state and its taxpayers are subjected to * * * providing care and support for such injured workmen *and their dependents*, and * * * this burden should * * * be more fairly distributed. * * *' (Emphasis supplied.) ORS 656.004." *Ibid.*, 6 Or App at 577.

The Attorney General argues further that the above language from the Act has remained unchanged since its enactment almost 70 years ago. Since that time the burden of the state and its taxpayers has substantially increased and consequently the rationale should be of continuing force particularly where, as here, the garnishment is sought by the state to recover funds it has already expended for the care and support of the worker's dependents.

Wausau argues that *Calvin* is no longer controlling because ORS 656.210 has since been amended to provide that in determining the rate or amount of temporary total disability benefits payable to an injured worker the number of dependents are no longer taken into account; that the subject monies are workers' compensation benefits and are plainly exempt from execution under ORS 656.234[1], and

[1] ORS 656.234 provides:

"No moneys payable under ORS 656.001 to 656.824 on account of injuries or death are subject to assignment prior to their receipt by the beneficiary entitled thereto, nor shall they pass by operation of law. All such moneys and the right to receive them are exempt from seizure on execution, attachment or garnishment, or by the process of any court."

that *Calvin* was wrongly decided, violates settled rules of statutory construction and should be expressly overruled.

A somewhat related issue involving a worker's temporary total disability payments arose in *Jones v. SAIF*, 40 Or App 311, 594 P2d 1316 (1979). In *Jones* the circuit court, acting under ORS 23.760 *et seq* ordered claimant's employer (not SAIF) to withhold 25 percent of claimant's disability payments to pay claimant's accrued support obligation. We held that SAIF was not authorized to withhold compensation from claimant under a garnishment order directed to claimant's "Employer". Penalties and an attorney fee were assessed against SAIF.

Again, in *Sandstrum v. SAIF*, 46 Or App 773, 613 P2d 96, *rev den* 289 Or 677 (1980), the circuit court acting under ORS 23.277 ordered claimant's employer to withhold money due claimant and pay it to the Department of Human Resources as payment on claimant's past due child support obligation. Thereafter the court ordered SAIF "as respondent" [claimant's] employer to "withhold and pay over to the Department of Human Resources * * * 25% of respondent's disposable earnings as defined in ORS 23.175." SAIF did so pursuant to an opinion from the Attorney General. We held that when SAIF acts solely as an insurer, worker's compensation benefits it pays are not subject to wage assignment under ORS 23.777. Further, we held that since SAIF acted under an attorney general's opinion to the contrary and obeyed a circuit court order to withhold benefits pursuant to a wage assignment signed by the claimant, claimant was not entitled to penalties and an attorney's fees. In both of the above cases, although involving other issues, this court implicitly recognized that workers' compensation benefits can be reached in a proper case to satisfy claims for support of an injured worker's dependents under ORS 23.760 *et seq. See also* 38 Op Atty Gen at 1690 (1978).

Further, we regard it as significant that, although *Calvin* was decided in 1971, four sessions of the Legisative Assembly have met and adjourned without any amendment of ORS 656.234, the exemption provision relied upon by Wausau.

We are not persuaded by Wausau's argument that *Calvin* is no longer controlling because ORS 656.210 has since been amended to provide that in determining the rate or amount of temporary total disability benefits, the number of dependents are no longer taken into account.

After reviewing the authorities, we conclude that *Calvin v. Calvin, supra,* was correctly decided and is dispositive of the issue presented here. It follows therefore that the trial court erred in dismissing the writ of garnishment. Additionally, we hold that claimant's contention that 75% of each monthly installment is exempt from garnishment because it constitutes compensation for loss of wages cannot be sustained. The definition of "earnings" in the applicable exemption provision reads:

> " 'Earnings' means compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus or otherwise, and includes periodic payments pursuant to a pension or retirement program." (ORS 23.175(2)).

Plainly, worker's compensation benefits do not fall within the above description.

Reversed and remanded.

GILLETTE, J., dissenting.

Our decision today continues a rule first announced by this court in 1971 in *Calvin v. Calvin,* 6 Or App 572, 487 P2d 1164, 489 P2d 403. I believe that *Calvin* was wrongly decided and ought not to be followed.

In *Calvin* the plaintiff, the ex-wife of defendant and custodian of their eight children, sought garnishment of an amount owing to defendant from Liberty Mutual Insurance Company. The money was part of a Workers' Compensation award. Defendant successfully resisted garnishment in the trial court by virtue of the provision of ORS 656.234, which provided the Workers' Compensation benefits were "exempt from seizure on execution, attachment *or garnishment,* or by the process of any court." (Emphasis supplied)

This court reversed. After first acknowledging that the literal language of the statute exempted compensation

awards like this one from garnishment, we nonetheless held that "* * * it is illogical to think that the benefits of the Act were intended to be withheld from the dependents of an injured workman who refuses to accept the legal obligation to support them." 6 Or App at 527. We reached this conclusion in light of the language in the preamble to the Workers' Compensation Law which stated:

> "* * *[T]he state and its taxpayers are subjected to * * * providing care and support for such injured workmen *and their dependents,* and * * * this burden should * * * be more fairly distributed * * *." Former ORS 656.004. (Emphasis supplied.)

This interesting spectacle of the language in a *preamble* to a statute being used to overrule the plain wording of a *substantive* statutory provision went unreviewed by the Supreme Court. In view of the fact that defendant had no money, the absence of a petition for review does not seem too remarkable.

Calvin has been mentioned by us only twice since, neither time affectionately. In *Bresnan v. Bresnan,* 42 Or App 739, 601 P2d 851 (1979), we construed virtually identical language in the Public Employes Retirement Act to *exempt* a public employe's pension from garnishment to pay back support. In *Sandstrum v. SAIF,* 46 Or App 773, 613 P2d 96 (1980), we discussed *Calvin* in the context of resolving a very tangential issue, but no way reconsidered or reaffirmed its holding.

In the present case we are asked to reconsider *Calvin* and give effect to the clear language of ORS 656.234. We should do so. Not only was the opinion wrong as written, its logic has suffered by a change in the Act between 1970 and the present. There is now no substantive language underpinning for our peculiar use of the Act's preamble in 1970. Today, unlike in 1970, benefits are not based in part upon the number of dependents an injured worker may have. Former ORS 656.210.

The best argument—the only real argument—upon which the majority may rely is the passage of time: the legislature has not changed the law since *Calvin.* There are two answers to this:

(1) One could not make the language any clearer than it is; and

(2) The constituency most desiring a clarification--fathers delinquent in paying their child support--is not exactly a strong lobby.

We should say we were wrong when we announced *Calvin.* I respectfully dissent.

BUTTLER, J., WARDEN, J., AND YOUNG, J., join in this dissent.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

McINTYRE,
Respondent,
v.
WRIGHT,
Defendant,
and
STATE ACCIDENT INSURANCE FUND,
Appellant.

(No. 376-325, CA 19231)

Appeal from Circuit Court, Multnomah County.

Harlow F. Lenon, Judge.

Argued and submitted May 29, 1981.

Darrell E. Bewley, Appellate Counsel, State Accident Insurance Fund, Salem, argued the cause for appellant. With him on the brief were K. R. Maloney, General Counsel, and James A. Blevins, Chief Trial Counsel, State Accident Insurance Fund, Salem.

Dave Frohnmayer, Attorney General, William F. Gary, Solicitor General, and Al J. Laue, Assistant Attorney General, Salem, filed the brief for respondent.

Before Gillette, Presiding Judge, and Roberts and Young, Judges.

GILLETTE, P. J.

Reversed in part and remanded.

Roberts, J., concurring opinion.

GILLETTE, P. J.

Respondent seeks to garnish Workers' Compensation benefits due defendant. The trial court granted a continuing garnishment against defendant's benefits for the lesser of 25 percent of the benefit or $255 per month. Defendant appeals. We reverse in part.

Defendant first contends that a creditor may not garnish Workers' Compensation benefits. Defendant is incorrect. *See Satterfield v. Satterfield,* ____ Or App ____, ____ P2d ____ (October 12, 1981).[1]

Defendant next contends that, assuming garnishment was permissible, a *continuing* garnishment was not. We agree. In *Weyerhaeuser Co. v. Lynch,* 268 Or 142, 502 P2d 351 (1971), the Oregon Supreme Court stated:

> "The law is well settled in Oregon that a garnishment creditor takes only such rights or interests as his debtor had at the time the notice of garnishment was served. *Scheuerman v. Mathison,* 74 Or 40, 144 P 1177 (1914). A garnishing creditor can stand in no better position than the debtor and garnishees are held only for clearly ascertainable debts owing at the time of service of the notice." 268 Or at 146.

Although *Weyerhaeuser* is distinguishable on its facts, the statement cited is a clear, general prohibition of continuing garnishment.

Respondent admits that *Weyerhaeuser* accurately states Oregon garnishment law, but argues that *Calvin v. Calvin,* 6 Or App 572, 487 P2d 1164, 489 P2d 403 (1971), which holds that Workers' Compensation benfits are not exempt from support obligations, implies that those who are entitled to support payments from the debtor are not creditors and therefore not subject to the general garnishment rules.

ORS 23.777[2] does provide an exception to the general rules of garnishment for those entitled to delinquent

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[1] But for *Satterfield,* the author of this opinion and Young, J., would reverse this case for the reasons set forth in the dissenting opinion in *Satterfield.*

[2] ORS 23.777 provides:

"(1) In addition to any other remedy provided in law for the enforcement of support, the court, upon notice that support payments or any fees provided for in chapter 458, Oregon Laws 1975, are delinquent and application by the

support payments. Although the garnishment statutes generally do not provide for continuing garnishment, ORS 23.777 allows the court to order "any employer or trustee, including but not limited to a conservator, of the obligor" to withhold "money due *or to become due* such obligor" for payment of delinquent child support. (Emphasis supplied.) Subsection (4) states that such an order "shall be a continuing order and shall remain in effect and be binding * * * until further order of the court." Since this provision specifically authorizes continuing garnishment upon only employers, trustees, or conservators of the obligor, continuing garnishment is implicitly improper as to all others.

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obligee or by the district attorney or Support Enforcement Division of the Department of Justice, shall issue an order directing any employer or trustee, including but not limited to a conservator, of the obligor to withhold and pay over to the Department of Human Resources or the clerk of the court out of which the order is issued, whichever is appropriate, money due or to become due such obligor in an amount not to exceed:

"(a) One-fourth of the disposable earnings as defined in ORS 23.175 due or becoming due the obligor at each pay period, until all delinquent amounts due together with interest are paid in full, plus all further amounts coming due before the delinquent amounts are paid in full.

"(b) Thereafter at each pay period, the amount ordered to be paid for support, but not more than one-fourth of the disposable earnings as defined in ORS 23.175 due or becoming due the obligor at each pay period.

"(2) (a) An order entered pursuant to this section shall recite the amount of all delinquent support amounts due, together with interest, and the amount required to be paid as continuing support.

"* * * * *

"(4) An order issued under subsection (1) or (3) of this section shall be a continuing order and shall remain in effect and be binding upon any employer or trustee upon whom it is served until further order of the court.

"(5) An order to withhold issued and served pursuant to this section shall have priority over any notice of garnishment subsequently served upon any employer or trustee of an obligor.

"(6) No employer or trustee who complies according to its terms with an order under this section or the notice provided for in paragraph (b) of subsection (2) of this section shall be liable to the obligor or to any other person claiming rights derived from the obligor for wrongful withholding.

"(7) An employer or trustee described in subsection (1) of this section who wilfully fails or refuses to withhold or pay the amounts as ordered shall be deemed to be in contempt of the authority of the court and may be held personally liable.

"(8) No employer shall discharge or refuse to hire an employe because of the entry or service of an order of withholding under this section. Any person who violates this subsection shall be deemed to be in contempt of the authority of the court."

SAIF is not an employer for purposes of the statute. *Sandstrum v. SAIF,* 46 Or App 773, 613 P2d 96, *rev den* (1980). The state makes no claim that SAIF is either a trustee or conservator; we hold that it is neither. Defendant is simply the third party beneficiary of an insurance contract between SAIF and defendant's employer.

Because SAIF is not a permissible garnishee under ORS 23.777, the support obligor must proceed under the general garnishment statutes and is not, therefore, entitled to continuing garnishment. The trial court's order granting continuing garnishment was in error. The court could garnish only sums owed defendant by SAIF at the time the proceeding was brought. We remand the case to the trial court to determine that amount.

Reversed in part and remanded.

ROBERTS, J., concurring:

The majority bases its decision in this case on our conclusion in *Sandstrum v. SAIF,* 46 Or App 773, 613 P2d 96, *rev den* 289 Or 677 (1980). I dissented in that case because I did not feel it was necessary to reach the issue of whether SAIF is an employer for purposes of ORS 23.777. That issue is central to this case.

SAIF is not an employer in the sense that "the benefits payable to the injured worker are not compensation for personal services performed by the worker for SAIF." *Sandstrum v. SAIF, supra,* 46 Or App at 779. However, the workers' compensation system is intended to provide an injured worker with income while he or she is unable to work and to offset an injured worker's reduced earning ability. There is no doubt that these payments are intended to be a *substitute* for wages. Nevertheless, I agree with the majority that, given the clear language of ORS 23.777, specifically entitling an employer or trustee of an obligor to a continuing garnishment order, it is not our role to import into the statute new reasoning that workers' compensation benefits, because they are paid in lieu of wages, may also be subject to a continuing garnishment.

While we used the general policy language from the preamble to the workers' compensation statute, ORS 656.004, to interpret, and seemingly contradict, another

portion of the workers' compensation statute relating to garnishment in *Calvin v. Calvin,* 6 Or App 572, 577, 487 P2d 1164 (1971), there is no basis on which we might use that same legislative policy to interpret the provisions of a law outside the workers' compensation statutes.[1] Thus, while we remain fully cognizant of the declared legislative intent to "provide care and support for such injured workers and their dependents," ORS 656.004, having said, in *Calvin,* that workers' compensation benefits are garnishable, we must await the Oregon Legislature's declaration that such benefits may be continually garnished, removing from a former spouse having custody of minor children the burden of bringing a new action each month in order to receive child support from a worker who is receiving workers' compensation benefits but refuses to pay a child support obligation.

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[1] *Calvin* itself has been criticized by other members of this court. *Satterfield v. Satterfield,* Or App , P2d (October 12, 1981) (Gillette, P. J., dissenting).

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation
of Charles R. Smith, Claimant.

SMITH,
Petitioner,
v.
CHASE BAG COMPANY,
Respondent.

(WCB No. 79-3919, CA 19581)

Judicial Review from Workers' Compensation Board.

Argued and submitted March 25, 1981.

Kenneth D. Peterson, Jr., Eugene, argued the cause for petitioner. On the brief were Steven C. Yates and Malagon, Velure & Yates, Eugene.

Noreen K. Saltveit, Portland, argued the cause for respondent. With her on the brief was Merten & Saltveit, Portland.

Before Buttler, Presiding Judge, and Warden and Warren, Judges.

WARDEN, J.

Affirmed in part; reversed in part and remanded.

WARDEN, J.

Claimant appeals an Order of the Workers' Compensation Board which denied him payments for travel expenses and for the purchase of a chair.

Claimant suffered a compensable injury to his low back on October 14, 1977. At that time he lived in southeast Portland. In November, 1977, he commenced treatment for his injury with Dr. Butt at the doctor's chiropractic and naturopathic offices in Molalla. In March, 1978, on the promise of employment, claimant moved to Veneta. He continued treatment with Dr. Butt, making frequent round-trip visits of 240 miles between Veneta and Molalla. The doctor determined that claimant was medically stationary in April, 1978, but he was of the opinion that claimant would need continuing palliative care as a result of his injury. The claim was closed in May, 1978, with an award of 5 percent unscheduled disability. Claimant continued going to Dr. Butt for palliative care, making as many as three trips per month between Veneta and Molalla for this purpose. On April 27, 1979, payment to claimant of further travel expenses between Veneta and Molalla was denied on the ground that it was unreasonable to pay such expenses for palliative care.

In August, 1979, Dr. Butt recommended that the claimant acquire a "Cyclo-massage" chair for his ongoing palliative care. On December 28, 1979, a request for funds to purchase the chair was denied. Claimant filed requests for hearing on the denial of payments for the travel expenses and for the purchase of the chair. After hearing, the referee approved the denial of travel expenses after April 27, 1979, and overruled the denial of the purchase of the chair.

At the hearing, the medical director of the Workers' Compensation Department testified:

> "My opinion that that much travel [is unreasonable] — about that much travel — would apply whether it was a chiropractor or an M.D. * * * If he was coming back to a M.D. for physio-therapy that distance, I would consider it unreasonable. * * * If he had a bad back and was coming up here for regular physio-therapy, I would consider that unreasonable."

The factors that the medical director used to form this conclusion were: (1) the type of treatment, (2) the nature of the complaints, (3) the level of the symptoms, and (4) the particular problem. The claimant was also seen by another physician, Dr. Pasquesi, who stated that the chiropractic care was palliative rather than curative and that the chair which was recommended was not necessary for either palliative or curative treatment. The referee stated:

> "* * * I find the additional expense for travel is unreasonable in this particular case. The need of the doctor-patient relationship has terminated or, at least, has diminished. Dr. Butt had determined that claimant was medically stationary in April 1978, and remarked at that time that claimant would need periodic palliative care in the future * * *. There was no further need of curative treatment and the anticipated physiotherapy does not require the confidential and trusting doctor-patient relationship.

As to the chair, the referee found:

> "[Dr. Butt's] determination that the chair would be beneficial in relieving claimant's discomfort and maintaining him as a productive-employed person, is given significantly more weight than the opinion of Dr. Pasquesi who evaluated claimant, but did not treat or prescribe for him.
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> "* * * * *
>
> "I do not find the purchase of the Cyclo-massage chair is unreasonable and it is within the contemplated medical services under ORS 656.245."

On review, the Board modified the referee's order, reversing the authorization for purchase of the chair and affirming the denial of travel expenses. The Board reasoned:

> "We do not find any medical evidence that the cyclo massage chair was prescribed as a form of medical treatment for the claimant. We do not find that under the facts of this case, that such a chair could be classified as 'medical services' within the meaning of ORS 656.245."

Payment of medical expenses, whether palliative or curative, are made pursuant to ORS 656.245.[1] *Wait v.*

[1] ORS 656.245 provides:

"(1) For every compensable injury, the direct responsibility employer or the State Accident Insurance Fund Corporation shall cause to be provided

Montgomery Ward, Inc., 10 Or App 333, 499 P2d 1340 (1972). Transportation costs necessarily incurred to seek medical services are also compensable pursuant to ORS 656.245. OAR 436-54-270;[2] *see also, Stritt v. SAIF*, 37 Or App 893, 588 P2d 136 (1978); *Francoeur v. SAIF*, 17 Or App 37, 520 P2d 477 (1974).

Claimant contends on appeal that his right to choose a treating physician prohibits the Board from disallowing travel expenses in this case. We agree. Claimant is seeking payment for travel expenses to obtain "medical services for conditions resulting from his injury." ORS 656.245(1). He is free to choose his own physician within the State of Oregon, pursuant to ORS 656.245(2). He began

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medical services for conditions resulting from the injury for such period as the nature of the injury or the process of the recovery requires, including such medical services as may be required after a determination of permanent disability. Such medical services shall include medical, surgical, hospital, nursing, ambulances and other related services, and drugs, medicine, crutches and prosthetic appliances, braces and supports and where necessary, physical restorative services.

"(2) The worker may choose his own attending doctor or physician within the State of Oregon. The worker may choose the initial attending physician and may subsequently change attending physician four times without approval from the director. If the worker thereafter selects another attending physician the insurer or self-insured employer may require the director's approval of the selection and, if requested, the director shall determine with the advice of one or more physicians, whether the selection by the worker shall be approved."

[2] OAR 436-54-270 provides:

"(1) The worker shall be notified at the time of claim acceptance that travel, prescriptions and other compensable injury related services paid by the worker will be reimbursed by the insurer or self-insured employer upon request.

"(2) For the purpose of this section:

"(a) The actual reasonable cost to a worker of related services resulting from a compensable injury shall be reimbursed within 30 days of the date of receipt by the insurer or self-insured employer of a written request. The request shall be accompanied by sales slips, receipts or other evidence necessary to support the request.

"(b) Meals, lodging, public transportation or use of a private vehicle required to seek medical services or collect compensation benefits when reimbursed at the then applicable rate of reimbursement to State of Oregon classified employees shall be deemed in compliance with this section. Reimbursement in excess of these rates will be allowed in those cases where special transportation or lodging is necessary and required.

"(3) Requests for reimbursement of services not claim-related shall be returned to the injured worker within 30 days."

his treatment with Dr. Butt while he resided near the doctor's Molalla office. He is receiving care to which he is entitled for conditions resulting from his injury. ORS 656.245(1); *Bowser v. Evans Product Company,* 270 Or 841, 530 P2d 44 (1974). That the treatment is palliative rather than curative makes no difference. *Wait v. Montgomery Ward, supra.* Claimant is entitled to reimbursement for reasonable travel expenses for trips made to visit his treating doctor. OAR 436-54-270; *Francoeur v. SAIF, supra.*

As to claimant's contention concerning the acquisition of the chair, OAR 436-69-335 provides that "chairs * * * are not reimbursable unless a need is clearly justified by report, which establishes that 'the nature of the injury or the process of recovery requires' that the item be furnished." The record contains no such report. The Cyclo-massage chair is not a "medical service" included within the meaning of ORS 656.245.

Affirmed in part; reversed in part and remanded.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation
of James P. Lavin, Claimant.

LAVIN,
Petitioner,
v.
ROSEBURG LUMBER COMPANY,
Respondent.

(No. 79-7425, CA A20670)

Judicial Review from Workers' Compensation Board.

Argued and submitted August 21, 1981.

Jerome F. Bischoff, and Bishoff, Murray & Strooband, Eugene, filed the brief for petitioner.

Brian L. Pocock, Eugene, argued the cause for respondent. With him on the brief was Cowling, Heysell & Pocock, Eugene.

Before Gillette, Presiding Judge, and Roberts and Young, Judges.

GILLETTE, P. J.

Reversed and remanded to the Board with instructions to reinstate the order of the referee.

GILLETTE, P. J.

The issue in this workers' compensation case is whether claimant's foot condition is compensable. The referee found that claimant's work was a material, contributing factor to his condition and ordered acceptance of his claim. The Board reversed the referee's order. We reverse.

Claimant is 31 years old and has worked for respondent since 1973. When he was about 10 or 11 years old, he stepped on a nail and developed osteomyelitis, an inflammation or infection of the bone, in his right foot. When he was later in the Navy, he was diagnosed to have degenerative arthritis in his foot. This condition apparently developed from the osteomyelitis, and as a result, the Navy discharged claimant with a ten percent disability. He explained that the Navy discharged him because it believed that the steel decks on which he had to run aggravated his condition.

Claimant then worked as a steel cutter for three years. He felt well during that time, although his foot would stiffen on occasion. In 1972, Dr. Donahoo examined him. Donahoo's report states that claimant has had chronic foot problems since he was a child. It indicates that claimant's foot bothers him in the morning when he first gets up and at night after a hard day, but that he has no particular pain once he is up and working. Donahoo attributed claimant's difficulties to talonavicular arthritic changes in his foot. Donahoo prescribed medication and a steel-reinforced arch support to alleviate claimant's problem. He stated that claimant would eventually have to undergo a fusion "should he become incapacitated." Donahoo did not indicate whether he thought claimant would become incapacitated in the future.

Claimant testified that after he started to work for respondent, his foot steadily got worse. His job required him to stand on a concrete floor most of the day. After a few years, wooden slats were put down over the concrete; claimant testified that standing then became somewhat easier. He also indicated that when he is out all day and active, as when hunting or fishing, his foot bothers him more.

Soon after he began working at Roseburg Lumber, claimant sought treatment, including physical therapy,

every two to three months for the pain in his foot. In November, 1979, a fusion was performed on his right talonavicular joint. In a letter to claimant's attorney, the surgeon, Dr. Johnson, stated his opinion:

> "[I]t is medically probable that Mr. Lavin's work as a machinist requiring him to stand for prolonged periods of time on cement floors and more recently on wood slats permanently worsened [his] talonavicular arthritis that was no doubt initiated by an episode when he was 9 or 10 years old."

This is the only medical evidence linking claimant's condition to his employment.

On appeal, respondent argues first that, because it did not have an opportunity to depose or cross-examine Johnson, his opinion should be disregarded. Both the referee and the Board considered Johnson's opinion in reaching their decisions. At the hearing on March 11, 1980, the referee agreed to receive Johnson's report in evidence and to keep the hearing open until respondent had an opportunity to depose Johnson. On July 3, respondent requested that the record be closed without Johnson's report because "it does not appear that a time for the taking of Johnson's deposition can be arranged." It did not explain why it could not depose Johnson in that three and one-half months. On July 17, the referee informed the parties that he planned to close the case. He did so on August 4. In its motion for reconsideration, respondent claimed that a time to take Johnson's deposition could not be arranged with claimant's counsel. Nothing in the record shows that claimant's counsel posed any unreasonable obstacles to taking Johnson's deposition. Given how long this case was open and respondent's failure to explain adequately why it was prevented from deposing Johnson, we conclude that his report is properly part of the record before us. We turn now to the merits of claimant's claim.

In *Weller v. Union Carbide*, 288 Or 27, 35, 602 P2d 239 (1979), the court, in a similar case, held that a claimant must

> "* * * 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 in his v-

pain (4) to the extent that it produces disability or requires medical services * * *."

before his claim will be found to be compensable.

Claimant's symptoms and pain here increased as a result of his job conditions, and his foot condition worsened during the time in question. The issue is whether claimant's having to stand on a hard surface for prolonged periods at work caused claimant's condition to worsen. On the basis of Dr. Johnson's opinion, we conclude that it did.

Respondent argues that there is no evidence that claimant's condition would not have progressed to its present level at all or at the rate it did if he had not worked for respondent. In fact, respondent argues, the evidence as a whole tends to show that the present level of claimant's foot condition would have been the same regardless of his job conditions. Dr. Donahoo's report states that claimant might eventually need to undergo surgery. Claimant's testimony, and Donahoo's medical progress notes indicate that even general activity causes claimant's pain in his foot. Respondent relies on *Henry v. SAIF*, 39 Or App 795, 593 P2d 1251 (1979), where we denied compensation to an employe who failed to offer proof that his foot condition, which he claimed was caused from continual standing on hard surfaces at work, would have been any different had he not been employed at all.

The distinction between this case and *Henry* lies in the unequivocal, unrebutted statement of Dr. Johnson that it is "medically probable" that claimant's job "permanently worsened" his condition. *Weller* calls for, and is satisfied by, just such testimony. Claimant has proved his claim.

Reversed and remanded to the Board with instructions to reinstate the referee's order.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of the Beneficiaries of Marian A. Williams, Deceased.

HEWITT
Petitioner,
v.
STATE ACCIDENT INSURANCE FUND CORPORATION,
Respondent.

(WCB No. 79-7248, CA 19548)

Judicial Review from Workers' Compensation Board.

Argued and submitted March 18, 1981.

Eric R. Friedman, Portland, argued the cause for petitioner. With him on the brief was Fellows, McCarthy, Zikes & Kayser, P.C., Portland.

Darrell E. Bewley, Appellate Counsel, State Accident Insurance Fund Corporation, Salem, argued the cause for respondent. With him on the brief were K. R. Maloney, General Counsel, and James A. Blevins, Chief Trial Counsel, State Accident Insurance Fund Corporation, Salem.

Before Buttler, Presiding Judge, and Warden and Warren, Judges.

WARDEN, J.

Reversed and remanded with instructions to accept petitioner's claim under ORS 656.226.

WARDEN, J.

Petitioner appeals the Workers' Compensation Board's Order which denied his claim for benefits pursuant to ORS 656.226.[1]

Petitioner and Marian Williams were unmarried cohabitants from 1974 until Marian Williams' death on May 20, 1979, from a compensable industrial accident. Petitioner is the father of Ms. Williams' child. A joint declaration of paternity was filed by petitioner and Ms. Williams with the Vital Statistics Section of the Oregon State Health Division. The child is a recipient of benefits under ORS 656.226 as a result of Ms. Williams' injury and death.[2]

The parties do not dispute that petitioner satisfies the criteria for benefits propounded in ORS 656.226, except that he is a surviving male rather than a surviving female. Petitioner contends that unless ORS 656.226 is interpreted to include benefits for surviving males as well as females, it is violative of the Equal Protection Clause of the United States Constitution and Article I, section 20, of the Oregon Constitution.[3]

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[1] ORS 656.226 provides:

"In case an unmarried man and an unmarried woman have cohabited in this state as husband and wife for over one year prior to the date of an accidental injury received by such man, and children are living as a result of that relation, the woman and the children are entitled to compensation under ORS 656.001 to 656.794 the same as if the man and woman had been legally married."

[2] Had petitioner and Marian Williams been married at the time of Ms. Williams' death, petitioner, too, would have been entitled to benefits as a surviving spouse. ORS 656.204.

[3] Section 1 of the Fourteenth Amendment to the United States Constitution provides:

" * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article I, section 20, of the Oregon Constitution provides:

"No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens."

Petitioner relies on ORS 174.110(2) and ORS 174.115[4] for his contention that the statute should be interpreted to provide benefits to petitioner. ORS 174.115 provides:

> "It shall be the policy of the State of Oregon that all statutes, rules and orders enacted, adopted or amended after October 3, 1979, be written in sex-neutral terms unless it is necessary for the purpose of the statute, rule or order that it be expressed in terms of a particular gender."

ORS 174.110(2) provides:

> "Words used in the masculine gender may include the feminine and the neuter."

ORS 174.110(2) is inapplicable. Petitioner asks us to interpret the word "woman" to include man. That would not be an interpretation of a word used in the masculine gender, so ORS 174.110(2) does not apply. ORS 174.115 also is not helpful. We cannot apply a "policy" to contradict the obvious meaning of the words employed by the legislature. The word "woman" is clear and merits no interpretation. We cannot employ judicial interpretation to thwart the plain meaning of the statutory language. *Myers v. MHI Investments, Inc.*, 44 Or App 467, 471, 606 P2d 652, *rev. den* 289 Or 107 (1980); *Monaco v. U.S. Fidelity and Guar.*, 275 Or 183, 188, 550 P2d 422 (1976); *Lane County v. Heintz Const. Co. et al*, 228 Or 152, 157, 364 P2d 627 (1961).

Having determined that ORS 656.226 cannot, by statutory construction, be interpreted to include men, we must now determine whether the statute deprives petitioner of the equal protection of the law.

Legislation that provides benefits to women but not to men has been upheld in some recent cases as a manifestation of "benign" discrimination. Those cases allow disparate treatment of men and women when the legislature has recognized that women have been treated unfairly economically and the legislation is an attempt to remedy the situation. *See Califano v. Webster*, 430 US 313, 97 S Ct 1192, 51 L Ed 2d 360 (1977); *Kahn v. Shevin*, 416

[4] Petitioner does not deny that ORS 174.115 applies only to statutes adopted or amended after October 3, 1979, which is after the date of the decedent's death in this matter which would of course be the triggering event entitling the petitioner to compensation. * * *"

US 351, 94 S Ct 1734, 40 L Ed 2d 189 (1974). When the impetus for the legislation has not been to compensate women for discrimination but for other reasons, disparate treatment of men and women has been held unconstitutional. *See Califano v. Goldfarb,* 430 US 199, 97 S Ct 1021, 51 L Ed 2d 270 (1977); *Weinberger v. Wiesenfeld,* 420 US 636, 95 S Ct 1225, 43 L Ed 2d 514 (1975); *Frontiero v. Richardson,* 411 US 677, 93 S Ct 1764, 36 L Ed 2d 583 (1973). In *Weinberger,* 420 US at 648, the Supreme Court stated:

> " * * * [T]he mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme * * * ."

Classifications based on sex must have a "close and substantial relationship to important governmental objectives." *Personnel Administration of Mass. v. Feeney,* 442 US 256, 273, 99 S Ct 2282, 60 L Ed 2d 870 (1970). *See also, Weinberger v. Wiesenfeld, supra; Frontiero v. Richardson, supra; Reed v. Reed,* 404 US 71, 92 S Ct 251, 30 L Ed 2d 225 (1971).

ORS 656.226 is not an example of "benign" discrimination.[5] If the legislature meant to ameliorate economic discrimination against women, it would not have made a distinction between women with children and women without children. It is apparent from the statute that its purpose is to give assistance to the surviving members of the family, not assistance to women as a disadvantaged group.[6] In effect, however, it discounts a female worker's

[5] ORS 656.226 was enacted as Oregon Laws 1927, chapter 414, and is found presently in substantially the language in which it was originally enacted. *Thomas v. SAIF,* 8 Or App 414, 495 P2d 46 (1972). It is unlikely that the 1927 legislature was concerned about remedying economic discrimination against women when this statute was promulgated. It is more likely that the disparate treatment was based on traditional notions of women's dependency.

[6] In *Kempf v. SAIF,* 34 Or App 877, 580 P2d 1032, *rev den* 284 Or 621 (1978), this court suggested that the legislature intended to give benefits to a surviving *partner* of a substantial relationship (one of at least one year duration which produced a child) rather than to a surviving *partner* of a casual relationship because this partner was more likely to be financially dependent than the surviving partner of a casual relationship. *Kempf v. SAIF, supra,* 34 Or App at 880. We will not assume that we determined in *Kempf* that the legislature was recognizing the "dependency" of surviving *women,* rather than surviving *partners,* as this assumption of female dependency has been classified by the United States Supreme Court as "an archaic and overbroad generalization." *See Califano v. Goldfarb, supra,* 430 US at 217.

contribution to her family and deprives her family of benefits when those same benefits would be available to the family of a male worker.

This denigration of a female worker's contribution to her family is not benign. Furthermore, ORS 656.226 provides a gender-based distinction which has no relationship to the purpose of the legislation. This is analogous to the nonremedial purpose and denigratory impact of the statute found invalid in *Weinberger.* We can find no meaningful distinction between *Weinberger* and the case at hand. In *Weinberger,* the Supreme Court found that the section of the Social Security Act, 42 USC § 402(g), which created survivor benefits for a widowed mother and the couple's minor children in her care, but which denied a widower-father benefits, violated the right to equal protection. The Act discriminated against female wage-earners and the distinction was based on an "archaic and overbroad" generalization that male workers' earnings were vital to support the family while female workers' earnings were not. The Court determined that the purpose of the Act was not premised on any special disadvantages of women. Its purpose was to provide children deprived of a parent with the personal attention of the other. It was meant to assist the family. The gender-based distinction was, therefore, irrational. The Court reasoned in *Weinberger,* 420 US at 651-652:

> "The classification discriminates among surviving children solely on the basis of the sex of the surviving parent. Even in the typical family hypothesized * * * in which the husband is supporting the family and the mother is caring for the children, this result makes no sense. The fact that a man is working while there is a wife at home does not mean that he would, or should be required to, continue to work if his wife dies. It is no less important for a child to be cared for by its sole surviving parent when that parent is male rather than female. And a father, no less than a mother, has a constitutionally protected right to the 'companionship, care, custody and management' of 'the children he has sired and raised, [which] undeniably warrants deference and, absent a powerful countervailing interest, protection.' *Stanley v. Illinois,* 405 US 645, 651, 31 L Ed 2d 551, 92 S Ct 1208 (1972). Further, to the extent that women who work when they have sole responsibility for children encounter special problems, it would seem that men with sole responsibility for children will encounter the same child care related problems."

We hold that the disparate treatment afforded unmarried fathers by ORS 656.226 does not have a close and substantial relationship, or any relationship, to a legitimate governmental objective in the workers' compensation law. The statute, therefore, is unconstitutional insofar as it discriminates against unmarried fathers on the basis of sex.

We reverse the Board and remand with instructions to order respondent to accept petitioner's claim and to make payments to petitioner which he would have been qualified to receive but for the unconstitutional discrimination contained in ORS 656.226.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation
of Wayne R. Batdorf, Claimant.

BATDORF,
Petitioner,

v.

STATE ACCIDENT INSURANCE FUND
CORPORATION,
Respondent.

(WCB No. 79-05894, CA A20932)

Judicial Review from Workers' Compensation Board.

Argued and submitted September 23, 1981.

Robert K. Udziela, Portland, argued the cause for petitioner. With him on the brief was Pozzi, Wilson, Atchison, Kahn & O'Leary, Portland.

Darrell E. Bewley, Appellate Counsel, State Accident Insurance Fund Corporation, Salem, argued the cause and filed the brief for respondent.

Before Buttler, Presiding Judge, and Warden and Warren, Judges.

BUTTLER, P. J.

Reversed and remanded to the Board with instructions that the claim be accepted and for further proceedings consistent with this opinion.

BUTTLER, P. J.

Claimant appeals a determination by the Workers' Compensation Board, affirming the referee's order, that an acute myocardial infarction (heart attack) was not compensably related to his employment. On *de novo* review, we reverse.

Claimant must establish both legal and medical causation in order to prove a compensable heart attack. *Coday v. Willamette Tug and Barge,* 250 Or 39, 49, 440 P2d 224 (1968); *Foley v. SAIF,* 29 Or App 151, 156, 562 P2d 593 (1977). In *Williams v. Burns Int'l Security,* 36 Or App 769, 778, 585 P2d 734 (1978), we noted that the cases have exhibited "confusion in determining what is legal and medical causation in heart cases." *See also,* Skelton, *Workmen's Compensation in Oregon,* 12 Will L J 1, 26 (1975) (*Conday's* legal causation test termed "nebulous"). In *Coday's* language, the question of legal causation is whether there is substantial evidence that claimant exerted himself in carrying out his job, a question of fact, but the exertion need not involve unusual stress. *Riutta v. Mayflower Farms, Inc.,* 19 Or App 278, 281, 527 P2d 424 (1974), *rev den* (1975).

As we interpreted medical causation in *Foley v. SAIF, supra,* the question is "whether the exertion *connected with [claimant's] employment* was a material contributing factor to [the] heart attack" (emphasis supplied), a fact question, the resolution of which requires proof by expert evidence. 36 Or App at 155-56. The two tests overlap considerably, the salient difference seeming to be that medical causation requires expert evidence. We understand *Coday* to require, first, a showing of "work-connected"[1] exertion; and, second, expert medical evidence to the effect that such exertion was, within the range of reasonable medical probability, a precipitating factor of the heart attack. Both requirements were satisfied here.

Claimant, 46 years old at the time of the hearing, was employed as a water truck driver in 1978. He exhibited

[1] *See Rogers v. SAIF,* 289 Or 633, 643, 616 P2d 485 (1980) (unitary "work-connection" approach adopted in lieu of mechanistic two-stage analysis "arising out of and in the course of employment").

several cardiac risk characteristics: a diabetic, 5 feet 11 inches tall weighing 240 pounds, and is a cigarette smoker with a family history of heart disease. On May 22, 1978, claimant drove to work at 3 a.m. in a water truck and noticed his "Adam's apple" (referring to his larynx) was aching. At the job site, by a stream near Klamath Falls, claimant removed a 30 to 40 foot hose from the truck, took it 15 to 20 feet down a 45 degree bank to the surface of the stream, stuck the hose in the water, climbed back up and activated the truck's pump to fill the tank. After the truck was full, claimant climbed down, retrieved the hose, placed it in the truck and proceeded to drive the truck while watering the roads. He filled the truck twice.

During the active segments of the first filling operation, claimant's larynx ached and he experienced aching in his arms. Those symptoms subsided when he was resting or driving the truck. During the second filling operation, claimant experienced increased discomfort in the form of larynx and arm pain, chest pain and breathing difficulties. His chest and larynx continued to ache, even while he was resting or driving. Claimant finally returned to the job site, where he told a fellow worker that something was "wrong." An ambulance was called, and claimant was eventually taken to the closest hospital. There it was determined, at about mid-day, that he had experienced or was experiencing an acute anterior myocardial infarction that began sometime within the preceding three or four hours.

There is no indication that claimant had engaged in any particular exertion after he reported back to his job site; there is no evidence contradicting claimant's account of events leading up to his hospitalization. *See Mawhinney v. SAIF*, 43 Or App 819, 822, 604 P2d 430 (1979) (no evidence conflicting with claimant's account of tire-loading prior to heart attack). We find claimant's account of events more probable than not.[2] We conclude the heart attack

[2] The Board in its opinion characterizes the hospital admission records as documenting that claimant said his heart attack occurred the night before admission. The records show that claimant on admission described the symptoms of a burning pain in his throat as starting "last PM." We do not consider that statement inconsistent with claimant's account of events, since claimant appears to have related that the aching larynx was already present when he reported to work, which was the preceding night, albeit 3 a.m.

probably occurred during the course of, or followed soon after, claimant's normal and usual work activity. It follows that legal causation has been shown.

Three expert opinions on medical causation were given in this case. Dr. Howard, an internist who treated claimant in the hospital, expressed the opinion by letter that claimant's job, described to him only as being that of a truck driver, was probably not a material contributing factor to claimant's heart attack, given his risk profile. Dr. Matthews, a cardiologist who had treated claimant after his release from the hospital and who had been specifically informed of the work activities engaged in by claimant on the day in question, concluded that there was a reasonable medical probability that the physical stress performed by claimant on the morning of the infarction was a material contributing factor to the onset of the acute myocardial infraction.

Dr. Kloster, the chief of the cardiology department at the University of Oregon Health Science Center, testified at length in his deposition on the basis of the hospital records and hypothetical facts recited to him. In the course of his deposition, Dr. Kloster said it was impossible to know exactly when the infarction started. He admitted a *possibility* that the aching larynx might have signalled the actual onset of the infarction and that the effect of the exertion may have been only to make the infarction larger than it otherwise might have been. But he noted that after claimant ceased working, he was short of breath and was observed by a co-worker to be "pale or gray or sweaty;"[3] a symptom which, the physician stated, "correlate[s] very well to the onset of infarction" and is "frequently most helpful in eliciting when a major cardiac event started." It was his opinion that the aching larynx and chest pain were more consistent with ischemia (constricted flow of blood to parts of the heart) and angina pectoris (heart-related chest pain), than with "the severe symptoms that are associated with infarction." He concluded that in all medical probability

[3] This fact appears in the deposition of Dr. Kloster. The insurer has not made any objection to the deposition testimony with respect to this fact, and we assume that if objected to it could have been proved at the hearing.

the "ischemic episode" was aggravated by claimant's work-connected exertion to such an extent that a myocardial infarction developed in the last hours that claimant worked.

The referee discredited the opinion of Dr. Matthews because the doctor, although informed of the filling activities, was not given precise details, *e.g.,* the grade of the slope down to the stream, or the length of the hose. The Board discredited Dr. Kloster's opinion because he was told the weight of the water hose exerted approximately 100 to 150 pounds drag rather than that the hose weighed approximately 50 pounds (estimated by the employer), or 70 to 80 pounds (estimated by the claimant).[4] We note that drag is not equivalent to weight. Such relatively minor discrepancies in terms of the stress facto do not, in our view, invalidate the medical opinions of Dr. Matthews or Dr. Kloster. There is nothing to indicate that their opinions would have been changed by that adjustment to the assumed facts. Furthermore, there is no *better-informed* medical opinion in the record which contradicts either Dr. Kloster or Dr. Matthews. We find that the record contains sufficient medical evidence to establish that claimant's exertion was a precititating factor in the onset of the myocardial infarction.

In *Summit v. Weyerhaeuser Company,* 25 Or App 851, 856, 551 P2d 490, *rev den* (1976), the activity of climbing stairs was found to be normal and usual exertion in performance of the job. That activity was found to satisfy the requirement of medical causation on the basis of medical evidence that if claimant had not been exerting himself at work, "his condition *might* have stabilized and he *may* not have required hospitalization and surgery." (Emphasis supplied.) 25 Or App at 856. That holding reflects the rule that claimant's burden of proof on medical issues (as on all others) is by a preponderance of the evidence; medical certainty is not required. *Hutcheson v. Weyerhaeuser,* 288 Or 51, 55-56, 602 P2d 268 (1979).

If climbing stairs is enough to precipitate a heart attack, it would seem that the act of propelling a 240 pound

[4] A fellow worker thought the hose weighed about 20 pounds.

human frame up a steep embankment could suffice, quite apart from the exact length or weight of the hose or the precise grade of the embankment. Although every heart attack case is, to some extent, medically different in its details and circumstances, we find it significant that the Supreme Court has held that the movement of a claimant's arm in engaging a hand lever clutch was enough to constitute a basis for the conclusion that the exertion was a material factor in causing a heart attack: *Olson v. State Ind. Acc. Com.*, 222 Or 407, 415-16, 352 P2d 1096 (1960). The medical evidence here establishes to our satisfaction that claimant's work-connected exertion was a precipitating factor in the onset of his myocardial infarction.

Because we find a compensable injury, this case is reversed and remanded to the Board with instructions that the claim be accepted and for further proceedings consistent with this opinion.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
Frank A. Hamel, Claimant.

HAMEL,
Petitioner,
v.
TRI METROPOLITAN TRANSPORTATION
DISTRICT OF OREGON, et al,
Respondents.

(WCB Case No. 79-00690, CA A21206)

Judicial Review from Workers' Compensation Board.

Argued and submitted September 23, 1981.

Don G. Swink, Portland, argued the cause and filed the brief for petitioner.

Ridgway K. Foley, Jr., Portland, argued the cause for respondents. With him on the brief was Schwabe, Williamson, Wyatt, Moore & Roberts, Portland.

Before Buttler, Presiding Judge, and Warden and Warren, Judges.

WARDEN, J.

Reversed and remanded with instructions to accept claimant's claim.

WARDEN, J.

The issue in this case is whether claimant has established the compensability of a herniated disc injury. Claimant appeals from a determination by the Workers' Compensation Board affirming the referee, who found that claimant had failed to prove his claim.[1] On *de novo* review, we reverse and remand.

Claimant is a bus driver, age 37 at time of hearing, who contends that he ruptured a disc while driving a city bus on November 21, 1978. Claimant had returned from a ten-day vacation and reported for work November 20. He spent approximately two hours in the morning and two hours in the afternoon waiting at the bus office, only to be told his runs were cancelled for that day. There is no evidence that claimant was then experiencing any back pain. On November 21, claimant reported again for work and was given a 40-foot, "1000 series" bus to drive on his usual run to Aloha. The 1000 series buses at that time did not have power steering, although that feature was later added as a result, in part, of driver complaints.

On the morning of the 21st, there were icy spots on the road, particularly in shaded areas. Claimant testified that driving the bus under icy conditions was a tense experience: "[T]he bus would slide and skid on icy spots, and you'd be very uptight and nervous and tense to try to keep it under control and super-cautious, too, to drive conservatively." Steering under those conditions, testified claimant, required the use of his entire body. At the end of the 45-minute run, claimant first became aware of a sharp pain in his low back and right hip. This pain became progressively worse throughout the day. At home (between runs and after work) claimant attempted to apply home remedies without success. Finally, the pain was so severe that, unable to sleep, claimant telephoned his company's dispatch office at 2:30 a.m. on Wednesday morning to report in sick for that day.

On November 22, claimant saw a doctor who noted that he had back pain and that x-rays showed a normal

[1] Claimant does not challenge the referee's ruling that the employer's denial of January 22, 1979, was reasonable.

lumbosacral spine. He was told by the doctor to return the following Monday. The next day claimant noticed numbness in his right large toe and increased low back pain on sitting. On the following Monday, claimant's doctor referred him to Dr. Cruickshank. After myelography was done and a herniated disc at the L-5-S-1 level diagnosed, Dr. Cruickshank performed a laminectomy on December 6, 1978.

The relevant portion of a letter of inquiry sent to Dr. Cruickshank by the insurer states:

> "When I talked to you by phone on January 18, I explained to you the onset of symptoms as Mr. Hamel had told us regarding his back problem, *and I explained to you the various physical activities Mr. Hamel is involved in away from work.* I asked you at that time what your opinion would be in terms of medical probability as to the cause of Mr. Hamel's herniated disc which you treated him for. At that time, you stated it was a very difficult question to answer, but *because of the physical work which Mr. Hamel had done away from his job and that there was no trauma involved in driving a bus,* it would be more probable that the physical work would cause the herniated disc than sitting and driving a bus. If your conclusions are still the same now as they were then, please state this. * * * (Emphasis added.)

In reply, Dr. Cruickshank wrote:

> "In response to the second question, I can only repeat that which I told you in our telephone conversation, that is that the question is extremely difficult to answer in that ruptured discs are known to occur in people who have had no good history of trauma, that is injury. The simple act of turning over in bed or bending over to pick up a handkerchief off the floor might well result in a herniated disc. However, from the point of view of medical probability, it would be more probable that physical work, such as cutting, splitting and carrying wood, operating a motorcycle over rough ground, such as is done on trails through the woods, would cause a ruptured disc than the work involved in sitting in a bus seat and operating a bus."

In July, 1979, another orthopedic physician evaluated claimant and reported:

> "There is no question that the genesis of a herniated intervertebral disc is degenerative changes referable to the disc that do no [*sic*] happen instantaneously but rather do

occur over a prolonged period of time. But the failure in this case, that is the actual moment when the nuclear component became decompensated, appears to have occurred at work."

The referee found that claimant failed to prove his claim because medical causation was not established:

"I find from the facts that claimant's condition is of a complicated nature and therefore requires expert medical evidence to establish causation. The treating physician, Dr. Cruickshank opined physical work such as cutting, splitting and carrying wood would more probably cause a ruptured disc than operating a bus. At the time he rendered his opinion he had the benefit of claimant's statement concerning the type of bus and road conditions that had existed. Dr. Hazel evaluated claimant and indicated his disc rupture occurred at work, however he failed to state it was caused or aggravated by the work effort. The best that can be determined from his statement is that the condition coincidentally occurred on the job. Neither of the foregoing medical authorities establishes causation. I find claimant has failed to prove his claim."

The record does not persuade us that claimant had cut, split or carried wood during his vacation or had recently ridden a trail bike over rough ground, let alone that he had recently experienced any off-the-job trauma doing any of those things, as suggested by the insurer's letter to Dr. Cruickshank. The record is devoid of evidence rebutting claimant's account of events leading up to the reported incident. Claimant vigorously denied that he had ridden a trail bike over rough ground in the last three years. Although he had cut wood during the fall, he did not recall doing so during his vacation; he readily remembered other activities he did during that time.

In an apparent attempt to demonstrate that claimant was not seriously injured on the job, the insurer also argues that claimant split firewood the day after first seeing the doctor. Claimant testified at the hearing that he or his wife or one of his five sons, ranging in age from 15 years down, may or may not have split pieces of wood three inches in diameter on that day (which was Thanksgiving day) to fuel the fireplace, but he could not really recall. That testimony was virtually unchanged from what claimant had told an investigator in his statement recorded less

than a week after his surgery. We conclude that claimant's version of the injury is not put in doubt by these insinuations, absent proof of injurious pre- or post-injury activities. We find claimant's account to be credible. We are not foreclosed from doing so, particularly since the referee made no finding on credibility.

With regard to the issue of medical proof, where a claimant's injuries are such to require skilled and professional persons to establish causation and extent, a claimant must adduce expert medical evidence to sustain the burden of proof. *Larson v. State Ind. Acc. Com.*, 209 Or 389, 399, 307 P2d 314 (1957). Under certain circumstances such expert testimony is not required. *See Madewell v. Salvation Army*, 49 Or App 713, 717, 620 P2d 953 (1980) (uncomplicated injury promptly reported and treated with no prior history). In *Madewell*, the injury was diagnosed only as low back pain; here, we have the more complicated diagnosis of a ruptured disc. Claimant did present undisputed medical evidence showing that he had suffered a ruptured disc, and that relatively minor activity can trigger the herniation of a vertebral disc. The requirement of medical proof is satisfied in this case. In this type of case, there is no requirement that the expert medical evidence must link *specific* exertion to the compensable condition. *But see Batdorf v. SAIF*, ___ Or App ___; ___ P2d ___ (November 2, 1981) (citing heart attack cases). Dr. Cruickshank's opinion is broad enough that we can infer an affirmative reply to the question whether claimant's driving probably caused the injury. The physician is not a trier of fact in workers' compensation proceedings. We thus give little weight to that part of Dr. Cruickshank's opinion responding to the insurer's question concerning wood cutting and trail riding, facts not proved at the hearing, other than to note that it supports the *general* proposition that greater physical exertion is more likely than sedentary work to cause a ruptured disc.

Although driving a bus is sedentary work, it is undisputed that steering that particular bus under those conditions required the use of claimant's entire body. Here, we have found claimant's account of the injury to be more probable than not. Furthermore, all medical histories related by claimant pertaining to this injury are consistent.

The medical evidence supports the proposition that the work-connected event, *i.e.*, the driving, triggered the injury, and we are entitled, under all the circumstances, to draw the conclusion that the bus driving was a "significant contributing factor" to the herniation of the disc. *Cf. Edge v. Jeld-Wen*, 52 Or App 725, 730, ___ P2d ___ (1981) (inconsistent medical evidence did not rule out compensability of herniated disc residuals).

We hold that claimant's injury is compensable, and we remand the case to the Board with instructions to require respondents to accept claimant's claim as compensable.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Esther Lenox, Claimant.

LENOX,
Petitioner,
v.
STATE ACCIDENT INSURANCE FUND CORPORATION,
Respondent.

(WCB No. 77-1507, CA A20484)

Judicial Review from Workers' Compensation Board.

Argued and submitted July 24, 1981.

Robert W. Muir, Albany, argued the cause for petitioner. With him on the brief was Emmons, Kyle, Kropp & Kryger, P.C., Albany.

Darrell E. Bewley, Appellate Counsel, State Accident Insurance Fund Corporation, Salem, argued the cause and filed the brief for respondent.

Before Richardson, Presiding Judge, and Thornton and Van Hoomissen, Judges.

VAN HOOMISSEN, J.

Affirmed.

VAN HOOMISSEN, J.

Claimant seeks judicial review of an order of the Workers' Compensation Board (Board) affirming the denial of her claim by the State Accident Insurance Fund (SAIF). We review *de novo* and affirm.

Claimant was employed by the Corvallis School District from 1958 until 1972. She took a sabbatical from August, 1969, to September, 1970. During that time she received compensation equal to one-half her regular teaching pay. In the summer of 1970, she was asked by her regular teaching supervisor to participate in a special workshop. Although she received no additional pay, claimant taught at the workshop and was exposed to chicken pox.

Claimant returned to her regular teaching duties in the fall of 1970. Between then and 1972, when she stopped working, she had considerable health problems, which caused her to miss a significant amount of work. She contends that her present condition and her various medical problems that have occurred since 1970 are the result of the chicken pox virus.

Claimant must prove her claim by a preponderance of the evidence. *Hutcheson v. Weyerhaeuser,* 288 Or 51, 55, 602 P2d 268 (1979). We review the record to determine if it preponderates in her favor; if it does not, she has failed to meet her burden of proof. *Gormley v. SAIF,* 52 Or App 1055, 1059, 630 P2d 407 (1981); *Raines v. Hines Lbr Co.,* 36 Or App 715, 719, 585 P2d 721 (1978).

Claimant saw a number of doctors who made indefinite and often inconsistent diagnoses of her medical condition. Claimant first was seen in 1970 by Dr. Bahrs who stated, in a report dated February 22, 1977, that in 1970 claimant was diagnosed as "probably having chicken pox." Dr. Badd indicates that in July, 1970, he treated her for thyroiditis, which was a persistent problem. In July, 1970, she saw Dr. Kliewer because of pressure feelings in her throat. She was seen again July 24, 1970, and August 6, 1970, with increased symptoms, and Dr. Kliewer diagnosed her problem as subacute thyroiditis. He did not think the thyroiditis was related to her occupation. He also later stated he was then unaware she had had chicken pox.

In 1978, claimant was seen by Dr. Bonnlander, who wrote that he did not think he was in a position to

> "* * * offer a firm medical opinion on the relationship between the diagnosis of a thyroiditis and its possible relationship to exposure to chicken pox virus several years ago."

Later however, Dr. Bonnlander reported:

> "* * * [T]here is much evidence to support the opinion that the protracted illness of Mrs. Lenox, was an outcome of contracting chicken pox, with the complication of subacute thyroiditis, arthritis including complication of autoimmunity, and general exhaustion and fatigue."

Dr. Bonnlander supported his view with an article by a leading authority on subacute thyroiditis, Dr. Volpe. In contrast, after reviewing the medical literature, two other specialists, Dr. Blatt and Dr. Rosenbaum, opined that the literature did not support the view that chicken pox causes subacute thyroiditis. Thus, it is unclear whether chicken pox causes subacute thyroiditis.

Claimant also saw Dr. Greer, an endocrinologist, who was unable to determine with certainty

> "* * * (1) that Mrs. Lenox contracted chicken pox in 1970; (2) that Mrs. Lenox had subacute thyroiditis; (3) that Mrs. Lenox has hypothyroidism at the present time. Even if all these three uncertainties are answered affirmatively, it is unlikely that the major disabilities which Mrs. Lenox has had over the past few years are related either to subacute thyroiditis or to hypothyroidism."

Dr. Jones, a specialist in infectious diseases, expressed the view that claimant's chicken pox had caused encephalitis.

Claimant had to prove the medical probability, rather than the mere possibility, of a causal connection between chicken pox and her symptomatology. *Gormley v. SAIF, supra,* 52 Or App at 1060. Overall, Dr. Jones' report spoke in terms of "may" and "possible," rather than in terms of medical probability. Dr. Jones first reported that "* * * there is a reasonable medical probability that Ms. Lenox had encephalitis caused by Varicella-Zoster virus in 1970," but he then concluded "I also believe that it is *possible* that her continued symptomatology * * * *may* have

resulted from this infection." (Emphasis added.) Later, he conceded that claimant's case was not clear cut:

> "First of all, it is *not certain* that she had disseminated Varicella-Zoster virus infection in 1970, but *may* have simply had shingles, a localized process. The latter would be much less likely to have been associated with an encephalitis, and we have *no clear* evidence other than her verbal history that she suffered from encephalitis at that time. In addition, there *is not firm* evidence that her resulting symptomatology was a result of the encephalitis. However, assuming that she had no pre-existing disabling mental, psychological, or physical condition prior to her illness in 1970, it is within medical probability that this chain of events *may have* occurred." (Emphasis added.)

Viewing Dr. Jones' report as a whole, we are not convinced claimant suffered from encephalitis in July, 1970, or that encephalitis caused her symptomatology. Significantly, none of the other medical reports indicate claimant suffered from encephalitis.

In summary, this claim is based on two medical theories. First, the majority of the medical testimony addressed whether claimant's subacute thyroiditis was caused by chicken pox. Second, Dr. Jones articulated the theory that claimant suffered from encephalitis caused by chicken pox. Under the first theory, the greater weight of the evidence indicates that chicken pox did not cause thyroiditis. Under the second theory, Dr. Jones was unable to say it was medically probable claimant actually suffered from encephalitis. We conclude claimant has failed to sustain her burden of proving compensability under either medical theory.

Affirmed.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
Delores A. Hanner, Claimant.

HANNER,
Petitioner,
v.
STATE ACCIDENT INSURANCE FUND
CORPORATION,
Respondent.

(No. 79-6689, CA A20345)

Judicial Review from Workers' Compensation Board.

Argued and submitted July 24, 1981.

Jack Polance, Eugene, argued the cause for petitioner. With him on the brief was Larry O. Gildea, P.C., Eugene.

Darrell Bewley, Appellate Counsel, State Accident Insurance Fund Corporation, argued the cause for respondent. With him on the brief were K. R. Maloney, General Counsel, and James A. Blevins, Chief Trial Counsel, State Accident Insurance Fund Corporation, Salem.

Before Richardson, Presiding Judge, and Thornton and Van Hoomissen, Judges.

PER CURIAM.

Affirmed.

THORNTON, J., dissenting opinion.

PER CURIAM.

In this workers' compensation case, claimant appeals an order of the Workers' Compensation Board denying her claim for benefits for an occupational disease. After *de novo* review of the record, we concur with the Board's determination that claimant did not sustain her burden of proof that she suffered a compensable occupational disease.

Affirmed.

THORNTON, J., dissenting.

After reviewing this record, it is my conclusion that the referee was correct in concluding that there is sufficient evidence to establish a compensable claim for an occupational disease - traumatic bursitis - to claimant's right shoulder.

Mr. Needham, claimant's foreman, readily recalled claimant's complaints of muscle soreness and her asking to switch to an easier job, although he did not recall any complaint about a shoulder injury. He testified further that claimant's particular job was hard, strenuous physical work; that muscle soreness was a frequent complaint of other new employees when they first began work of this same type.

There is no evidence that claimant had suffered any shoulder problems before her employment pulling 2×4's from the green chain. Likewise there is no evidence of any off-the-job injury to the shoulder. The report of Dr. Woolpert, an orthopedic physician, who was claimant's treating physician, his diagnosis of traumatic bursitis and his subsequent treatment of the condition with injections of xylocaine and Celestone plus heat therapy and exercise persuades me that claimant is actually suffering from a compensable occupational disease. *Christenson v. SAIF*, 27 Or App 595, 557 P2d 48 (1976). I would remand with instructions to accept the claim as a compensable occupational disease claim.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
Shirley B. Johnson, Claimant.

JOHNSON,
Petitioner,
v.
STATE ACCIDENT INSURANCE FUND
CORPORATION,
Respondent.

(No. 79-7925; CA A20259)

Judicial Review from Workers' Compensation Board.

On petitioner's petition for reconsideration filed October 5, 1981. Former opinion filed August 24, 1981, 53 Or App 627, 633 P2d 17.

Allan H. Coons and Coons & Hall, Eugene, for petition.

Before Gillette, Presiding Judge, and Roberts and Young, Judges.

ROBERTS, J.

Petition for reconsideration allowed; former opinion withdrawn; affirmed.

ROBERTS, J.

The author Gertrude Stein is said, on her deathbed, to have beseeched her life-long companion, Alice Toklas: "What is the answer?" When there was no reply, Stein fell silent, then spoke her final recorded words: "In that case, what is the question?"[1] We confess to having created a similar dilemma in this case. Claimant, in her petition for reconsideration, takes us to task for our former opinion in which we held that claimant's occupational disease claim was not timely filed. Claimant points out that she prevailed on the timeliness issue before the Workers' Compensation Board (Board), that SAIF did not challenge the Board's ruling on timeliness, and that therefore the only issue presented to this court was whether claimant met her burden to prove that she sustained a compensable occupational disease as a result of her work activity in Oregon. Claimant is correct. That is the question, and we withdraw our former opinion.

The Board found, based on *Weller v. Union Carbide*, 288 Or 27, 602 P2d 259 (1979), that claimant had not shown by a preponderance of the evidence that her work as a nurse's aide at Douglas Community Hospital had caused a worsening of her underlying pseudoarthrosis. On *de novo* review of the record, we conclude the Board was correct.

Weller sets forth the elements a claimant must show in order to prevail on an occupational disease claim where the disease itself does not arise out of the employment. *See Beaudry v. Winchester Plywood Co.*, 255 Or 503, 469 P2d 25 (1970). *Weller* established that a claimant in such a situation must prove, by a preponderance of the evidence, that (1) her work activity and conditions (2) caused a worsening of her underlying disease (3) resulting in an increase in pain (4) to the extent that it produced disability or required medical services. *Weller* makes it clear that disability resulting from pain caused by work activity, where there is no actual change in the disease itself, is *not* compensable. Subsequent cases have interpreted *Weller* to require claimant to show a worsening of the disease itself, not merely an increase in symptoms. *See*

[1] Mellow, *Charmed Circle: Gertrude Stein & Company* 400 (Praeger 1974).

Autwell v. Tri-Met, 48 Or App 99, 615 P2d 1201, *rev den* 290 Or 211 (1980).

The two doctors who testified by deposition as to claimant's condition stated clearly and repeatedly, in response to precise questioning by claimant's attorney, that, although claimant's symptoms were increased, they could not say with any medical certainty that her work caused any acceleration or worsening of the underlying condition. The Board's denial was therefore correct.

Petition for reconsideration granted; former opinion withdrawn; affirmed.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
Dennis Berliner, Claimant.

BERLINER,
Petitioner,
v.
WEYERHAEUSER COMPANY,
Respondent.

(WCB No. 79-9454, CA A20552)

Judicial Review from Workers' Compensation Board.

Argued and submitted August 21, 1981.

Peter McSwain, Eugene, argued the cause for petitioner. On the brief were Evohl F. Malagon and Malagon, Velure & Yates, Eugene.

Paul Roess, Coos Bay, argued the cause for respondent. With him on the brief was Foss, Whitty & Roess, Coos Bay.

Before Gillette, Presiding Judge, and Roberts and Young, Judges.

ROBERTS, J.

The order of the Board is reversed, and the referee's order is reinstated.

ROBERTS, J.

The issue in this workers' compensation case is whether claimant's claim for his work-related psychiatric condition was prematurely closed. The referee found that claimant was not medically stationary when his claim was closed; the Workers' Compensation Board reversed the referee and reinstated the original determination order granting claimant 5 percent unscheduled permanent partial disability for injury to his low back, 10 percent scheduled permanent partial disability for loss of use of his right leg, and 10 percent scheduled permanent partial disability for loss of use of his left leg. On *de novo* review, we find that claimant was not medically stationary and reverse.

Claimant injured his right knee in 1975 while employed as a choke setter. He subsequently developed problems with his left leg and hip and low back. These were held compensably related to the original injury by a Board order on November 18, 1977. We affirmed without opinion. *Berliner v. Weyerhaeuser*, 43 Or App 474, 604 P2d 459 (1979). In late 1977 claimant began consulting a psychiatrist, who diagnosed a cyclothymic personality and reactive depressive neurosis. By Board order dated May 9, 1978, the 1975 injury was found to materially have contributed to claimant's psychiatric condition.

The evidence which was apparently relied on by the Board included:

(1) The 1975 evaluation of claimant for the Disability Prevention Division, finding a moderate degree of psychopathology present for many years prior to the injury, and concluding that claimant's tension and anxiety had been only mildly influenced by his 1975 injury. The clinical psychologist preparing the report predicted claimant's negative personality characteristics — alcoholism, impulsiveness, anxiety and marital upset — would persist in future years.

(2) A letter from the psychiatrist who first treated claimant in the spring and summer of 1977. He reported claimant initially complained of anxiety related to his medical condition, manifested by insomnia, weight loss, increasing irritability and fleeting suicidal tendencies.

This doctor reported that over four sessions claimant had improved in mood and in confidence. Claimant had at that time received no medication but, in addition to the sessions with the psychiatrist pursued marital therapy and self-hypnosis. The psychiatrist said that the most therapeutic treatment for claimant would be prompt resolution of his physical and financial problems.

(3) A letter from a therapist at Coos County Community Mental Health Services, where claimant had first been seen in November, 1976, reported that a combination of marital therapy, group therapy and hypnotherapy had seemed to help claimant "though he still has periods of depression related to his situation."

Subsequent to the May, 1978, order, and pertinent to whether claimant's psychiatric condition had stabilized by August, 1979, the record contains the following:

(1) A letter from claimant's first psychiatrist, dated October 26, 1978, addressing the issue whether claimant's condition was medically stationary. The doctor reported it was not, that claimant had been on medication for several months and that it had recently been necessary to increase the dosage. The psychiatrist added that claimant needed vocational help "immediately" and advised employer to check with him in two to three months for another evaluation.

(2) A report dated March 7, 1979, from Dr. Martin, the psychiatrist who had by then become claimant's treating physician. Dr. Martin, asked for his opinion as to whether claimant was medically stationary, reported that he was not. He added, "While it would be difficult to estimate the length of time needed for further treatment I would hope that in the next three or four months he is sufficiently stabilized that only intermediate sessions at monthly intervals would be necessary."

(3) A letter from Dr. Martin to employer dated August 10, 1979, reporting that claimant was no longer on medication "and psychiatrically appears to be getting along fairly well." Dr. Martin reported he had been seeing claimant once a month and "would now prefer to see him only on an as needed basis."

As a result of Dr. Martin's August 10 letter, the determination order was issued October 9, 1979, awarding claimant temporary time loss payments from May 7, 1975, through August 10, 1979, and the award for permanent disability. Claimant requested a hearing, which was held March 27, 1980. Immediately following the hearing, Dr. Martin testified by deposition, which was taken in his office. During the deposition he testified unequivocally that claimant had not been medically stationary in August, 1979, and, at the time of the deposition, was still not medically stationary. Dr. Martin had, on March 10, 1980, written to the employer as follows:

> "* * * [Y]our company apparently interpreted my remarks in that letter of August 10th, as saying that Mr. Berliner was medically stable. As a result of that action Mr. Berliner had gradually become increasingly anxious and depressed and it was again necessary for me to see him because of his increased insomnia, ten pound weight loss, increasing paranoid ideations with suicidal and homicidal thoughts. At the present time Mr. Berliner has settled down with this additional individual psychotherapy and is currently doing better *though still far from being medically stationary.*" (Emphasis added.)

"Medically stationary" is defined in ORS 656.005(21) as happening when "no further material improvement would reasonably be expected from medical treatment, or the passage of time." Claimant had the burden to prove, by a preponderance of the medical evidence, that his condition was not medically stationary at the time his claim was closed. *Austin v. SAIF*, 48 Or App 7, 12, 615 P2d 1188 (1980). Here he has done so.

Dr. Martin, in his deposition, said clearly that he believed claimant could be expected to improve. The only other medical testimony in evidence was a report from Dr. Colbach, who examined claimant at employer's request after the hearing on April 30, 1980, and nearly eight months after the claim closure. This report was received by the referee as additional evidence.[1] Dr. Colbach found claimant's psychiatric condition then to be stationary,

[1] The referee also received, as additional evidence, Dr. Martin's response to Dr. Colbach's report.

GILLETTE, P. J.

The issue in this workers' compensation case is which of two governmental entities, the State or Multnomah County (County), is the employer, for Workers' Compensation Act purposes, of two court reporters (claimants). The referee held that the State was responsible because the claimants were under the direction of the circuit court; the State Accident Insurance Fund (SAIF) was ordered to provide coverage. The Workers' Compensation Board reversed, holding that the County was responsible. The County appeals. We reverse.

Claimants each were employed as official court reporters in the Multnomah County Circuit Court at the time they suffered job-related injuries. Compensability is not an issue. Both the County and SAIF denied coverage, each maintaining that the other was responsible. The County has served as the paying agent under ORS 656.307 pending the outcome of this dispute.

ORS 656.005(16) defines "employer:"

"* * * * *

"(16) 'Employer' means any person, including receiver, administrator, executor or trustee, and the state, state agencies, counties, municipal corporations, school districts and other public corporations or political subdivisions, who contracts to pay a remuneration for and secures the right to direct and control the services of any person."

The claimants are hired and paid by the County, which has limited authority to control their salary. ORS 8.372.[1] The County provides the work place and the office

[1] ORS 8.372 provides:

"(1) The 'governing body of a county,' as used in ORS 8.372 to 8.387, means the county court or board of county commissioners of such county.

"(2) The annual salary of each official reporter for the circuit court shall be not less than $7,200. The annual salary shall be payable in monthly instalments throughout the year as county salaries are paid.

"(3) In each judicial district composed of only one county, whenever, in the judgment of the governing body of such county, the minimum annual salary established by this section is not commensurate with the character and amount of service performed by the official reporter or reporters in the district, the governing body of the county may pay out of the funds of the county such additional amounts as will properly compensate such reporter or reporters for the services performed."

furniture. It negotiates the labor contract with the reporters, but the record does not reveal the extent of judicial involvement, if any, in the labor negotiation process.

The parties agree that the basic test for determining an employment relationship for workers' compensation consists of two elements: 1) the existence of a contract for hire; and 2) the employer's right to control the employe's services. A dispute has arisen here because the County bargains with and pays court reporters, while the State, through its circuit court judges, controls and benefits from their services.

The County argues that control is the most decisive of the two factors for determining employment. It cites *Harris v. SAIF*, 191 Or 254, 271, 230 P2d 175 (1951), where the Supreme Court stated:

> "The payment of wages is considered the least conclusive of the tests for determining whether the relation of employer and employee exists. It is not decisive where it is shown that the employer was actually under the control of another person during the process of work.
>
> "* * * * *
>
> "The principle to be deduced from the authorities is that, when the remaining evidence shows beyond dispute that the alleged employee is subject to the control and direction of one person, evidence that his wages were paid by another should be disregarded." (Citations omitted.)

The State responds that control is decisive only in determining "whether a worker is a subject worker or a non-subject worker, *e.g.*, an independent contractor." It likens the situation at hand to that of a "borrowed servant." The "borrowed servant" doctrine applies where an employe in an existing employment relationship is loaned by the original employer to a special employer. In that situation, the general employer remains liable for workers' compensation unless 1) the special employer contracts with the employe, 2) the work being done is that of the special employe, and 3) the special employer has the right to control the details of the employe's work. *See* 1B Larson, *Workmen's Compensation Law*, § 48 (1980). Here, the State argues, the County is the general employer which lends court reporters to the State; because the State does not contract to hire the employe, the County remains liable.

The borrowed servant analysis presupposes that an employment relationship already exists between the putative general employer and the employe upon which to base workers' compensation coverage. 2 Larson, *Workmen's Compensation Law* 8-327, § 48.10 states, in part:

> "What gives the lent-employee cases their special character, however, is the fact that they begin, not with an unknown relation, but with an existing employment relation. * * * The only presumption is the continuance of the general employment, which is taken for granted as the beginning point of any lent-employee problem."

What is a *presupposition* for the purposes of the borrowed servant concept is *the issue* here. Far from taking employment by the County "for granted," we are here inquiring as to whether it exists. The borrowed servant analysis does not help. Court reporting is a hybrid, not satisfying the employment requirements completely for either the State or the County.

Unlike the Board, we find the County's position persuasive for several reasons. First, *Harris* holds that, as between control and payment of wages, control is the decisive factor for determining employment. Here, the State's right to control court reporters is undisputed. They are appointed by the individual judges in whose courts they serve, and they hold their offices at the pleasure of the appointing judges. ORS 8.310(1). They are officers of the court, ORS 8.310(2), and are subject to qualifications established by the Oregon Supreme Court. ORS 8.310(1). Finally, state judges are authorized to direct and control their work. ORS 8.330 and 8.340.[2] This right of control itself, under *Harris,* seems determinative as to workers' compensation liability.

The right to control is also important from a policy standpoint. The judges of the State of Oregon benefit directly from the services of the court reporters. They not

[2] Although there is a bargaining agreement between Multnomah County and the Association of Court Reporters that deals with vacations, sick leave, medical and dental insurance, retirement benefits, office space, furnishings and wages, the agreement states that, "[c]ourt reporters are hired by, work for and serve at the pleasure of, the presiding Circuit Court Judge." Also, to obtain leave from work other than sick or vacation leave, the reporter must obtain permission, not from a county official but from the circuit court judge. Moreover, workers' compensation coverage is not one of the benefits listed in the agreement.

only perform reporting duties in court, but are also the judges' official secretaries. *See* ORS 8.330. The State benefits most directly from court reporters' services, and it should be responsible for providing their workers' compensation insurance.

In addition, it is not entirely clear that the County is completely liable for paying court reporters. There is a contract of hire between counties and court reporters; yet, the legislature allocates funds from the state's general fund to help defray the costs to the County of administering state courts. *See* Or Laws 1979, ch 536. While this is by no means a dollar for dollar reimbursement, it amounts to the State assuming partial responsibility for payment of court reporter's salaries.[3]

Most importantly, ORS 8.310(4) states:

> "(4) Each such reporter shall be deemed a county employee for purposes of the provisions of [the Public Employees Retirement Act of 1953] and [the Retirement Plan for Multnomah County] *only.*" (Emphasis supplied.)

Because the legislature did not list workers' compensation as one of the purposes for which court reporters are deemed to be County employes, they should be treated otherwise as employes of the State.[4]

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[3] Although it is not binding on this court, an opinion of the Attorney General, No. 7942 (August 18, 1980), determined that staffs of circuit and district court judges are employes of the state for purposes of protection under the Tort Claims Act, which provides that "every public body is liable for its torts or those of its officers, employes and agents * * *." ORS 30.265. The Attorney General concluded:

> "The fact that staff salaries are paid by the counties is irrelevant since those salaries are paid only by virtue of funding statutes and not by virtue of any real control over the employees by the counties."

[4] The State points out that, according to an opinion of the Attorney General, No. 7942, *supra*, n 3, court reporters are not counted as state employes for purposes of ORS 240.185 which sets a maximum number of state employes. That statute does not purport to determine whether members of any group are State employes. Its purpose is to limit the number of *certain types* of state employes. Among those individuals excluded from the purview of the statute, in addition to court reporters, are, the Governor, Secretary of State, the State Treasurer, the members of the Supreme Court and the Legislative Assembly, personnel who administer unemployment insurance benefit programs of the Employment Division of the Department of Human Resources, and other enumerated administrative personnel. Presumably, the State would not argue that all the individuals listed were meant to be excluded from SAIF workers' compensation coverage.

The order of the Board is reversed and remanded with instructions to reinstate the referee's decision.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
Johnny Smith, Claimant.

SMITH,
Petitioner,
v.
BROOKS-SCANLON, INC.,
Employer,
and
EMPLOYEE BENEFITS INSURANCE CO.,
Respondent - Cross-Petitioner,
and
UNITED PACIFIC/RELIANCE,
Respondent - Cross-Respondent.

(WCB Case No. 77-1889; 78-1678, CA A20145)

Judicial Review from Workers' Compensation Board.

Argued and submitted July 29, 1981.

Alice Goldstein, Portland, argued the cause for petitioner. With her on the brief was Welch, Bruun & Green, Portland.

Margaret H. Leek Leiberan, Portland, argued the cause for respondent - cross-petitioner, Employee Benefits Insurance Co. With her on the brief was Lang, Klein, Wolf, Smith, Griffith & Hallmark, Portland.

Dennis VavRosky, Portland, argued the cause for respondent - cross-respondent United Pacific/Reliance. With him on the brief were Ronald W. Atwood and Rankin, McMurry, VavRosky & Doherty, Portland.

Before Buttler, Presiding Judge, Joseph, Chief Judge, and Warden, Judge.

WARDEN, J.

Reversed in part; affirmed in part; and remanded with instructions to reinstate the referee's order finding claimant to be permanently and totally disabled.

WARDEN, J.

Claimant appeals from an order of the Workers' Compensation Board which reversed the referee's award of permanent total disability and made an award of 80 percent unscheduled disability for a right shoulder injury (for which insurer Employee Benefits Insurance Co. (EBI) was held responsible) and reversed the referee's award of additional compensation for a left shoulder injury.[1] EBI cross-appeals, contending that respondent United Pacific/Reliance Insurance Company (United Pacific) is the carrier responsible for the right shoulder condition.

At the time of the hearing, claimant, age 52, was a laborer with a seventh-grade education. He had worked as a logger, heavy equipment operator, forge hammer operator and rubber tire skinner operator. In March, 1975, while employed at Brooks-Scanlon, Inc., claimant sustained an on-the-job injury to his right shoulder, a tear of the rotator cuff; United Pacific was the responsible insurance carrier. He returned to work in May, 1975, and was awarded 5 percent unscheduled disability in September, 1975. On August 6, 1976, he sustained an on-the-job contusion to the left shoulder. He returned to work in November, 1976. On November 28, after a few days back on the job, he suffered a "massive anterior cuff tear with involvement directly over the biceps tendon" in the right shoulder. EBI was the insurer for Brooks-Scanlon in 1976. On December 16, 1976, the right rotator cuff was surgically repaired.

Claimant has not been released for work by his treating doctor since the surgery on the right shoulder. No party contends that his medical condition was not stationary at the time of the hearing. One physician summarized claimant's description of his condition in January, 1979:

> "His chief complaint is pain in both shoulders. This is described as a severe aching sensation, at times pulsating. It is no better at rest. It is aggravated by motion, particularly elevation and any lifting with the arm. Occasionally he has awakened at night because of pain. Intermittently, he has numbness of the right hand. The right shoulder seems to be more symptomatic than the left with discomfort and weakness."

[1] Due to our disposition of this case, we find it unnecessary to address the question of additional compensation for the left shoulder injury.

This doctor, who saw claimant once, thought he could return to sedentary employment, which was also the view of another physician who had examined claimant on one occasion. His treating physician, however, stated in his report in December, 1977, that claimant was permanently and totally disabled:

> "I have recommended total disability and the patient is willing to accept this status. This is the worst case of symptomatic tenosynovitis and probable rupture of the rotator cuff that I have seen. *I think there is an underlying psychopathology to some extent with very poor motivation to return to work, however, with the combination of the symptoms of these two shoulders at the present time I would certainly classify this man as totally disabled.*" (Emphasis added.)

Claimant testified that he is able to engage in some recreational and household activities, but with difficulty because of the limited mobility of his arms, aching pain in his shoulders and swelling of his hands. Although the fact that claimant has not been released for work would tend to indicate that claimant is, as a medical matter, permanently and totally disabled, his treating doctor has created an ambiguity in linking the physical problems with claimant's motivation. In addition, two other physicians felt that claimant could physically do some form of work. We conclude, nonetheless, that claimant is permanently and totally disabled in that he is foreclosed from the labor market by a combination of his physical limitations, education, aptitude, age and adaptability to do other than heavy physical labor. *Wilson v. Weyerhaeser Company,* 30 Or App 403, 409, 567 P2d 567 (1977). In addition to the problems with both shoulders, claimant has a 45 percent hearing loss.[2] A vocational consultant reported that the hearing loss could preclude claimant from unskilled jobs such as that of a security guard, where hearing ability is important. The consultant also reported that claimant has no skills or aptitudes for sedentary employment and that most light, unskilled jobs require repetitive movement of the dominant upper extremity (the right arm in claimant's case), which claimant is unable to sustain.

[2] Claimant does not assign error to the determination by the referee affirming the denial of the claim that the hearing loss was caused by claimant's employment with Brooks-Scanlon; the Board did not address the matter of the hearing loss.

Both EBI and United Pacific argue that claimant is not permanently and totally disabled, because he has not made any "effort to obtain regular gainful employment." ORS 656.206(3).[3] Claimant's failure to seek employment is excused by the fact that he was never released for work by his treating doctor. In *Butcher v. SAIF*, 45 Or App 313, 317, 608 P2d 575 (1980), we found that claimant had shown that he was completely incapacitated and continued: "Claimant was told by all the doctors involved in his examination and treatment that he could not work. Claimant relied on those statements and did not seek employment." In *Morris v. Denny's*, 50 Or App 533, 538, 623 P2d 1118 (1981), we said:

> "In view of claimant's guarded prognosis for return to work and the psychiatrist's conclusion that she was not a candidate for vocational rehabilitation, her failure to seek employment or vocational rehabilitation does not militate against her claim, where it would be futile for claimant to attempt to be employed."

We are satisfied that it would have been futile for claimant here to have sought employment when he had not been released for work by his treating doctor. We therefore reverse as to the extent of claimant's disability and find, as did the referee, that claimant is permanently and totally disabled.

The question raised by the cross-appeal is which of the two insurance carriers is responsible for claimant's current disability. The preponderance of the medical evidence shows that a contributing factor in the aggravation of claimant's right shoulder injury was the additional stress placed upon that shoulder by the weakness of the left shoulder occasioned by the August, 1976, injury covered by EBI. In finding that an aggravation rather than a new injury occurred in November, 1976, claimant's treating physician did not rule out a relationship between the left and right shoulder conditions. One of the other physicians explained the mechanism:

> "In August of 1976, [claimant] sustained an injury to the left shoulder. His right shoulder was not injured [in

[3] ORS 656.206(3) provides:

> "The worker has the burden of proving permanent total disability status and must establish that he is willing to seek regular gainful employment and that he has made reasonable efforts to obtain such employment."

that incident]. When he returned to work in November of 1976, however, he was forced by his history to depend almost entirely on the previously-injured right upper extremity to perform rather demanding tasks of a heavy equipment operator. This aggravated the pre-existing condition on the right side. It would appear that the August, 1976 injury of the left shoulder did significantly aggravate the pre-existing right shoulder problem. This aggravation really is an indirect problem related to the demands of his employment and inability to use the left upper extremity to protect the previously-injured right upper extremity. It is probable that no surgery would have been necessary in December of 1976, had his left shoulder not been injured; however, it would be only speculative to state that he would never have needed surgical correction of his rotator cuff tear on the right side."

We conclude that the incident of November 28, 1976, resulted in further damage to the rotator cuff to the point that surgery was required and was the result of his almost exclusive use of his right arm due to the left shoulder injury. The left shoulder injury, being the direct cause of the right shoulder damage, makes responsibility for both shoulders that of EBI. *See Wood v. SAIF,* 30 Or App 1103, 1108, 569 P2d 648 (1977), *rev den* 282 Or 189 (1978). The order of the Board is reversed insofar as it found claimant to be less than permanently and totally disabled; it is affirmed insofar as it found EBI to be the carrier responsible for payment of claimant's benefits.

Reversed in part; affirmed in part; and remanded with instructions to reinstate the referee's order finding claimant to be permanently and totally disabled.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
Geraldo Mosqueda, Claimant.

MOSQUEDA,
Petitioner,
v.
ESCO CORPORATION,
Respondent.

(WCB Case No. 79-08138, CA A21181)

Judicial Review from Workers' Compensation Board.

Argued and submitted September 28, 1981.

Noreen K. Saltveit, Portland, argued the cause for petitioner. With her on the brief were Karen L. Fink, and Merten & Saltveit, P.C., Portland.

Emil Berg, Portland, argued the cause for respondent. On the brief were Daryll E. Klein and Wolf, Griffith, Bittner, Abbott & Roberts, Portland.

Before Buttler, Presiding Judge, and Warden and Warren, Judges.

WARDEN, J.

Reversed with instructions to accept the claim and for further appropriate proceedings.

WARDEN, J.

Claimant appeals from an order of the Workers' Compensation Board affirming the referee's determination that claimant had not suffered an aggravation of his low back since the time of the last award on January 24, 1978. We reverse and remand.

The sole question is whether claimant has established a worsening of his condition. In finding that claimant had not proved an aggravation, the referee viewed the evidence as follows. Claimant's wife testified at the hearing that claimant's pain was the same as ever. A neurological specialist, Dr. Mason, testified by deposition that claimant's condition had been "basically" the same over the past three years. Orthopaedic Consultants reported in August, 1979, that claimant's condition had not substantially worsened since 1977. Certain objective findings of increased limitations in March, 1980, could be discounted as not "amounting to much," because the treatment claimant was undergoing was not curative but was rather for maintenance purposes.

We accord relatively little weight to the wife's responses to questions designed to elicit the degree of worsening claimant had experienced. The wife spoke only Spanish and required an interpreter. It is not clear that she understood the questions asked. Her response to the question whether her husband's back had changed since he injured it in 1977 was that, although her husband was relieved temporarily when he received therapy, the rest of the time her husband's pain was "equal." That could as well describe the constancy of the pain problem as it could a lack of worsening.

We find more significant the finding by Dr. Mason of objective worsening in March, 1980, some months after the last examination and report of Orthopaedic Consultants. As Dr. Mason explained in his deposition, claimant had

> "changes in lumbar curvature which hadn't been described previously. He still has possibly more limitation as far as range of movement. And the tendon reflexes were decreased in both knee kicks and ankle jerks * * *. [T]here is some increased neurological deficit * * *."

Dr. Mason noted that claimant's straight leg raising had decreased in extension from 60%, reported in 1976, to 30% in May, 1979, to 20%by March, 1980, a decrease he termed "significant." Contrary to the referee's characterization of the deposition testimony of Dr. Mason, that physician testified that he had found evidence of worsening:

> "And my feeling would be is that his condition is worse in 1980 and that it's on the basis of his examination done on that day [March 28, 1980], even though, you know, the basic problem is a chronic problem, and that he really has the same complaints in 1980 that he had in 1976. *I think his condition was worsened to a degree.* I think there is evidence on his examination that would make me think so." (Emphasis added.)

The physician's testimony is sufficient, in our view, to establish a compensable worsening. It is irrelevant that the treatment for claimant's low back is not "curative." Furthermore, claimant needed to show only a worsening of his original condition to establish aggravation under ORS 656.273(1);[1] it is not required that he show a *substantial* worsening.

Because we find claimant has proved a compensable aggravation of his condition, we reverse and remand to the Board with instructions that the claim be accepted, and for further proceedings consistent with this opinion.

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[1] ORS 656.273(1) provides as follows:

> "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."

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

SENGER,
Appellant,
v.
RISBERG'S TRUCK LINE, et al,
Respondents.

(No. 77-1-300, CA 19088)

Appeal from Circuit Court, Clackamas County.

Dale Jacobs, Judge.

Argued and submitted May 15, 1981.

Steven E. Benson, Portland, argued the cause and filed the brief for appellant.

Glen S. Shearer, Portland, argued the cause for respondent. With him on the brief was Schouboe, Marvin & Furniss, P.C., Portland.

Before Buttler, Presiding Judge, and Warden and Warren, Judges.

WARREN, J.

Affirmed.

WARREN, J.

Plaintiff appeals from the trial court's judgment that plaintiff's personal injury negligence action is barred by ORS 656.154,[1] governing joint employers' tort immunity.

Risberg's Truck Line (Risberg's) is a common carrier; it was formed in 1935 for the purpose of transporting merchandise for Fred Meyer, Inc. It presently operates as an independent company, however, and has contracts with other enterprises as well. The Fred Meyer account involves transporting merchandise from warehouses to the retail stores. By 1975, Risberg's had 60 drivers and 150 pieces of equipment assigned to handle that account alone. Plaintiff is a dock employee for Fred Meyer at one such retail store, and defendant Jordan is a Risberg's driver assigned exclusively to the Fred Meyer account. Jordan made deliveries to plaintiff's particular department every Tuesday and Wednesday.

The standard delivery routine for Risberg's drivers assigned to Fred Meyer was as follows: The driver would arrive at a Fred Meyer warehouse in the morning, be given the day's delivery instructions and be told which truck he was to use. He would then locate the trailer at the appropriate loading dock and assist Fred Meyer employees in loading the truck, although the loading responsibility was primarily Fred Meyer's. When the driver arrived at the receiving store, it was primarily his responsibility to maneuver the truck to the dock and to unload it. The dock employees were responsible for opening the warehouse door, unsealing the truck door, counting the merchandise as it was unloaded and resealing the truck door afterwards. In addition, they were instructed by Fred Meyer to assist the driver in unloading and would signal the driver to help him move the truck into position when necessary. Employees of both employers were instructed by their employers to cooperate with each other.

On the day plaintiff was injured, Jordan had to stop his truck a considerable distance from the dock to

[1] ORS 656.154 has been amended to abolish the immunity which is at issue here. Or Laws 1975, ch 152, § 1. The accident in this case happened prior to the amendment.

allow plaintiff to unseal and open the truck doors, because there was a long wall beside the dock which prevented the doors from being opened any closer to the warehouse door. The doors were folded back against the side of the truck, and Jordan then backed up along the wall to the dock. After the truck was unloaded, Jordan attempted to pull the truck away from the dock so that the doors could be closed and resealed. One of the doors caught on a projection on the building, and plaintiff was injured as he attempted to aid Jordan by holding the door back against the side of the truck so that it would clear the projection.

Plaintiff brought this action against defendants for his injuries. Defendants' supplemental answer alleged that the action was barred by ORS 656.154. The case was tried to the court on the supplemental answer, and judgment was entered for defendants. Plaintiff appeals.

ORS 656.154 provided:

> "(1) If the injury to a workman is due to the negligence or wrong of a third person not in the same employ, the injured workman * * * may elect to seek a remedy against such third person. However, no action shall be brought against any such third person if he or his workman causing the injury was, at the time of the injury, on premises over which he had joint supervision and control with the employer of the injured workman and was an employer subject to ORS 656.001 to 656.794.
>
> "(2) * * * 'premises' means the place where the employer, or his workman causing the injury, and the employer of the injured workman are engaged in this furtherance of a common enterprise or the accomplishment of the same or related purposes in operation."

This statute provided immunity for defendants if two requirements are satisfied: (1) joint supervision and control; and (2) a common enterprise. In his first assignment of error plaintiff contends that they are not satisfied here.

The term "joint supervision and control" describes a situation where each employer controls its employees' activities and has some control over the conditions under which both its employees and the employees of the other employer work. *Perkins v. Willamette Industries,* 273 Or 566, 572, 542 P2d 473 (1975); *Deitz v. Savaria, Smith,* 260 Or 538, 491 P2d 620 (1971). Here each employer had

control of its workmen and had directed them to work together cooperatively; the employees had no direct control over each other. The first requirement is met.

To meet the common enterprise requirement, "it is not necessary that the two employers be engaged in a common enterprise as their ultimate business objective." *Deitz v. Savaria, Smith, supra,* 260 Or at 545. The important thing is a common aim. Whether employers have a "common aim" is to a large extent a question of perspective; that is, at some level the purposes of independent businesses inevitably diverge, and the court must determine "how large the circle of 'common enterprise' or 'related purpose' is [to be] drawn." *Deitz v. Savaria, Smith, supra,* 260 Or at 545-546. For example, plaintiff contends that because Fred Meyer is "engaged in selling goods to the public" and defendants are "engaged in the transportation of goods and merchandise from the warehouse to retail stores," they were not engaged in a common enterprise. The statute contemplated, however, examining the employers' goals on a much smaller scale, and we think it is clear that Fred Meyer and Risberg's had the common aim of unloading the truck and moving it out as expeditiously as possible.

Citing *Kosmecki v. Portland Stevedoring Co.,* 190 Or 85, 223 P2d 1035 (1950), plaintiff argues that there was no common aim, because holding back the truck door was outside the normal range of plaintiff's employment and a mere favor to the driver. In the first place, plaintiff's assistance was of considerable benefit to Fred Meyer, as well as to defendants; other trucks were waiting to unload, and the dock was tied up while defendant's truck was hung up on the wall. In any event, it is immaterial that plaintiff was assisting in an activity in which he was not specifically instructed to engage. It is enough that he had assisted the driver in maneuvering his truck on prior occasions and was doing so at the time of the injury. *Perkins v. Willamette Industries, supra.* Plaintiff's reliance on *Kosmecki,* where the plaintiff's gratuitous service to the defendant was found not to be in furtherance of a common enterprise, is misplaced, for the case was not decided on that ground.

Closest to being in point is *Green v. Shell Oil Co.,* 271 Or 362, 532 P2d 221 (1975), where the plaintiff was

repairing the defendant's truck, which had broken down on the highway. The plaintiff was injured by the defendant's employee's alleged negligence when he started the truck motor in order that the repair work could continue. The court stated:

> "Both employers were interested in getting the wheel repaired. It was necessary to operate the truck to repair the wheel. Hays [defendant] was responsible for the operation of the truck. * * * It is irrelevant that plaintiff's helper could also operate trucks. * * * As would be expected, the operator of the truck and the repairman were cooperating in getting the job done." 271 Or at 366.

Here, both employers wanted to get the truck moving. It was necessary for someone to hold the door, and plaintiff was the logical person to do it.

Even if Risberg's is immune under sections (1) and (2) of ORS 656.154, plaintiff contends that this case comes under section (3), the pickup or delivery exception, which provided that:

> "No person engaged in pickup or delivery of any goods, wares or merchandise to or from the premises of any employer other than his own shall be deemed to have joint supervision or control over the premises of a third party employer."

This provision has never been applied literally, but rather has been interpreted in light of its purposes and limited to "ordinary pickup and delivery situations, as those words are commonly understood." *Boling v. Nork,* 232 Or 461, 465-466, 375 P2d 548 (1962). In *Green v. Market Supply Co.,* 257 Or 451, 479 P2d 736 (1971), the court elaborated on *Boling:*

> "[I]n deciding *Boling v. Nork* we had in mind a continuum, running from the simple delivery of a parcel on one end to a complex operation requiring the 'massing of men and machinery' on the other. We think this case * * * is a pickup and delivery situation as those words are commonly used. We are persuaded to that conclusion by the findings of the trial court that (1) defendant's employees were exclusively responsible for making the delivery; (2) they were capable of making it themselves; (3) it was not necessary for any employee of Fred Meyer, Inc., to help with the delivery; and (4) it was not necessary to use any machinery to make the delivery." 257 Or at 455-456.

Green involved the one-time return to the plaintiff's employer of a meat grinder which the defendant had repaired for him. The plaintiff was injured when he helped the defendant's employees with the unloading.

At the other end of the spectrum is *Perkins v. Willamette Industries, supra.* There the plaintiff-truck driver made three or four trips each day to the defendant's lumber mill to haul away wood shavings. The court distinguished *Green,* stating:

> "Unlike *Green,* this was not an isolated transaction between two otherwise unconnected employers, but rather a continuing course of conduct involving the cooperative efforts of both employers in the furtherance of a common objective. * * * " 273 Or at 574.

Application of these two decisions to the case at hand satisfies us that this was not an "ordinary pickup and delivery." First, the criteria set out in *Green,* as a whole, cut against plaintiff. It was not defendant's exclusive responsibility to *unload* the truck, because plaintiff was obligated to help him. In any case, *making a delivery* requires opening the door of the receiving dock, unsealing and then resealing the truck doors, for which plaintiff had exclusive responsibility. The injury occurred, after all, when Jordan was pulling away from the dock so it would be possible to close and reseal the doors. Most important of all is the fact that this long-standing arrangement involved the kind of recurring conduct as in *Perkins,* and an even greater level of cooperation.

In sum, this is precisely the kind of situation in which ORS 656.154 provided tort immunity. The judgment of the trial court is affirmed.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Arye Nell Colbert, Claimant.

COLBERT,
Petitioner,
v.
STATE ACCIDENT INSURANCE FUND CORPORATION,
Respondent.

(WCB Case No. 79-7258, CA A20374)

Judicial Review from Workers' Compensation Board.

Argued and submitted September 23, 1981.

Richard A. Sly, Portland, argued the cause for petitioner. With him on the brief was Bloom, Marandas & Sly, Portland.

Darrell E. Bewley, Appellate Counsel, State Accident Insurance Fund Corporation, Salem, argued the cause and filed the brief for respondent.

Before Buttler, Presiding Judge, and Warden and Warren, Judges.

WARREN, J.

Reversed and remanded with instructions to reinstate the opinion and order of the referee.

WARREN, J.

Claimant appeals from an order of the Workers' Compensation Board, reversing an order of the referee which allowed this claim for aggravation of the psychological component of industrial injuries sustained by claimant in 1975. Claimant makes six assignments of error. The first three challenge the Board's order on the merits of the denied aggravation claim. The fourth is without merit, and the rest require no discussion. On *de novo* review, we reverse.

Claimant's last award of compensation was a stipulated order dated April 15, 1977, for 15 percent unscheduled neck and back disability. While that award does not explicitly refer to claimant's psychiatric condition, we presume that the extent of claimant's "functional overlay," documented in March, 1977, as forming a "significant part" of claimant's "mild" or "minimal" loss of function, was taken into account. We thus measure worsening of the psychiatric problem from the date of the last award in 1977.

The referee found that claimant established a worsening of her psychiatric condition. In reversing the referee, the Board originally stated there was no evidence that claimant had ever been treated for functional overlay and that the preponderance of medical opinion showed no worsening of claimant's "underlying condition" (which could refer either to her physical or psychiatric complaints). In its order denying claimant's motion to reconsider, the Board declared that the record contained "no direct evidence" that claimant's underlying psychological condition had worsened and also stated that claimant's hospitalization for her psychological condition was due to depression that had been an "on-going problem for years even prior to the industrial injury."

Our reading of the record persuades us both that claimant's current psychiatric condition arose out of her physical injuries and that it worsened during the period from April, 1977, to August, 1979. Claimant's functional overlay was observed in 1975 by a clinical psychologist who characterized it as a "moderate anxiety tension reaction"

"largely attributable" to claimant's injuries. That psychologist predicted that severe psychosis could develop if claimant's [physical] condition did not improve. In March, 1977, a treating physician, Dr. Soot, reported that he agreed with a February, 1977, Orthopaedic Consultants' report that a "significant part of [claimant's] symptomatology *and disability* * * * [was] secondary to a functional overlay." (Emphasis added.) Contrary to the assertion of the Board, the record contains a January, 1978, letter from Dr. Soot to SAIF indicating that claimant was hospitalized at Woodland Park Mental Health Hospital in 1977 "because of what appeared to me as being significant psychological adjustment problems to her present disability." Claimant's psychiatric condition continued to be related to her injuries, as documented in Dr. Cherry's report of October, 1979, noting "almost a panic response * * * to her pain situation and the fact that she has seen several doctors without real relief."

With regard to worsening, in 1975 the functional overlay was described by the clinical psychologist as a "moderate psychopathology." In 1977, as noted above, the condition was felt to form a significant part of a mild or minimal loss of function. The first indications that claimant's functional overlay problem was more serious than the "moderate" anxiety previously noted appeared in medical reports in June, 1979. Reporting that month on claimant's fifth visit to the clinic in two years, Orthopaedic Consultants commented:

> "The entire examination is conducted in an atmosphere of relatively poor communication — the patient is rather bizarre in her posturing and guarded in her responses, which makes communication and performance of instructions difficult. She sits with her head held stiffly and her hands shielding her eyes.
>
> " * * * * *
>
> "It is obvious from examination of the patient and from her performance during the interview that there is a *serious and profound functional disturbance* present. This has *apparently* been documented on earlier examinations by the Pain Center and by her physician." (Emphasis added.)

In fact, the earlier medical reports referred to had spoken in terms of "hypochondriachal" [illegible]

symptoms and "a degree of accentuation" of claimant's physical complaints. Prior references in reports by Orthopaedic Consultants had been the mere listing of "functional overlay," without amplification, as part of the diagnosis. In contrast to those descriptions of claimant's problem, in June, 1979, Dr. Berkeley, who had treated claimant in a May, 1979, hospitalization, stated: "My overall impression * * * is that there is a *very severe psychological functional overlay* and that the patient should be seen again by a psychiatrist." (Emphasis added.)

Finally, Dr. Cherry reported in August, 1979, that several days after he had examined her, claimant "called me very frantically that she just had too much pain to tolerate. * * *. She appears to be much more severely symptomatic than at the time she was closed." In October, 1979, after treating claimant at St. Vincent's Hospital, Dr. Cherry suggested that she should return to the Pain Center and stated emphatically, "I do not believe that her present condition is tolerable."

On balance, we consider the evidence to indicate a compensable worsening of claimant's psychiatric condition in the summer of 1979, since the time of her last award in 1977. As found by the referee, claimant has established an aggravation of her compensable condition. ORS 656.273(1) and (3).

Reversed and remanded with instructions to reinstate the opinion and order of the referee.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation
of Dale Scofield, Claimant.

NATIONAL FARMERS' UNION INSURANCE,
Petitioner,
v.
SCOFIELD, et al,
Respondents.

(WCB 78-3310, 78-7638, CA A20339)

Judicial Review from Workers' Compensation Board.

Argued and submitted July 22, 1981.

Brian L. Pocock, Eugene, argued the cause for petitioner. With him on the brief was Cowling, Heysell & Pocock, Eugene.

Martin J. McKeown, Eugene, argued the cause and filed the brief for respondent Dale Scofield.

Frank A. Moscato, Portland, argued the cause for respondent Employers Insurance of Wausau. With him on the brief was Bullivant, Wright, Leedy, Johnson, Pendergrass & Hoffman, Portland.

No appearance for respondent State Accident Insurance Fund Corporation.

Before Richardson, Presiding Judge, and Thornton and Van Hoomissen, Judges.

THORNTON, J.

Reversed and remanded with instructions to reinstate the referee's order.

VAN HOOMISSEN, J., dissenting opinion.

THORNTON, J.

This appeal involves a dispute among three insurance carriers as to which is liable on a workers' compensation claim involving one employer, Lane Electric Cooperative, and two successive injuries. The sole issue presented by National Farmers' on this appeal is whether claimant's condition is the responsibility of Wausau or National Farmers'. The referee ruled that claimant's need for medical services and other compensation after May 23, 1977, stemmed from an injury on August 27, 1974, while Wausau was on the risk. Wausau then appealed to the Workers' Compensation Board. The Board reversed the referee and held that National Farmers' was liable, taking the view that an incident which occurred in 1977, involving claimant's lifting of a portable yard light, rather than the 1974 incident, was the source of the compensable injury and that, therefore, National Farmers' was the responsible carrier.

Claimant sustained a compensable low back injury working in October, 1973, when SAIF was on the risk. The claim was accepted. Claimant experienced no significant symptoms after the 1973 injury until August 27, 1974, when he again injured his low back while pulling an electric line. At that time Wausau was on the risk. Claimant testified that he filled out the employer's standard accident form after the 1974 incident and mailed it to the employer with his time sheet. The company records do not, however, contain this form or any record of it. There is, therefore, an issue between Wausau and the claimant whether the 1974 claim is barred because of late notice. Claimant was treated for that injury by Dr. Erpelding, his family physician, and by Dr. Collis but the claim was never processed.

On May 23, 1977, claimant experienced the low back difficulty mentioned above after lifting the portable yard light. Claimant saw Dr. Collis following this incident, although the appointment had been made previously for his continuing back problem dating back to the 1974 injury. On May 24, 1977, claimant executed a claim form, reporting that he had strained his back on May 23. General Adjustment Bureau (GAB) provided claim service to

National Farmers'. GAB denied National Farmers' responsibility for this latest incident and for claimant's continuing need for medical treatment on the ground that they were related to his industrial injury of August, 1974, before National Farmers' insured the employer. Wausau in turn denied responsibility on the ground that claimant's problems resulted from the 1977 incident rather than the August 27, 1974 incident.

Dr. Hirons examined and treated claimant from June 18 to August 1, 1977. On June 18, 1977, Dr. Hirons causally related a condition he diagnosed as "sciatica" to the August 27, 1974, industrial injury when pulling the wire. But on March 27, 1978, Dr. Hirons reported:

> "In reviewing the chart of Mr. Schofield, it would be consistent to say that this man had an injury occurring in 1974 and that he has had discomfort off and on since, and that he has some aggravation of this injury leading to his visits with us starting in June 1977, and going on from there."

On May 23, 1978, claimant was required to undergo surgery for his back condition.

Claimant requested a hearing on the denials. SAIF was joined as a necessary party to the proceedings. At the hearing Wausau raised the issue of the timeliness of claimant's claim. The referee found that claimant sustained a compensable injury on August 27, 1974, and that his claim was not barred by reason of untimely filing and remanded the claim to Wausau. Wausau sought Board review. The Board reversed the referee's order, upholding Wausau's denial, and remanded the claim to National Farmers'. National Farmers' appeals to this court.

A threshold issue is raised by Wausau, asserting that National Farmers' appeal should not be considered because of its failure to follow Rules of Appellate Procedure 7.17(f) and 7.19 in not making assignments of error and by failing to set out verbatim the pertinent portions of the record to be reviewed.[1] Because our review in workers'

[1] RAP 7.17(f):

"The appellate's brief shall open with a clear and concise statement of the case which shall set forth in the following order under separate headings:

compensation cases is *de novo,* assignments of error, while desirable and extremely helpful, are not required. *See Patterson and Patterson,* 286 Or 631, 596 P2d 554 (1979); *State ex rel Juv. Dept. v. Moyer,* 42 Or App 655, 601 P2d 821 (1979), *rev den* 288 Or 633 (1980). As already noted, the sole issue is whether claimant's condition is the responsibility of Wausau or National Farmers'. Under these circumstances we find no violation of the cited provisions of our rules.

We now turn to the merits, and, based on our *de novo* review of the record, we agree with the referee that SAIF has no responsibility or obligation with respect to claimant's claim for his disabling back condition. The claim accepted by SAIF was a non-disabling compensable injury, which required the payment of medical benefits only, and has no relevance to this case.

Next, we conclude that claimant has proven by a preponderance of the evidence that his claim for his disabling back condition which required surgery in 1978 is a compensable claim against Wausau, employer's insurer in 1974. *See Calder v. Hughes & Ladd,* 23 Or App 66, 541 P2d 152 (1975). Also, claimant's testimony, supported by the

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"* * * * *

"(f) Any other matters necessary to inform the court concerning the questions and contentions raised on the appeal, insofar as such matters are a part of the record, with reference to the portions of the record where such matters appear.

RAP 7.19:

"Each assignment of error shall be clearly and succinctly stated under a separate and appropriate heading. The assignment of error must be specific and must set out verbatim the pertinent portions of the record.

"The arrangement and wording of assignments of error, so far as applicable, together with reference to pages of the transcript or narrative statement, shall conform to the illustrations in Appendix F.

"Where several assignments of error present essentially the same legal question, they shall be combined so far as practicable . . .

"In the court's discretion, alleged errors of the trial court will not be considered on appeal unless regularly assigned as error in the appellant's or cross-appellant's opening brief, except that the appellate court may take notice of errors of law apparent on the face of the record. Similarly, assignments of error which the court can consider only by searching the record for the proceedings complained of will not be considered and a brief not complying with the rules may be stricken."

testimony of his son, showed the fact of the accident in 1974 and also established chronic symptoms following that accident. Claimant's testimony, supported by the testimony of Mr. Newland, employer's office manager, established the fact that claimant's chronic symptoms worsened with the passage of time from August 27, 1974, to May 22, 1977, the day preceding the May 23, 1977, incident. Claimant's testimony in this regard is also medically confirmed. He was examined and treated by Dr. Collis on December 1, 1976, and made a return appointment to see Dr. Collis on May 24, 1977, without regard to the then unknown May 23, 1977, incident. Also, during late 1976 or early 1977, claimant inquired of Mr. Newland about the status of the claim which arose out of the 1974 event, because his condition was worsening and because he wanted to know who would be responsible for continued medical treatment.

Wausau places great reliance on a statement in an opinion expressed by Dr. Serbu, the neurosurgeon who performed the laminectomy in 1978. In its brief, Wausau states:

> "Claimant was referred to a neurosurgeon, Dr. John Serbu, on August 17, 1977. Dr. Serbu examined and treated Claimant several times over the next two years. Initially, Claimant did not report the May, 1977 injury and Dr. Serbu was of the opinion that Claimant's problem was related to either the 1951 laminectomy[2] or the 1974 injury. But on May 15, 1978 when Dr. Serbu was informed of the 1977 injury, he concluded, on the assumption that the incident had in fact occurred, that 'obviously one would have to relate his present symptomatology more to the 1977 injury rather than the 1974 injury.'"

Dr. Serbu first examined claimant in consultation on August 17, 1977. During 1978, he treated claimant. On March 30, 1978, Dr. Serbu reported that he felt claimant's problem, the disabling back condition, was related to his 1974 injury, but on May 15, 1978, he related claimant's symptomatology more to the 1977 injury than the 1974

[2] According to the record, in 1951, claimant had lumbar disc surgery for low back and leg pain at the Veterans' Administration Hospital in Portland. He had good results following this surgery and was able to return to work until his 1974 injury.

injury.[3] Apparently, when Dr. Serbu prepared his March 30, 1978 report he was unaware of the May 23, 1977, incident. On July 31, 1978, the doctor reported, in part:

> "When I first saw this gentleman on August 17, 1977 he did relate an injury in 1974, but did not indicate any injury in 1977 nor did he tell me that he saw Dr. Dennis Collis. He indicated that he was seen by Dr. Loescher of the Eugene Hospital and Clinic, Dr. Hirons, and also a psychologist.
>
> "Thus I personally have no knowledge of an injury on May 23, 1977. I would feel once again that this is very difficult to organize chronologically and etiologically. Much of the decision would have to be made by reviewing Dr. Collis's record to decide whether the stated injury of May 23, 1977 aggravated the condition which Dr. Collis had seen previously. If it did not then I would feel that his whole problem is related to his 1974 injury."

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[3]

"May 15, 1978

"GAB Business Services Inc.
Suite 3
2130 S.W. 5th Avenue
Portland, Oregon 97201

"Re: Dale E. Scofield
File No. 49318-22419

"Gentlemen:

"Mr. Dale E. Scofield was seen in my office again this afternoon at the request of Doctor Hirons.

"Recently his claim was presumably denied. The patient claims that on 5/23/77 he did see Doctor Dennis Collis after injuring his back while unloading some material from a truck. I personally have no record of this injury, but I am certain Doctor Collis would have such a record if this is true. If that statement is true, then obviously one would have to relate his present symptomatology more to the 1977 injury rather than the 1974 injury.

"In any event, he has again developed severe left leg pain. His straight leg raising test is very abnormal, etc.

"I discussed the entire situation with Mr. Scofield and indicated that I could not say whether he would be picked up as an industrial case or not. He claims that in any event he would like to know if anything can be done to help his problem. He is thus scheduled for a myelogram on Monday, May 22, 1978.

"Any further decisions your company may make would be sincerely appreciated by our office.

"Best regards.

"Sincerely,

John Serbu, M.D."

When the above comments by Dr. Serbu are considered in the full context, we do not find the May 15, 1978, letter to be persuasive on the causal relationship involved here.

Lastly, we conclude that claimant's claim is not barred either by his alleged failure to give timely notice under ORS 656.265(1), or because there is no legal aggravation claim. Claimant's testimony indicates that he filled out the company's standard industrial accident form and mailed it to the company office with his time sheet. There was some evidence that other documents pertaining to employes were also missing from, or could not be found in, the employer's records. Under Oregon law, there is a disputable presumption that a letter duly directed and mailed was received in the regular course of mail. ORS 41.360(24). The presumption in this case has not been overcome by other evidence contained in the record.

Furthermore, claimant is not proceeding on an aggravation claim. His claim for compensation is a claim related to chronic problems which arose out of an original claim which was never processed and of which, in our opinion, the employer had notice. The arguments advanced by the dissenting opinion overlook the fact that claimant had problems with his back and leg which bothered him continuously following his 1974 injury; that he had already made an appointment to see his doctor about his back at the time of the May 23, 1977, episode; that he went back to work the day following this incident and kept his appointment with Dr. Collis that day; and that claimant's medical findings were not changed in any way by that incident.

From the foregoing it is manifest that this is not a case for the application of the last injurious exposure rule.

Reversed and remanded with instructions to reinstate the order of the referee.

VAN HOOMISSEN, J., dissenting.

Claimant sustained a compensable back injury in 1974. At that time Wausau was on the risk. In 1977, he again injured his back. National Farmers' was then on the risk. The issue is who should pay, Wausau or National

Farmers'?[1] My review of the record satisfies me the Workers' Compensation Board (Board) correctly determined the 1977 injury independently caused and materially contributed to the worsening of claimant's back condition and that the condition is therefore the responsibility of National Farmers'.

Claimant had underlying back problems before the 1977 incident. Between 1975 and 1977, he was examined several times by his family physician, Dr. Erpelding, who noted in June, 1975, that claimant had pain in his left hip. By July, the pain had lessened, and by August, the hip seemed "much better." Later examinations in 1976 and 1977 make no mention of any hip or back problems.

Claimant was examined in December, 1976, by Dr. Cornog, who reported claimant stated he had achieved a good result from his 1951 back surgery and felt it did not hinder him in his work. Dr. Collis examined claimant later the same day. He noted claimant had had trouble with his back for some 25 years, that he had done well at difficult work until the 1974 injury, and that he had had more back troubles since that time, but had not missed any work. Dr. Collis reported claimant had low back pain and sciatica:

> "I think it is secondary to his surgery of 25 years ago, but he also may have contused his sciatic nerve some two years ago."

Dr. Collis prescribed no medication and did not order claimant to restrict his work or other activities.

Claimant was injured on May 23, 1977. As of that date, he had not missed any work because of his back problem. Claimant testified:

> "I went to unload a yard light that was in the back [of the truck] and I picked it up to swing it over and set it on the dock and when I got halfway to the dock I just went down like somebody hit me between the ears, I thought, and then in a few minutes I got up * * * I got a sharp pain in my back and down my leg. * * *"

[1] Claimant argues this court should affirm the Workers' Compensation Board's finding that his back disability and subsequent surgery are the responsibility of National Farmers', contending the Board correctly determined that the injury of May 23, 1977, independently caused and materially contributed to the worsening of his back condition.

Claimant saw Dr. Collis on May 24, the day following his new injury. At that time he indicated his back "is about the same over the last six months, except for an injury yesterday of twisting." About four weeks later, he was examined by Dr. Hirons, who reported claimant mentioned his back pain had bothered him on and off ever since the 1974 injury, but that "in the last month it has gotten significantly worse" and that claimant "had some aggravation of this injury leading to his visits with us starting in June, 1977, and going on from there." In August, 1977, claimant was referred to Dr. Serbu, a neurosurgeon, who examined and treated him several times over the next two years. In May, 1978, Dr. Serbu reported that if the claimant's account of his May, 1977, injury was true:

> "* * * [T]hen obviously one would have to relate his present symptomatology more to the 1977 injury rather than the 1974 injury."

The test in successive injury cases is whether the most recent incident contributes independently or even slightly to the causation of the disabling condition. *Smith v. Ed's Pancake House,* 27 Or App 361, 556 P2d 158 (1976). If it does, under the last injurious exposure rule, full liability is placed upon the insurer covering that risk, in this case National Farmers'.

The medical evidence and claimant's own statements to his treating physicians satisfy me that his underlying back condition had not worsened to such a degree by May, 1977, that his later disability would have occurred regardless of the lifting of a portable yard light weighing 25 to 30 pounds from a truck and that this lifting merely precipitated what was going to happen anyway in a very short time. The severity of pain suffered, the strain and difficulty of the lifting, and the greater frequency of claimant's complaints and treatments for the back problem show that he suffered a new injury in 1977.

Claimant testified that he was on the ground for what "seemed like quite a while, but it probably was only a minute or so."

> "Q Now, on May 23, 1977, you described an incident carrying something and you turned and you had immediate pain in your low back. I think you said it was so bad it knocked you to the ground?

"A Right.
"Q And you had never had pain like that before?
"A Not quite like that."

Although feeling somewhat better the next day, he still had pain down his legs and went to see Dr. Collis.

Not only was the pain severe and unusual, but the lifting incident itself was a significant traumatic incident. The referee observed:

> "Under normal circumstances, I do not believe that a person with an otherwise 'normal back' or 'good back' would receive an injury to the back while carrying an object weighing only 25 to 30 pounds."

The referee misunderstood the issue, *i.e.,* whether the incident contributed independently or even slightly to a worsening of the underlying condition. If it did, the incident is treated as a new injury. *Smith v. Ed's Pancake House, supra.*

The key to deciding responsibility under the last injurious exposure rule is to determine when and why the condition became *disabling.* Where a subsequent injury contributes independently to a claimant's disability, the first injury is superceded and the later insurer is liable for the resulting disability. *Gilroy v. General Distributors,* 35 Or App 361, 367, 582 P2d 428 (1978); *Kolar v. B & C Contractors,* 36 Or App 65, 71, 583 P2d 562 (1978).

During the nearly three-year period between August, 1974 and May, 1977, claimant missed no work because of his back problem, did not attempt to change to a less strenuous job, did not otherwise appear to restrict his activities significantly, was treated by a physician particularly for the back problem only one time, and was apparently not given any medication for the problem. Following the May, 1977, incident claimant's low back problem continually worsened, resulting finally in a lumbar laminectomy in May, 1978, and in his present disability.

The evidence demonstrates the worsening of claimant's underlying back problem was independently caused by the 1977 lifting and twisting incident. This court should affirm the Board's finding that National Farmers' is liable on the claim.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
Ole Larson, Claimant.

LARSON,
Petitioner,
v.
BROOKS-SCANLON,
Respondent.

(No. 79-07895, CA A20838)

Judicial Review from Workers' Compensation Board.

Argued and submitted August 21, 1981.

Martin E. Hansen, Bend, argued the cause for petitioner. On the brief were Lyman C. Johnson and Johnson, Marceau, Karnopp & Petersen, Bend.

Margaret H. Leek Leiberan, Portland, argued the cause for respondent. With her on the brief was Lang, Klein, Wolf, Smith, Griffith & Hallmark, Portland.

Before Gillette, Presiding Judge, and Roberts and Young, Judges.

GILLETTE, P. J.

Reversed and remanded with instructions to reinstate the referee's order.

GILLETTE, P. J.

This is a workers' compensation case in which the issue is whether claimant has shown, by a preponderance of the evidence, that his present disabling low back symptoms are an aggravation of an earlier compensable injury. The referee held that they are; the Workers' Compensation Board reversed. We reverse.

Claimant, a 55-year old logger, has an extensive history of low back trouble since at least 1967. However, he was symptom free at the time of the compensable incident on August 13, 1975, which underlies this claim. Claimant was diagnosed as having degenerative disc disease and a herniated disc. A laminectomy for the disc problem was performed. Claimant's treating physician, Dr. Miller, subsequently found claimant medically stationary with no residual problems. The claim was closed by a Determination Order on July 12, 1976, which awarded claimant compensation for temporary total disability only.

Claimant suffered another lumbosacral strain in 1977, for which he ultimately received an award of 15 percent unscheduled low back disability. Another aggravation claim in 1978 was compromised in a disputed claim settlement.

In July, 1979, claimant again saw Miller for recurrence of back and leg pain—the situation which gives rise to the present aggravation claim. He had only worked two and one-half days since June 15, 1979, because of back pain. Miller found claimant to be essentially asymptomatic by July 23, 1979, and released him for work on August 1, 1979.

The carrier denied claimant's aggravation claim on August 22, 1979. Claimant was seen by Dr. Kendrick, an associate of Miller, on August 24, 1979, because he had had another recurrence of disabling back pain and Miller was not available. Kendrick reviewed claimant's medical reports, examined claimant and concluded that claimant was suffering, and had suffered, from exacerbation directly related to his work and related to his original injury of 1975. Claimant asked for a hearing on the denial.

On June 16, 1980, claimant's aggravation claim was ordered accepted by a referee after a hearing. On

August 4, 1980, Miller sent a letter stating that claimant's symptoms were caused by his 1975 injury. Claimant's attorney mailed this letter to respondent's attorney on August 13, 1980. On December 19, 1980, claimant moved the Board to incorporate the August 4, 1980 report into the record. The Board denied the motion and reversed the referee's order on March 31, 1981. Claimant appeals.

Claimant first argues that the Board erred in denying his motion to incorporate Miller's letter into the record. We do not decide the issue because, even without Miller's clarifying letter, we find that the evidence preponderates in claimant's favor.

Among the medical opinions that the Board had before it when it made its decision were three letters from Miller and a letter from Kendrick. Brooks-Scanlon urges us to give deference to Miller's opinion because he is claimant's treating physician and to discount the opinion of Kendrick because he saw claimant only once, relatively late in the course of his ailment. It could be argued just as plausibly that Miller's opinions should be discounted, for they seem to be inconsistent with each other, while Kendrick's opinion deserves deference because it is clear and resolves the apparent inconsistency.[1] At any rate, the medical evidence must be examined.

In August, 1977, Miller reported that there was no evidence of any permanent disability from claimant's 1975 injury and that there were no abnormal findings in the claimant's back. Kendrick interpreted that conclusion in his 1979 letter:

> "I think it is important to recognize that Dr. Miller's statement that he had no evidence of permanent disability

[1] In fact, the referee reached that conclusion:

> "* * * In review of the medical evidence, Dr. Miller, the treating physician, in July 1979, stated there was no question that claimant's symptoms were related to his degenerative disc disease. This contradicts his previous opinion of March 28, 1978, wherein he remarked that claimant's recurring symptoms are a direct result of his injury. However, Dr. Kendrick's opinion is not qualified. He opined claimant was suffering from exacerbations directly related to his work and previous injury. Dr. Miller's opinion becomes suspect because of the inconsistencies. I give greater credence to Dr. Kendrick's unequivocal opinion of the relationship between claimant's present condition and his previous industrial injury." Opinion, Workers' Compensation Board, Hearings Division, June 16, 1980.

certainly does not mean that the patient was not more predisposed to further back difficulty than a person without any previous disc disease. In fact, the opposite is true and there is no question that the patient had a greater predisposition for injury, particularly given the heavy type of work that he does."

A letter from Miller on March 24, 1978, stated without reservation that the claimant's symptoms were the result of the 1975 injury. It was his later letter of July 23, 1979, which was primarily relied upon by the Board in denying compensation. It states:

"There is no question in my mind that this patient's symptoms are related to the original problem of degenerative disc disease at the L4-5 level."

That statement could mean one of two things. As interpreted by the Board and by Brooks-Scanlon, it could mean that the symptoms were *solely* the result of the pre-existing disc disease. On the other hand, it may have been referring only to the undisputed fact that the symptoms were at least *partially* caused by the disease, without eliminating the 1975 injury as an aggravating factor. The claimant's attorney made an argument to that affect in his amended brief to the Board.[2] We find the letter ambiguous and therefore give it little weight.

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[2] In his brief, claimant's attorney stated:

"Insurer has consistently wanted to take the position that all of Mr. Larson's problems are related to degenerative disc disease and not to his injury. I would point out that Dr. Miller stated in the above quoted sentence only that his symptoms 'are related to the original problem of degenerative disc disease' and did not say that degenerative disc disease was the sole cause. I would point out also that the site of the degenerative disc disease is the L4/5 level which Dr. Miller points out in the beginning of his July 23, 1979 letter is the site where 'this patient had a wide decompressive laminectomy because of a complete block at L4/5 in October 1975.' Dr. Miller has consistently over the course of his treatment of this man related the degenerative disc problem to the site of the original injury. I would refer the Board again to Exhibit 23 which is Dr. Miller's report of March 24, 1978. That is the letter in which Dr. Miller stated that it was his opinion 'that this patient's recurring symptoms are a direct result of his injury, which he had, which precipitated his original surgery.' In that same letter Dr. Miller asked the insurer to 'see the office summary dated February 13, 1978 when I saw this patient.' That February 13, 1978, office visit note was attached to the letter. In that note the Doctor states that 'The patient obviously has had an aggravation of his existing degenerative disc disease in his back.' It is clear that the Doctor relates the injury the laminectomy and the disc disease together in treating this man's problem."

Finally, the Board had before it the letter from Dr. Kendrick that stated that he was "somewhat appalled" by the denial of the claim. He wrote:

"I think it is inconceivable that one can come to any conclusion other than the fact that the patient's back and leg pains are a result of re-exacerbation of his original injury of 1975. * * * It is my considered opinion that Mr. Ole Larson is now suffering, and has suffered from, exacerbation directly related to his work and related to his original injury of 1975."

Taken together with the claimant's history and his course of treatment under Dr. Miller, we find this opinion persuasive.

The order of the Board is reversed and remanded with instructions to reinstate the referee's order.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of James Eber, Claimant.

EBER,
Petitioner,
v.
ROYAL GLOBE INSURANCE COMPANY, et al,
Respondents.

(WCB Nos. 79-4969 & 79-4048, CA 19751)

Judicial Review from Workers' Compensation Board.

Argued and submitted July 29, 1981.

Roger D. Wallingford, Portland, argued the cause and filed the brief for petitioner.

Margaret H. Leek Leiberan, Portland, argued the cause for respondent Royal Globe Insurance Company. With her on the brief was Lang, Klein, Wolf, Smith, Griffth & Hallmark, Portland.

Marshall Cheney, Portland, argued the cause for respondent Industrial Indemnity Company. With him on the brief were Bruce L. Byerly, and Cheney & Kelley, Portland.

Before Buttler, Presiding Judge, and Joseph, C. J., and Warden, J.

BUTTLER, P. J.

Reversed and remanded for further proceedings.

BUTTLER, P. J.

Claimant appeals from a determination by the Workers' Compensation Board (Board), contending that the Board erred in (1) affirming the referee's denial of compensability for a condition of the *left* knee, and (2) reversing the referee's finding of compensability for a condition of the left wrist. We find both conditions to be compensable and Industrial Indemnity Company to be the responsible carrier.

In November, 1977, claimant, a 50-year-old male, 6' 3-1/2" tall and weighing 250 pounds, sustained an on-the-job injury to his *right* knee which required a meniscectomy operation in February, 1978. Respondent Industrial Indemnity accepted responsibility for the claim arising out of that injury. Following that injury, greater stress was placed on claimant's *left* knee, already weakened by a degenerative arthritis secondary to a previous cartilage injury and a meniscectomy in 1959, and by a compensable strain to that knee occurring in 1975, when claimant's employment was covered by respondent Royal Globe Insurance Company.

In a report dated December 7, 1978, prior to the surgery on the *right* knee, claimant's treating doctor documented the stressful effect the *right* knee injury had on the *left* knee and predicted that the *left* knee would require further treatment as a result, although he commented at that time that the *left* knee was "not related particularly to this claim [for the *right* knee]." Claimant did, in fact, have further problems with the *left* knee: surgery on it was performed in April, 1979. Both the Board and referee relied on the doctor's comment, quoted above, to support the conclusion that claimant did not prove the compensability of the *left* knee condition. As we view the record as a whole, the uncontroverted medical evidence supports the conclusion that the injury to the *right* knee exacerbated the preexisting *left* knee condition to the extent that the *left* knee ultimately required surgery. Because that condition was the natural result of a new injury rather than simply an aggravation, Industrial Indemnity, and not Royal Globe, is the responsible carrier.

Following the surgery to the right knee in February, 1978, claimant used crutches for about six weeks after

his release from the hospital. During that period, claimant developed a worsening of a pre-existing carpal tunnel syndrome in his left wrist, for which surgery was performed in February, 1979. Industrial Indemnity denied responsibility for the left wrist condition.

In April, 1979, prior to the left knee surgery but after the right knee surgery, the treating physician reported that the carpal tunnel syndrome in the left arm had been precipitated by claimant's use of his left hand and wrist in helping him stand and support himself with crutches. In its order, the Board stated that medical evidence was necessary to show that claimant was required to use crutches because of the *right* knee injury and observed that the treating doctor referred only to "knees" in the plural, but not specifically to the right knee. Because the Board had concluded that the left knee condition was not related causally to the right knee injury, its apparent reasoning was that if the use of crutches was required only because of the condition of both of claimant's knees, there was no causal link between the right knee and the use of crutches. We have concluded that claimant's left knee condition is compensable, so even if the crutches would not have been reasonably required solely for the right knee injury, the record supports their use here.

Claimant's use of crutches following knee surgery appears to be a "direct and natural consequence of the original injury." *See Wood v. SAIF*, 30 Or App 1103, 1108, 569 P2d 648 (1977), *rev den* 282 Or 189 (1978). A chain of causation is thus established between the right knee injury and the deterioration of claimant's left wrist carpal tunnel. Because the left wrist condition derives from the right knee injury, we find Industrial Indemnity also responsible for the left wrist condition.

Reversed and remanded for further proceedings.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation
of Kenneth L. Elliott, Claimant.

CLAYTON'S AUTOMOTIVE, et al,
Petitioners,

v.

STAYTON AUTO SUPPLY, et al,
Respondents.

(WCB Case Nos. 79-08090 and
79-04846, CA A21216)

Judicial Review from Workers' Compensation Board.

Argued and submitted October 30, 1981.

Paul D. Clayton, Eugene, argued the cause for petitioners. With him on the brief was Luvaas, Cobb, Richards & Fraser, P.C., Eugene.

Emil R. Berg, Portland, argued the cause for respondents Stayton Auto Supply and Scott Wetzel Services, Inc. On the brief were Darryll E. Klein and Wolf, Griffith, Bittner, Abbott & Roberts, Portland.

Robert Muir, Albany, argued the cause for respondent Kenneth L. Elliott. With him on the brief was Emmons, Kyle, Kropp & Kryger, Albany.

Before Joseph, Chief Judge, and Warden and Warren, Judges.

WARREN, J.

Affirmed.

WARREN, J.

This case presents a factual question whether claimant's low back injury was an aggravation of a previous compensable injury or a new injury. The Workers' Compensation Board, affirming the referee, determined that it was a new injury. The responsible employer and insurer appeal, and we affirm.

In November, 1974, while working for Stayton Auto Supply (Stayton), claimant injured his low back lifting a wheel and tire. A lumbar laminectomy was performed, and claimant received a compensation award for 30 percent unscheduled permanent partial disability. Claimant was hospitalized in December, 1976, and April, 1978, during bouts of low back pain. In June, 1978, for the first time, claimant returned to work; his employer was Clayton's Automotive (Clayton), which had taken over the business of Stayton. On March 1, 1979, claimant tripped over a piece of lumber and fell forward into a pile of oil barrels. Claimant immediately experienced severe pain in his lower back and was forced to lie down for a time before he could stand; his wife came and drove him home. Claimant saw his doctor the next day and was put on medication. On March 7, 1979, claimant was admitted to Salem Hospital for conservative lower back management. Prior to the 1979 incident, claimant had had an eight-month period of relative stability. Following the incident, claimant required hospitalization in August, 1979, February, 1980, and June, 1980, with recurrent lumbosacral strain. After the March incident, claimant did not return to regular employment.

The final medical opinions of the physicians involved in this case (Drs. Boughn and Buza, and Orthopaedic Consultants), are that claimant's 1979 incident was a worsening or aggravation of the earlier low back injury. In an initial report dated March 6, 1979, Dr. Boughn checked the "yes" box in response to the query: "Is condition requiring treatment the result of the industrial injury or exposure described?" In January, 1980, Dr. Boughn amplified that earlier opinion:

> "The questions that you ask, especially your final question concerning his treatment as to relationship either to the March 1979 or the November 25, 1974 incident is an

extremely difficult one to answer. You will find enclosed in this letter several items of correspondence which have attempted to address this fact. *Certainly a person with a normal back would not have experienced as much pain from the injury in March of 1979 and would have probably lost very little time at work with such a minor injury. However, I must admit that before this injury imant was gainfully employed, making only occasional visits to this office for back pain, and he has been totally disabled since the last injury."* (Emphasis added.)

This letter is somewhat ambivalent; the physician does not directly express an opinion on the aggravation/new injury issue, though the language used suggests a new injury. However, Dr. Buza reported in September, 1979, that the March injury was not a new injury, that the 1974 injury was exacerbated by the 1979 incident and that claimant had "basically the same pain" as before. When this report was sent to Dr. Boughn in May, 1980, for his comment, he jotted down the reply, "I concur." It is argued that Dr. Boughn must thus be counted in the aggravation camp. Finally, in May, 1980, Orthopaedic Consultants unequivocally stated that claimant's condition was a continuation of his initial 1974 injury and not a new or separate injury. It is worth noting, however, that the Orthopaedic Consultants group appears to have been under the impression that claimant had seen his doctor on "multiple occasions" in 1978, when, in fact, claimant had had an eight-month, trouble-free period immediately prior to his injury.

The circumstances surrounding the trauma of March, 1979, suggests that a new injury could have occurred at that time: the period of relative stability prior to the incident, the traumatic and painful fall itself, and the total disability and increased frequency of hospitalization following the incident. While it is conceded that claimant's problems resulting from the March fall were confined to the same area of the back previously injured, that fact does not rule out the possibility of a new injury to that area. We find Dr. Boughn's January, 1980, letter describing claimant's condition in terms of a new injury, complicated by his previously weakened back, more persuasive than his subsequent conclusory concurrence with Dr. Buza's September, 1979, report. In any event, Dr. Buza's conclusion that the 1974 injury "was exacerbated by his injury in March of

1979" is not inconsistent with a new injury. Dr. Buza concluded "there is an increase of severity, duration of his pain that was exactly the same pain that occurred in 1974 and that he has had since that time with his injury from 1979." We interpret Dr. Buza's report to mean that while the 1979 incident injured the same area of claimant's back, and that the nature of the pain was the same, it was increased in severity and duration by the trauma. This, taken with Dr. Boughn's opinion that the new trauma resulted in an increase in disability, warrants a conclusion that a new injury occurred.

Here, as in *Smith v. Ed's Pancake House*, 27 Or App 361, 365, 556 P2d 158 (1976), the claimant was relatively stable for a period of time prior to March, 1979. His fall precipitated increased pain and disability. Quoting from 4 Larson, Workmen's Compensation Law § 95.12 (1976), we noted that:

> "'* * * [I]f the second incident contributes independently to the injury, the second insurer is solely liable, even if the injury would have been much less severe in the absence of the prior condition, and even if the prior injury contributed the major part to the final condition. * * *'"

We conclude that the 1979 incident contributed significantly to the causation of the claimant's present disabling condition and that, therefore, the second employer and its insurer are the responsible parties.

Affirmed.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of RAY WHITMAN, Claimant

RAY WHITMAN, Petitioner

v.

WESTERN CONCRETE, Respondent

(N. 80-03300, CA A21143)

Judicial Review from Workers' Compensation Board.

Argued and submitted October 30, 1981.

Allen T. Murphy, Jr., Portland, argued the cause for petitioner. With him on the brief was Richardson, Murphy, Nelson & Lawrence, Portland.

Emil R. Berg, Portland, argued the cause for respondent. On the brief were Daryll E. Klein, and Wolf, Griffith, Bittner, Abbott & Roberts, Portland.

Before Joseph, Chief Judge, and Warden and Warren, Judges.

JOSEPH, C.J.

Reversed with instructions to reinstate the order of the referee.

FILED: DECEMBER 7, 1981

JOSEPH, C.J.

The issue in this workers' compensation case is the extent of unscheduled disability. By determination order, claimant was awarded 25 percent unscheduled disability for a low back injury. The referee awarded claimant 60 percent. Claimant appeals from a determination of the Workers' Compensation Board awarding him 35 percent unscheduled disability; he seeks 100 percent unscheduled disability. On de novo review, we reinstate the referee's award.

Claimant is a 49-year old construction worker with a high school education who has worked for the same employer for 21 years. He first injured his back in 1967, when a hoist on which he was riding suddenly plummeted 20 to 30 feet. Claimant lost a week of work, recovered and had no apparent residuals. On December 22, 1978, while working as an operator of a concrete-pouring machine, he tripped over a cable at a job site and twisted his back. On March 7, 1979, he underwent extensive back surgery, including a four-level laminectomy and removal of a herniated disc.

Claimant attempted to return to work in January, 1980, but was not able to resume full-time employment. He has averaged about two and a half days of work a week and has found it difficult to work longer than five to six hours a day. After the injury, claimant was able to handle concrete-pouring jobs only by using a lighter system than he used before the injury; he cannot do jobs where more than a couple of pieces of equipment need to be attached to the pouring boom. In order to provide more work for claimant, his employer has attempted, with limited success, to find contracts that would require his heavier work to be performed by the general contractors. Claimant has retained his skill in repairng concrete pumps when they break down on the job, but his physical limitations prevent his working as a repairman in the shop. Since the 1978 injury, he has been unable to do regular construction work because of the heavy lifting.

Before the injury, claimant regularly raised two to three hundred head of hogs and some other livestock on his farm; he did most of the farm chores and maintenance work himself. After the injury, he was able to raise only a small number of sheep; he has been forced to rely on members of his family to shear and trim sheep, milk cows, bale hay and maintain the farm. Claimant, whom the referee found particularly credible with respect to his complaints, has seldom been without pain in his low back and right hip and can sleep only two or three hours at a stretch. Working even part-time has put considerable physical strain on him.

The extent of permanent partial disability is measured by loss of earning capacity due to the compensable injury, taking

into account age, education, training, skills and work experience. ORS 656.214 (5).[1] Here, because of his physical limitations, claimant has been able to work only part-time at his former job and then only under special conditions. He is 49 years old and has only a high school education, 21 years of now largely unusable construction experience and no other marketable skills. We assess extent of unscheduled disability by the exercise of our independent judgment on de novo review. Smith v. SAIF, 51 Or App 833, 836, 627 P2d 495 (1981); Owen v. SAIF, 33 Or App 385, 388, 576 P2d 821 (1978).

The record persuades us that, as a result of this compensable injury, claimant has lost more than half his earning capacity. The referee so found, and the Board's order articulates no reason to conclude otherwise. We therefore reinstate the 60 percent unscheduled permanent partial disability awarded by the referee.

Reversed with instructions to reinstate the order of the referee.

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1 ORS 656.214(5) provides:

"In all cases of injury resulting in permanent partial disability, other than those described in subsections (2) to (4) of this section, the criteria for rating of disability shall be the permanent loss of earning capacity due to the compensable injury. Earning capacity is the ability to obtain and hold gainful employment in the broad field of general occupations, taking into consideration such factors as age, education, training, skills and work experience. The number of degrees of disability shall be a maximum of 320 degrees determined by the extent of the disability compared to the worker before such injury and without such disability. For the purpose of this subsection, the value of each degree of disability is $85."

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of
Kenneth Ivie, Claimant.

Kenneth Ivie,

Petitioner,

v.

No. 80-04388
CA A20724

State Accident Insurance Fund Corporation,

Respondent.

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Judicial Review from Workers' Compensation Board.

Submitted on record and briefs July 24, 1981.

Michael Strooband, and Bischoff, Murray & Strooband, P.C., Eugene, filed the brief for petitioner.

Darrell E. Bewley, Appellate Counsel, State Accident Insurance Fund Corporation, Salem, filed the brief for respondent.

Before Richardson, Presiding Judge, and Thornton and Van Hoomissen, Judges.

RICHARDSON, P.J.

Reversed with instructions to reinstate the referee's order.

FILED: December 7, 1981

RICHARDSON, P.J.

In this workers' compensation case SAIF denied claimant's claim. The referee ordered SAIF to accept the claim, finding that claimant's degenerative joint disease had worsened as a result of his work activity. The Workers' Compensation Board reversed the referee's order. Claimant appeals from the Board's order reinstating SAIF's denial of the claim. We reverse.

The issue in this proceeding is compensability; whether claimant has shown that his work activity has caused a worsening of the underlying disease and not merely an increase in symptoms. In Weller v. Union Carbide, 288 Or 27, 602 P2d 259 (1979), the court held that, in order for pain from a preexisting disease to be compensable, the claimant

> " * * * would have to prove by a preponderance of evidence that (1) his work activity and conditions (2) caused a worsening of his underlying disease (3) resulting in an increase in his pain (4) to the extent that it produces disability or requires medical services. * * *" 288 Or at 35

The second element is at issue here.

The record shows that claimant, age 51 at the time of the hearing, had worked as a spreaderman for the employer for eighteen and one-half years. His work entailed repetitive arm and shoulder motions in feeding pieces of veneer into the spreader, one step in the manufacture of plywood. About one and one-half to two years before the hearing, claimant began to have trouble with his right shoulder. He had noticed pain and discomfort for the last five to six years. In August, 1979, he sought medical attention from Dr. O'Toole, whom he had seen for a variety of other ailments during 1979. Dr. O'Toole's chart notes for that visit state:

> "August 23, 1979--Has both right epicondylitis and AC [acromioclavicular] joint degenerative arthritis and pain, presumably one came first and then the other was exacerbated by alteration and physical motion in accomplishing customary tasks on the green chain. * * * "

Claimant sought medical attention from a second physician, Dr. Weinman, in early 1980. Dr. Weinman's written report of his examination of claimant on March 13, 1980, states:

> "Impression: Degenerative joint disease and possible internal derangement of right acromioclavicular joint.
>
> "Recommendations: He's a candidate for a Mumpford operation to excise the distal clavicle. He'll think it over and let us know."

Because he lacked funds, claimant postponed the operation in order to investigate whether his employer, through SAIF, would cover the expenses. In this regard, Dr. Weinman wrote to SAIF on March 31, 1980: "I do think that repetitive activity of the kind that he describes to me probably has contributed to his problem." SAIF consulted Dr. Harwood, who concluded on the basis of Dr. Weinman's report:

> " * * * [I]n my professional opinion, the current right shoulder problem is not the result of his work activity as far as etiological factor is concerned. * * * So, I feel that this is a pre-existing degenerative joint disease of the shoulder, which has been aggravated by the above work activities, not caused by it."

Claimant underwent the recommended surgery and pursued his administrative remedies. In preparing for the hearing before the referee, SAIF again solicited Dr. Weinman's medical opinion. In his letter of June 27, 1980, he stated: "It is my opinion that this patient's job aggravated the disease process, necessitating his Mumpford excision of the distal clavicle on May 22, 1980."

SAIF also consulted Dr. Brooke, who reviewed claimant's medical file. In his letter of September 2, 1980, Dr. Brooke concluded: "This [treatment] was however, to correct a pre-existing condition rather than the transcient [sic] aggravation of symptoms provoked by his employment. In this regard, please note that I am in complete agreement with the assessment of Dr. Harwood." SAIF asked Dr. Weinman to respond to Dr. Brooke's conclusion. Dr. Weinman wrote, on September 17, 1980, that the purpose of the operation was to relieve claimant's pain. His report continued:

> " * * * If I am to report the attitude and the history as obtained from the patient, I must feel that:
> "1) He had pre-existing acromioclavicular joint disease.
> "2) It was made symptomatic by his job."

Based on the record developed at the hearing, the referee stated in his opinion and order:

> "Applying the test of preponderance of evidence; that being whether the facts asserted are more probably true than false, I conclude the claimant has established compensability under the criteria set forth in Weller v. Union Carbide, * * * . I specifically find that the claimant's work over eighteen and a half years required repetitive use of his arms and shoulders which tended to aggravate, make worse, the underlying joint disease as described by his attending physicians. This work activity did more than merely produce symptoms, it made the underlying condition, (disease), worse. (Ex. 17). This worsening resulted in an increase in claimant's pain (symptoms) requiring the surgery performed and

described. The claimant has met his burden of proof."

We agree with the referee's conclusion. Claimant's attending physicians both stated that claimant has degenerative joint disease that was "exacerbated" (Dr. O'Toole) or "aggravated" (Dr. Weinman) by his work activities. Dr. Harwood agreed with Dr. Weinman, but emphasized that claimant's work activities did not cause the disease but only aggravated a preexisting disease. This distinction is immaterial to this workers' compensation claim, however, if the Weller criteria are satisfied.

Dr. Brooke agreed generally with Drs. O'Toole, Weinman, and Harwood, but noted that the surgery was to treat the preexisting disease, not the work-caused aggravation of symptoms. In his September 17, 1980, letter Dr. Weinman appeared to agree with Dr. Brooke by saying that claimant's preexisting disease was made symptomatic by his job. We do not so interpret Dr. Weinman's last statement, however. It is also consistent with the view that the preexisting disease worsened and became symptomatic. This is the view that Dr. Weinman's earlier statements reflect, as do Dr. O'Toole's and Dr. Harwood's statements. Although Dr. Brooke disagreed, we find the weight of the medical opinion evidence favors claimant.

Autwell v. Tri-Met, 48 Or App 99, 615 P2d 1201, rev den 290 Or 211 (1980), and Slechta v. SAIF, 43 Or App 443, 603 P2d 366 (1979), rev den 288 Or 519 (1980), are distinguishable. In Autwell, the claimant's job as a bus driver caused him serious pain. The medical opinions agreed that the claimant's life-long knee problems had not worsened; they had only become symptomatic. Under Weller, the claimant failed to prove that his underlying disease had worsened. In Slechta, the claimant suffered from degenerative arthritis in his lower back, affecting his work as a maintenance carpenter. His physician initially stated that the disease was preexisting and that claimant's work aggravated his problem. On cross-examination by SAIF, the physician explained that the claimant's work would cause the disease to become increasingly symptomatic, but that claimant's work was not the cause of continuing degeneration of his spine. Thus, under Weller, the claimant failed to prove that his underlying disease had worsened due to his work activity. In contrast, claimant here showed that his work activity did cause a worsening of his preexisting acromioclavicular joint disease. Claimant has met his burden of proof.

Reversed with instructions to reinstate the referee's order.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of
Miner Lee Harris, Claimant,

Miner Lee Harris,

Petitioner,

v. No. 79-9167
CA A21009

SAIF Corporation,

Respondent.

*****

Judicial Review from Workers' Compensation Board.

Argued and submitted October 30, 1981.

Evohl F. Malagon, Eugene, argued the cause for petitioner. With him on the brief was Malagon, Velure & Yates, Eugene.

Darrell E. Bewley, Appellate Counsel, SAIF, Salem, argued the cause and filed the brief for respondent.

Before Joseph, Chief Judge, and Richardson and Warren, Judges.

JOSEPH, C. J.

Reversed with instructions to reinstate the order of the referee.

FILED: December 14, 198

JOSEPH, C.J.

The issue in this workers' compensation case is the extent of unscheduled disability for a low back injury. By the determination order claimant was awarded 40 percent; after a hearing the referee awarded 60 percent; the Workers' Compensation Board reduced the award to 40 percent. Claimant appeals.

Claimant is a 49-year-old logging-truck driver with a 7th grade education and work experience primarily in heavy physical labor. In 1964, he injured his low back in a work-connected fall in California; in 1965, he underwent a laminectomy and fusion; in 1966, the fusion was surgically repaired. Claimant received a lump sum award of $5600 for that injury for residual permanent disability; the record does not reveal what percentage of disability that represented under the California workers' compensation system. In 1969, he returned to full-time work driving trucks. On October 22, 1978, he sustained a compensable low back injury while loading logs and has not worked since.

In February, 1979, a consulting neurosurgeon characterized claimant's condition as:

> " * * * a moderately severe and probably permanent disability involving the lumbar spine characterized by limitations of the range of motion, physical intolerance to strains and stresses, or other forces bearing on the lumbar spine, such as heavy lifting, pulling, pushing, back bending, and twisting, and by a probably chronic pain syndrome which may fluctuate in severity from time to time."

In March, 1979, that doctor stated that claimant did not appear to be able to return to his previous occupation as a truck driver, and in May, 1979, he recommended vocational rehabilitation for light work placement. In June, 1979, he described claimant's work limitations as:

> " * * * avoidance of lifting in excess of 20-25 lbs., avoidance of back-bending and twisting, and avoidance of prolonged posture for more than two hours and avoidance of operation of heavy machinery or equipment."

In August, 1979, claimant's treating doctor also recommended retraining or placement in a lighter type of employment. At the time of the referee's hearing, claimant had recently been contacted by a vocational rehabilitation counselor and was scheduled for an appointment.

The referee said in his opinion and order that, although claimant's residual disability from his 1964 injury might have "impaired" occupations requiring heavy lifting, the 1978 injury foreclosed him from the occupation in which he had had the most experience. The Board, however, reinstated the determination order of 40 percent, because it considered the referee's award of 60 percent "excessive for the residual effects of this injury and its relationship to claimant's loss of wage earning capacity." (Emphasis in original.)

In the exercise of our independent judgment on de novo review, we measure the extent of permanent partial disability by the loss of earning capacity due to the compensable injury, taking into account age, education, training,skills and work experience. ORS 656.214(5); Smith v. SAIF, 51 Or App 833, 836, 617 P2d 495 (1981). ORS 656.222[1] requires that the combined effect of claimant's prior injuries and his past award for any previous disability also be considered. After the original injury, claimant was eventually able to return to truck driving, and he earned his living at that job for nine years before the 1978 accident. Although we recognize that claimant's earning capacity may have been somewhat diminished after the California injury, claimant nonetheless could still work at the type of job in which he was most experienced and in which his pre-1978 earning capacity inhered. Under the facts here, after due consideration given to the previous award, we conclude claimant would be fairly compensated by the award made by the referee.

Reversed with instructions to reinstate the order of the referee

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1 ORS 656.222 provides:

> "Should a further accident occur to a worker who * * * has been paid or awarded compensation for a permanent disability, his award of compensation for such further accident shall be made with regard to the combined effect of his injuries and his past receipt of money for such disabilities."

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation
of Robert K. Hedlund, Claimant.

Robert K. Hedlund,

Petitioner,

v. No. 79-09967
CA A21495

State Accident Insurance Fund
Corporation,

Respondent.

* * * * * *

Judicial Review from Workers' Compensation Board.

Submitted on record and briefs October 15, 1981.

Robert K. Udziela and Pozzi, Wilson, Atchison, Kahn & O'Leary, Portland, filed the brief for petitioner.

Darrell E. Bewley, Appellate Counsel, State Accident Insurance Fund Corporation, Salem, filed the brief for respondent.

Before Gillette, Presiding Judge, and Roberts and Young, Judges.

GILLETTE, P. J.

Reversed and remanded with instructions to reinstate referee's order.

FILED: DECEMBER 30, 1981

GILLETTE, P.J.

Claimant appeals from an order of the Workers' Compensation Board that deleted a referee's award of temporary total disability compensation and sua sponte reduced the amount of fees awarded to his attorney. We reverse and reinstate the referee's order.

Claimant suffered a compensable injury in March, 1978, when he was involved in a sewer cave-in while working as a pipe-layer. A fellow worker was killed. On the basis of the physical injuries claimant received in that accident, he was awarded temporary total disability to August 20, 1978, by a determination order dated October 26, 1978.

SAIF reopened the claim in August, 1979, after claimant began seeing Dr. Mighell, a psychiatrist, for treatment. Claimant complained of inability to work and, specifically, that he was unable to work near ditches. Dr. Mighell concluded that claimant was suffering from a traumatic neurosis directly traceable to the cave-in incident so that he could no longer work as a pipe-layer; he suggested that claimant could work productively in another line of work. Claimant was seen by two other psychiatrists and a clinical psychologist. All agreed that his psychological condition was related to the original accident.

The aggravation claim was closed by a second determination order, dated April 16, 1980, which awarded temporary toal disability from August 23, 1979, to March 19, 1980. The order did not award claimant any permanent partial disability.

Claimant requested a hearing. The referee held that claimant was entitled to 30 percent unscheduled permanent partial disability. He also awarded claimant additional temporary total disability from February 1, 1979, to August 22, 1979, less time worked. Finally, the referee awarded claimant's attorney 25 percent of the temporary total disability award, not to exceed $750, and 25 percent of the permanent partial disability award, the total fee not to exceed $2000. SAIF appealed to the Board, which affirmed the permanent partial disability award, deleted the additional temporary total disability award made by the referee and reduced claimant's attorney's fees award to a maximum of $1250. This appeal followed.

Claimant first asserts that the Board erred in deleting the referee's award of temporary total disability for the period between February 1 and August 22, 1979. He argues that a preponderance of the evidence proves that he was unable to and did not work during that period due to his compensable injury. SAIF argues that 1) the medical evidence shows only that claimant was unable to return to his work as a pipe-layer; 2) the record supports a finding that claimant did work during the relevant period; and 3) no

medical evidence exists to show that claimant first developed his disabling symptoms in February, 1979, inasmuch as he did not seek treatment for the aggravation until August of that year.

The evidence supports the referee's conclusion that the aggravation of claimant's earlier compensable injury began in February, 1979. Dr. Mighell wrote, "[Claimant] has not wokred since February, 1979. I feel that he has been suffering from temporary total disability since this time * * * ." SAIF offered no testimony to dispute Dr. Mighell's conclusion. It merely points out that claimant did not see any doctor until August, 1979, and so there is no first hand evidence that he was actually suffering from the disability in February. We hold that claimant's history as he gave it to Dr. Mighell (and, later, another doctor) to the effect that he last worked in January, 1979, and that his symptoms began at that time, combined with Dr. Mighell's conclusion that claimant had been suffering from his disabling condition since that time, preponderates in favor of extending the period during which claimant was entitled to temporary total disability payments.

SAIF argues that claimant was not entitled to temporary total disability compensation, because he was fit for other forms of employment during the relevant period. SAIF points to a comment in Dr. Mighell's initial evaluation that claimant worked as a "backfill man" for the first six months of 1979. It also points to another of his comments to the effect that it "would be helpful' for claimant to return to work.

We first point out that a preponderance of the evidence indicates that claimant's work history in 1979 was limited to two very brief, unsuccessful attempts at returning to construction work.[1] Although claimant apparently told Dr. Mighell initially that he had worked for six months in 1979, both Dr. Mighell and a psychologist, Dr. Quan, indicate in their written reports of later meetings with claimant that his work history in 1979 was limited to one or two very brief, unsuccessful attempts at return to construction work. Claimant also testified before the referee that he had worked only two days in May and three days in August, 1979. SAIF did not provide evidence to the contrary.[2] We conclude from the entire record that the statement contained in Dr. Mighell's initial report that claimant worked six months during 1979 was in error.

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1 The fact that a worker is capable of working a few hours at a time at light work does not affect the right to temporary total disability payments. Vader v. SIAC, 163 Or 492, 98 P2d 714 (1940).

2 The referee made no finding that claimant's testimony was less than credible; we assume from the nature of the order he entered that the referee believed that testimony. See Locke v. SAIF, 21 Or App 725, 726, 536 P2d 534 (1975).

Claimant's failure to work at some job other than his usual profession during the period before his condition became stabilized does not affect his entitlement to temporary total disability compensation, which is "compensation for loss of income until claimant's condition becomes stationary in order to enable a claimant to support self and family during that period." Taylor v. SAIF, 40 Or App 437, 595 P2d 515, rev den 287 Or 477 (1979). ORS 656.005(21) defines "medically stationary" to mean

> " 'Medically stationary' means that no further medical improvement would reasonably be expected from medical treatment or the passage of time."

A temporary total disability award is intended, therefore, to compensate an injured worker at least until it is determined to what extent he may be expected to recover from his injury. It would not be reasonable to require a claimant to train for or adapt to a new line of work while his ability to return to his usual line of work is not yet determined. The Board erred in doing so.[3]

The Board also decreased the referee's award of attorney's fees. It stated:

> "* * * The Board reverses that portion of the referee's order which awarded increased temporary total disability. Because of this modification, the referee's order is further modified to provide that claimant's attorney's fee, payable from claimant's increased compensation, shall not exceed $1250." (Emphasis supplied.)

The Board's decision to decrease attorney's fees was based on its deletion of the increased temporary total disability award. Because we hold that the Board erred in deleting the additional award, we also hold it erred in reducing the award of attorney's fees.

Reversed and remanded with instructions to reinstate the referee's order.

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[3] Claimant was not avoiding work during the period of his temporary total disability. He twice attempted to return to his usual line of work but was prevented by his psychological condition from remaining on the job. When Dr. Mighell suggested that he seek work in another field, claimant unsuccessfully sought employment as a longshoreman. SAIF does not argue that claimant was, either at the time of his injury or at the time presently under consideration, qualified for immediate entry into some other line of work.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of
Charles L. Livesay, Claimant.

Charles L. Livesay,

Petitioner,

v. WCB Case No. 79-10108
CA A21082

State Accident Insurance Fund Corporation,

Respondent.

* * * * * *

Judicial Review from Workers' Compensation Board.

Argued and submitted September 23, 1981.

Robert S. Gardner, Corvallis, argued the cause for petitioner. On the brief were J. W. Walton and Ringo, Walton, Eves & Gardner, P.C., Corvallis.

Darrell E. Bewley, Appellate Counsel, State Accident Insurance Fund Corporation, Salem, argued the cause and filed the brief for respondent.

Before Buttler, Presiding Judge, and Warden and Warren, Judges.

WARREN, J.

Reversed and remanded with instructions to make an award of permanent total disability.

FILED: December 30, 1981

WARREN, J.

This is an appeal from a Workers' Compensation Board decision affirming the order of the referee which granted claimant compensation equal to 90 degrees for 60 percent loss of his right leg and 240 degrees for 75 percent unscheduled disability for injury to his left hip and right shoulder. The only issue on appeal is whether claimant is permanently and totally disabled. We review de novo. ORS 656.298.

Claimant is 43 years old and has a seventh grade education. He has no special skills or trade and has worked as a timber feller since 1961. He has always been a laborer; he has never held a supervisory position. In 1966, claimant sustained his first industrial injury, to his right knee, resulting in surgical removal of cartilege, for which he was awarded no permanent partial disability. In 1971, he sustained a fracture to his left heel and a weakened left ankle. In 1977, he sustained a fracture of his left knee, which required surgical repair. The current injury occurred in February, 1978, when claimant sustained a fractured left hip, a fractured right knee and an injury to his right shoulder. As a result of his last injury, claimant underwent surgical replacement of his left hip and right knee joint and faces the possible need for replacement of the left knee joint and surgery to his right shoulder.

As a result of his injuries, claimant's activities are greatly restricted. He has difficulty standing and walking, cannot stoop and has no lateral movement. He also has only about 50 percent strength in his right shoulder and limited movement of the shoulder. He clearly cannot return to the type of job he held before his injury.

Claimant received counseling from a vocational nurse at SAIF, was tested by a private vocational consulting firm and was placed at the Willamette Rehabilitation Center for evaluation of his on-the-job limitations. Claimant was found to be highly motivated but severely restricted physically. It was the opinion of his counselors that vocational retraining was not appropriate because of claimant's age, education and work background. Claimant expressed an interest in buying a small restaurant. His wife has experience in the restaurant business, and he felt he could work on a part-time basis. This possibility was investigated, but it was abandoned when tests showed that claimant did not have the necessary math and bookkeeping skills to operate a business.

Claimant's vocational counselor testified that his physical limitations made it unlikely that he would be able to find a job, because:

> " * * * Any job he had or got would have to be so flexible that he would have to be able to sit as long as he wanted, stand as long as he wanted, be able to come and go pretty much as he pleased with the restrictions of knowing he's only going to be at work two, maximum three days a week and the rest of the week he would be off because he hurt too bad. That kind of job is difficult to find. * * * "

A rehabilitation coordinator at the Willamette Rehabilitation Center testified that, considering claimant's situation, age, work experience and injuries, she did not think any employment would be available to him, and the area supervisor of the Workers' Compensation Department Field Services Division wrote that claimant could not hold down a full-time job.

In his opinion, the referee stated that claimant had no training which would qualify him for any occupation other than those involving heavy labor, which he is no longer physically able to perform. However, the referee refused to find claimant permanently and totally disabled, because he found "claimant has resources left to him * * * even without vocational help." These resources appear to be claimant's strong desire to be gainfully employed and his interest in the possibility of owning a restaurant. The record shows that claimant has no experience in the restaurant business and was lacking in business skills. Claimant's wife has had experience in the restaurant trade, but her experience is irrelevant to a determination of whether claimant is permanently and totally disabled.

"Permanent total disability" and "suitable occupation" are defined by ORS 656.206(1)(a):

> " 'Permanent total disability' means the loss, including preexisting disability, of use or function of any scheduled or unscheduled portion of the body which permanently incapacitates the worker from regularly performing work at a gainful and suitable occupation. As used in this section, a suitable occupation is one which the worker has the ability and the training or experience to perform, or an occupation which he is able to perform after rehabilitation."

Permanent total disability may be based on a combination of medical and non-medical conditions, including age, education, adaptability to non-manual labor and mental capacity, as well as conditions of the labor market. Morris v. Denny's, 50 Or App 533, 537, 623 P2d 1118 (1981); Wilson v. Weyerhaueser, 30 Or App 403, 567 P2d 567 (1977). Where, from a realistic standpoint, these conditions result in claimant being foreclosed from the labor market, a finding of permanent total disability is appropriate. Peterson v. SAIF, 52 Or App 731, 734, 629 P2d 843 (1981).

In this case, there is evidence that claimant is not totally physically disabled; however, the opinion of vocational experts is that his prospects for finding gainful employment, if they exist at all, are very limited because of his age, training and capacity. Claimant has made substantial efforts to find some type of work he can perform; he wants to work. There is evidence that it was felt that a determination that claimant was permanently and totally disabled might cause him to lose his motivation to look for work. We do not believe that claimant should be penalized for his spirit and determination. Furthermore, the concern is not what the future may hold, but rather whether claimant is able at present to perform a gainful and suitable occupation. In Gettman v. SAIF, 289 Or 609, 614, 616 P2d 473 (1980), the claimant was found ineligible for vocational rehabilitation services but was denied permanent total disability because of his potential for retraining. The Supreme Court concluded, as we did in Leedy v. Knox, 34 Or App 911, 581 P2d 530 (1980), that denial or deferral of an award of permanent disability cannot await the results of possible future change in employment status, but must be based on conditions as they exist as the time of the award. In Gettman, the Supreme Court said:

> "ORS 656.206(1)(a) * * * provides that a 'suitable occupation' includes one which the claimant 'is able to perform after rehabilitation.' We conclude that the language of this statute, which speaks in the present tense, precludes cancellation of a permanent total disability award based upon a speculative future change in employment status. In other words, whether this claimant is permanently totally disabled must be decided upon conditions existing at the time of decision, and his award of compensation for permanent total disability can be reduced only upon a specific finding that the claimant presently is able to perform a gainful and suitable occupation." 289 Or at 614

There was no finding here that claimant is presently able to perform any gainful and suitable occupation and, so far as we can determine from the record, the only resource left to claimant is his motivation to work despite his disability. Residual motivation to work is not, without the ability to work, salable on the employment market and is not a basis for denial of an award of permanent total disability. We find that claimant is not presently capable of regularly performing work at a gainful and suitable occupation and conclude that he is permanently and totally disabled.

Reversed and remanded with instructions to make an award of permanent total disability.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation
of Arlie H. Johns, Claimant.

Arlie H. Johns,

Petitioner,

v. No. 80-08634
CA A21958

Utility Trailer & Equipment Co.,

Respondent.

* * * * * *

Judicial Review from Workers' Compensation Board.

Argued and submitted December 9, 1981.

Roger G. Weidner, Portland, argued the cause and filed the brief for petitioner.

Scott M. Kelley, Portland, argued the cause for respondent. With him on the brief was Cheney & Kelley, Portland.

Before Gillette, Presiding Judge, and Roberts and Young, Judges.

PER CURIAM.

Reversed and remanded to Workers' Compensation Board with instructions.

FILED: DECEMBER 30, 1981

Cite as 55 Or App 431 (1981)

PER CURIAM.

The decision of the Workers' Compensation Board to the effect that there is no bona fide dispute between the parties under ORS 656.289(4) is reversed, and the case is remanded to the Board to perform its review of the parties' agreement pursuant to that statute.

though he said the depressive neurosis should improve in future years.

The referee found Dr. Colbach's opinion "not very persuasive," and on the basis of the opinion of the treating physician, Dr. Martin, he held that claimant's condition on August 10, 1979 was not medically stationary. The Board reversed, saying

> "Although Dr. Martin does not find claimant's psychological condition to be stationary, it appears that claimant will not be declared stationary by this doctor until claimant is vocationally retrained and back to work."

We find the opinion of Dr. Colbach, who examined claimant only once eight months after closure, to be of little weight in determining whether claimant's psychological condition had stabilized earlier. The unwavering opinion of claimant's treating physician, who had seen him for over a year, was that the claimant was not medically stationary. Employer's only attack on Dr. Martin's testimony was an assertion that the doctor's desire to see claimant receive vocational training, and his mistaken belief that claimant could not do so after his time loss benefits were terminated, provided a motive for the doctor to "change his story" after the August 10 letter. Claimant has met his burden of proof in showing that he was not medically stationary on August 10, 1979.

The order of the Board is reversed, and the referee's order is reinstated.[2]

Reversed.

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[2] Because of the manner in which we decide this case, we do not reach claimant's second assignment of error, that the Board erred in reinstating the original determination order rather than remanding for a hearing on the extent of disability.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Merle Cooper, claimant.

COOPER,

Petitioner,

v.

STATE ACCIDENT INSURANCE FUND CORPORATION, et al,

Respondents.

(WCB No. 79-8266, CA 19780)

Judicial Review from Workers' Compensation Board.

Argued and submitted May 29, 1981.

David W. Hittle, Salem, argued the cause for petitioner. With him on the brief was Olson, Hittle, Gardner & Evans, Salem.

Darrell E. Bewley, Associate Counsel, State Accident Insurance Fund Corporation, Salem, argued the cause for respondent State Accident Insurance Fund Corporation. With him on the brief were K. R. Maloney, General Counsel, and James A. Blevins, Chief Trial Counsel, State Accident Insurance Fund Corporation, Salem.

Margaret H. Leek Leiberan, Portland, argued the cause for respondents Rosoboro Lumber and EBI. With her on the brief was Lang, Klein, Wolf, Smith, Griffith & Hallmark, Portland.

Before Gillette, Presiding Judge, and Roberts and Young, Judges.

YOUNG, J.

Affirmed.

YOUNG, J.

Claimant appeals the denial of his workers' compensation claim. He pressed his claim as either a compensable injury or an occupational disease. No party has chosen one or the other theory exclusively. The referee denied the claim. On review the Board affirmed the denial. The central question is compensability. If we determine the claim to be compensable, we must then determine the responsible carrier. We review *de novo,* ORS 656.298(6), and affirm.

The essential facts are not seriously disputed. Claimant is 57 years old. He worked for 20 years at Rosboro Lumber Company as a core layer in the plywood mill. Sometime in early May 1979, a piece of core or veneer "jumped" with some force from a machine where claimant was working, caught his gloved right hand and "snapped [his] wrist sideways." Claimant experienced some pain, complained to co-workers about it and finished his shift. Swelling developed in the wrist during the day and continued until surgery in October, 1979. Claimant did not seek medical help and continued working for several weeks. He wore an elastic bandage to control the swelling.

In late July, claimant injured his left elbow at work. That injury required him to see Dr. Bylund. Because the right wrist was painful and swollen, he asked the doctor to examine his wrist. Dr. Bylund diagnosed tendonitis and referred claimant to Dr. Carter, an orthopedic surgeon. He examined the wrist on September 6, 1979, and found a preexisting condition diagnosed as "an old scapholunated dissociation with secondary degenerative change of the radioscaphoid joint * * * related to what appears to be an old trauma." The diagnosis was a condition that preexisted the May, 1979, injury.

On September 24, 1979, Dr. Carter reported that claimant was unable to work because of wrist pain. "Based on the degree of post-traumatic arthritis that [claimant has] it would be perfectly expected that he would have a level of pain that would preclude his working." Employee Benefits Insurance Company (EBI) paid time loss from September 6, 1979 to November 16, 1979. Wrist surgery was performed in October.

Dr. Carter was firm in his opinion that the underlying wrist condition was unrelated to the employment. He reported in September, 1979 that

> "* * * I have also pointed out to him [claimant] again today that he has a condition which is a post-traumatic arthritis as a result of an injury at some time in the past and that the fact that he has presented only recently with symptoms of pain is or would be a natural progression of that particular type of disease."

On March 31, 1980, Dr. Carter responded in writing to questions asked by claimant's attorney. The pertinent questions and answers are:

> "1. * * * [W]as Mr. Cooper's injury in May, 1979, * * * the 'old scapholunate dissociation' that you referred to in your letter of report of September 6, 1979?"
>
> "* * * [W]hen I examined him and reviewed x-rays of his wrist in September 1979, the x-ray appearance of the wrist indicated that the process had been present most likely for many years and was not an injury that occurred as recently as May 1979. Therefore, the injury in May of 1979, was not the 'old scapholunate dissociation' that I referred to in my letter report of September 6, 1979. The x-ray appearance was, in fact, such that one would have expected the disease process to have been present for many years."
>
> "2. * * * [W]as Mr. Cooper's injury in May, 1979, * * * a material contributing cause of the condition for which you performed the wrist surgery * * *?"
>
> "The injury of May 1979, was in my opinion an incident that brought to light an underlying disease process that would have become symptomatic as a matter of time with or without that injury of May 1979."
>
> "3. * * * [W]as Mr. Cooper's work activities * * * a material contributing cause of the condition for which you performed wrist surgery * * *?"
>
> "In my opinion Mr. Cooper's work activities were not a material contributing cause of the condition for which I performed wrist surgery in October 1979."
>
> "4. * * * [D]id Mr. Cooper's work activities materially aggravate Mr. Cooper's underlying condition for which you performed the wrist surgery in October, 1979?"
>
> "* * * [I]t is my opinion that Mr. Cooper's work did materially aggravate Mr. Cooper's conditon in that it allowed his condition to remain symptomatic in the form of pain."

Claimant did not seek medical attention for two to three months following the May incident. Claimant did not establish by a preponderance of the evidence that it was the injury and not the underlying condition that required medical care. It was not the May incident itself that required medical attention but rather the pain associated with the underlying condition. In Dr. Carter's opinion the work activities "were not a material contributing cause of the condition for which he performed wrist surgery in October 1979." Consequently, claimant has not established a compensable injury.

The issue of whether claimant has proven an occupational disease claim is more difficult. ORS 656.802(1)(a) defines occupational disease:

> "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."

In *Beaudry v. Winchester Plywood Co.*, 255 Or 503, 469 P2d 25 (1970), the court held that a disability resulting from a worsening of the preexising conditon by reason of claimant's work activities and conditions were compensable and within the definition. The seminal case for our analysis is *Weller v. Union Carbide*, 288 Or 27, 603 P2d 259 (1979), an occupational disease claim. There the court held that in order to prevail a claimant must show 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 in his pain (4) to the extent that it produces disability or requires medical services.

There is no evidence in this record of a work incurred or work induced physiological or pathological change in the underlying condition. On the contrary, the evidence is that the May injury and the subsequent work activities aggravated the condition, resulting in a change of symptoms only, i.e., pain, and not a change in the underlying condition. Under the *Weller* test, without a worsening of the underlying condition the claim is not compensable.

There is nothing in the record to explain how pain can occur without a contemporaneous worsening of the underlying disease. In this case, the pain was of sufficient

intensity to be disabling, and claimant was unable to work because of the pain and submitted to an operation. However, under *Weller* we are not entitled to presume that pain and a worsening of the underlying condition are connected.

Affirmed.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
Gary W. Hunter and Michael LeRoy, Claimants.

MULTNOMAH COUNTY,
Petitioner,
v.
HUNTER, et al,
Respondents.

(Nos. 79-4980, 79-10169, 79,10606 CA A20559)

Judicial Review from Workers' Compensation Board.

Argued and submitted August 21, 1981.

Paul G. Mackey, Deputy County Counsel, Portland, argued the cause for petitioner. With him on the brief was John B. Leahy, County Counsel, Multnomah County Counsel, Portland.

Daniel C. Dziuba, Portland, argued the cause for respondents Gary Hunter and Michael Leroy. With him on the brief were Pozzi, Wilson, Atchison, Kahn & O'Leary, Keith E. Tichenor and Robert K. Udziela, Portland.

Darrell E. Bewley, Appellate Counsel, State Accident Insurance Fund, Salem, argued the cause and filed the brief for respondent State Accident Insurance Fund Corporation.

Before Gillette, Presiding Judge, and Roberts and Young, Judges.

GILLETTE, P. J.

Reversed and remanded with instructions to reinstate the referee's opinion.

PROPERTY OF
WORKMEN'S COMPENSATION BOARD
SALEM, OREGON

INDEX CONTENTS

Overview of Subject Index	874
Subject Index	876
List of Own Motion Rulins	891
Case Citations	894
Van Natta's Citations	899
ORS Citations	901
Administrative Rule Citations	902
Larson Citations	903
Claimants Index	904

OVERVIEW OF SUBJECT INDEX

AOE/COE

AFFIRM & ADOPT
See MEMORANDUM OPINIONS

AGGRAVATION CLAIM

AGGRAVATION/NEW INJURY

AGGRAVATION (WELLER)

AGGRAVATION (WORSENING)

APPEAL & REVIEW

ATTACHMENT
See GARNISHMENT

ATTORNEY'S FEES

BENEFICIARIES

CAUSATION

CLAIMS, FILING

CLAIMS, PROCESSING

COLLATERAL ESTOPPEL

CONDITIONS
See OCCUPATIONAL DISEASE, CONDITION OR INJURY

CONSTITUTIONAL ISSUES

DENIAL OF CLAIMS

DEPENDENTS
See BENEFICIARIES

DETERMINATION ORDER

DISCOVERY

DISPUTED CLAIM SETTLEMENTS
See SETTLEMENTS & STIPULATIONS

DOCUMENTARY EVIDENCE

EMPLOYMENT RELATIONSHIP

EVIDENCE

FEDERAL EMPLOYEES LIABILITY ACT

FIREFIGHTERS

GARNISHMENT

HEART ATTACKS, HEART DISEASE

INDEMNITY ACTIONS

INMATE INJURY FUND

INTERIM ORDER

JURISDICTION

LUMP SUM
See PAYMENT

MEDICAL CAUSATION

MEDICAL OPINION

MEDICAL SERVICES

MEDICALLY STATIONARY

MEMORANDUM OPINIONS

NON-COMPLYING EMPLOYER

NON-SUBJECT/SUBJECT WORKERS

OCCUPATIONAL DISEASE CLAIMS

OCCUPATIONAL DISEASE, CONDITION OR INJURY

OFFSETS

ORDER ON REVIEW

OWN MOTION RELIEF

PAYMENT

PENALTIES

PPD (GENERAL)

PPD (SCHEDULED)

PPD (UNSCHEDULED)

PERMANENT TOTAL DISABILITY

PSYCHOLOGICAL CONDITIONS & FACTORS

RECONSIDERATION

REMAND

REOPENING CLAIM WITHIN ONE YEAR OF DETERMINATION ORDER

REQUEST FOR HEARING

REQUEST FOR REVIEW--BOARD

RES JUDICATA

SETTLEMENTS & STIPULATIONS

SUBJECT WORKERS
See NON-SUBJECT/SUBJECT WORKERS

SUCCESSIVE INJURIES
See AGGRAVATION/NEW INJURY

TEMPORARY TOTAL DISABILITY

THIRD PARTY CLAIM

TORT ACTION

VOCATIONAL REHABILITATION

SUBJECT INDEX

(Volumes 32 and 33)

AOE/COE (ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT)
See also: CAUSATION; EMPLOYMENT RELATIONSHIP; HEART ATTACKS, HEART DISEASE; MEDICAL CAUSATION; NON-SUBJECT WORKERS
Drinking, 728
Going & coming rule, 19
Injury at work
Acute back strain, 219
Parking lot, 284
Personal project as bonus, 487
Premises, 19,284
Public street, 396
Unknown vs. idiopathic causation, 509
Work-connection test, 19,396

AFFIRM & ADOPT See MEMORANDUM OPINIONS

AGGRAVATION CLAIM
Compared with Reopening, 291
"Dry" aggravation, 621
Made after request for hearing on D.O., 291
Medical only, no D.O., 131

AGGRAVATION/NEW INJURY
Aggravation found, 55,68,155,195,243,295,324,462,472,545, 815,833
Applied to out-of-state employer, 545
Continuing symptoms, 55,68
Different test for off-job injury, 331,477,501,562
Intervening injury vs. last injurious exposure, 559
Intervening (off-job) injury, 477,486,559,562
Last injurious exposure rule not applicable, 833
Massachusetts-Michigan rule, 55
Neither found, 120
New injury found, 51,107,535,741,850
Right shoulder/left shoulder relationship, 815
.307 Order
Duty to request, 155,295

AGGRAVATION (WELLER)
See also: REOPENING
Applies to occupational disease and injury, 545
Symptoms alone not compensable, 193
Right knee injury aggravates left knee, 847
Temporary worsening, 139
Traumatic injury distinguished, 220
Underlying disease
Not worsened, 14,217,465,539,545,629,676,799,806
Worsened, 445,773,847,857
Weller applicable only where underlying condition symptomatic, 615

AGGRAVATION (WORSENING)
See also: REOPENING
Collateral attack on D.O. forbidden, 21
Credibility, 5,309
Industrial causation not proven, 617
No worsening shown, 21,76,121,252,273,440,515,617
Not due to injury, 5,11,701
Objective findings required, 134
Occupational disease
Successive exposures, 682
Off-job injury, 331
Permanent disability where none at closing, 309
Pre-existing condition worsened, 111
Psychological condition, 829
Scheduled test spreads to unscheduled area; Woodman test, 452
Two injuries: which caused worsening, 621
Worsened condition defined, 76
Worsening shown, 48,92,280,309,571,621,753,820,829,843

APPEAL & REVIEW
See also: REMAND; REQUEST FOR HEARING; REQUEST FOR REVIEW
Issue not raised can't be decided, 799
Retroactivity of case law, 707

ATTACHMENT See GARNISHMENT

ATTORNEY'S FEES
Award
Affirmed, 464,671,864
Ch. 655 proceeding, 533
Premature, 198,687
Reversed, 247,450
Based on efforts & results, 138,154,276,286,301,512
Based on gross, not net, award, 531
Board Review
Added by amendment, 86,94
Efforts, 286
Entitlement to carrier-paid, fee, 478
Court case, determining party, 373
In dispute between carriers, 154
Inmate injury claim, 171,251
Memorandum invited; permitted, 51,276
Modified, 25
Net increase in compensation needed, 221
No award from future benefits, 687
None awarded, despite penalty, 324
Partial denial overturned, 53,380
Penalty issue
Reasonable/unreasonable effort, 505
Mandatory vs. discretionary, 478,669
Range of fees, 216
Referee's authority limited, 276,687
Source of fee, 380
Suggested schedule, 373
Third party recovery, 261
Workers' Compensation Board jurisdiction, 346,373

BENEFICIARIES
Common-law marriage must be proven, 439
Of PTD, 104
Unmarried fathers, 777

CAUSATION
See also: MEDICAL CAUSATION
2nd injury, condition caused by first, 5,18

CLAIMS, FILING
Late filing for injury, 535
Occupational disease, 107,139,364,716
Occupational disease vs. injury, 113

CLAIMS, PROCESSING
See also: DENIAL OF CLAIMS
Independent exam, insurer's rights, 724

COLLATERAL ESTOPPEL
See also: RES JUDICATA
Application, 671

CONDITIONS See OCCUPATIONAL DISEASE, CONDITION OR INJURY

CONSTITUTIONAL ISSUES
No authority to decide, 42

CREDIBILITY ISSUES
Claimant credible despite inconsistencies, 730
Claimant impeached, 101,469,486,490,667
Conflicting histories, 18,436,579,667
Conflicting lay testimony, 48,487
Medical opinion based on claimant's history, 5,30,469,486
Referee's findings inconsistent, 36
When Board in superior position, 662

DENIAL OF CLAIMS
After acceptance, 628,707
De facto, 671
Effective, 139
No appeal notice, no timeliness defense, 68
Specify reasons, 48

DEPENDENTS See BENEFICIARIES

DETERMINATION ORDER
Classification as "injury" or "occupational disease", 707
Lump sum payment, 350
Referee duty to correct, 273

DISCOVERY
Scope of, 182

DISPUTED CLAIM SETTLEMENTS See SETTLEMENTS & STIPULATIONS

DOCUMENTARY EVIDENCE
Film
Not sufficient to reverse PTD, 640
Unauthenticated, admitted, 52

EMPLOYMENT RELATIONSHIP
Borrowed servant doctrine, 810
Contract, 810
Control, right to, 810
Common enterprise, 823
Joint supervision & control, 823
State vs. county, 810

EVIDENCE
See also: DOCUMENTARY EVIDENCE
Burden of proof
Non-subject workers, 60
Going forward: intervening injury defense, 73
Discretion of referee, 598
Film: See DOCUMENTARY EVIDENCE
New, not accepted on reconsideration, 490
New, not accepted on review, 245
New, not considered on review, 693

FEDERAL EMPLOYEES LIABILITY ACT
Exclusive remedy, 201

FIREFIGHTERS
Fireman's presumption, 744

GARNSIHMENT
Continuing garnishment, 763
For child support, 757

HEART ATTACKS, HEART DISEASE
Coronary artery disease, 744
Emotional stress, 357
Expert opinion required, 782
Fireman's presumption, 744
Legal/medical causation, 357,782
Myocardial infarction
Compensable, 357,471,782
Not compensable, 40,58,146
Physical exertion, 357
Relative expertise of doctors, 58,629
Treating physicians
Given greater weight
Not given greater weight, 357
Weller applied, 629

INDEMNITY ACTIONS
Third party claim, 314

INMATE INJURY FUND
Filing requirements, 171,251
Timeliness of claim, 171,251

INTERIM ORDER
Request for remand, 462
Not appealable, 655,704
TTD, 136

JURISDICTION
Distinguished from authority, 703
Not deferred on extent while compensability not final, 647
Order deferring hearing not final, 655,704

LUMP SUM See PAYMENT

MEDICAL CAUSATION
Agency expertise applied, 116
Different doctors before, after aggravation, 579
Expert opinion required, 17, 514,714,788
Failure of proof, 114,116,297,469,629,654,714,793
Heart conditions: See HEART ATTACKS, HEART DISEASE
Inconsistent histories analyzed, 26,579,657
Injury
Condition related to, 170,346
Condition unrelated to, 54,162,499,562
Material contributing cause test, 501
Multiple possible diagnoses, 169,297
Myocardial infarction: See HEART ATTACKS, HEART DISEASE
Occupational disease claims, 586
Opinion based on history not enough, 667
Psychological claims, 586
Two conditions, one related, 693
Work activity
Condition related to, 788
Condition unrelated to, 469,514,654

MEDICAL OPINION
Analysis vs. observation, 357
Based on history, witness not credible, 499,667,669
Conclusory statement insufficient, 714
Conflicting, 29,102,629,793
Contradictions by one physician, 110,552
Must consider off-job exposure, 517
Physician as advocate, 144
Psychological claims, 586
Relative expertise, 146
Uncontroverted, 111
Uncontroverted opinion not binding, 559,586,701
Weight, treating physician, 40,357,445

MEDICAL SERVICES
Acupuncture, 564,721
Blanket denial of future medicals, 134,721
Chiropractic treatment
Reasonable, within limits, 467
Consultant's billing compensable, 733

MEDICAL SERVICES (Continued)
For litigation only: not compensable, 546
Furniture, 54,248,678,768
Hospitalization for overdose, 581
Ongoing treatment
Related to injury, 467,699
Unrelated to injury, 225
Out-of-state, 645
Palliative vs. curative, 768
Pay pending appeal (pre-1979 injuries), 21,705
Pre-employment physical, 306
Transportation costs, 768
Treatment: defer to treating doctor, 511

MEDICALLY STATIONARY
Chiropractic treatment, 687
Circumstantial evidence, 748
Date determined, 678,687
Definition, 144,492,748,864
Psychological condition, 144,801
Regression at closure, 144
Requirements of proof, 748

MEMORANDUM OPINIONS
M. Abrams, 179
G. Akres, 244
T. Aldrich, 476
J. Alire, 224
D. Allen, 149
M. Allen, 231
R. Allen, 224
A. Allensworth, 642
C. Arata, 654
W. Arndt, 286
A. Arnold, 534
S. Arroyo, 573
S. Attebery, 200
H. Avila, 593
V. Ayer, 65
M. Ayers, 642
R. Baca, 232
R. Baer, 643
R. Bailey, 483
H. Baker, 152
K. Baker, 97
R. Baldwin, 65
L. Bangs, 442
B. Barber, 288
M. Barella, 602
D. Barger, 655
R. Baril, 433
R. Barrong, 643
R. Bea, 454
R. Beaman, 534
J. Beasley, 288
T. Beck, 643
D. Beemer, 463
A. Beeson, 433
L. Bellinger, 658
C. Bellmore, 484
G. Bennett, 91
V. Benson, 268
V. Berov, 25
M. Bess, 153
K. Binder, 631
J. Binks, 522
J. Birdsell, 484
B. Bissonette, 218
C. Blake, 594
W. Blaylock, 454
J. Bogner, 288
B. Booth, 119
J. Bowman, 488
V. Boyd, 561
K. Brackley, 603
V. Brandon, 603
J. Brandow, 603
J. Brannon, 65
R. Brennen, 119
N. Breshears, 573
L. Bristow, 179
L. Brown, 659
P. Brown, 66
F. Browne, 92
G. Brugia, 561
G. Bryant, 435
J. Caba, 455
P. Carpenter, 443
H. Carter, 443
C. Castleberry, 575
S. Cessnun, 29
P. Chamberlain, 180
J. Chandler, 149
L. Chastagner, 119
R. Childress, 632
S. Chochrek, 289
B. Clark, 493
D. Clark, 100
J. Clark, 444
B. Clevenger, 666
D. Cobbin, 200
J. Coen, 472
L. Cole, 200
L. Cooksey, 289
E. Cooley, 526
C. Cooper, 444
J. Copenhaver, 605
L. Cornwell, 100
J. Corwin, 30
D. Craven, 455
M. Crawford, 537
T. Crisman, 201
W. Crooke, 290
G. Croxell, 120
G. Curths, 526
R. Curtis, 66
R. Cyr, 290

MEMORANDUM OPINIONS (Continued)

A. Dalton, 435
L. Davidson, 15
I. Davis, 232
J. Davis, 291
E. Dines, 566
M. Dolton, 493
R. Donais, 537
M. Douglas, 493
F. Drake, 537
L. Dreier, 93
J. Driskell, 71
J. Duncan, 436
W. Dyer, 232
K. Eatwell, 595
A. Edmunds, 436
L. Egge, 495
R. Ekman, 673
A. Emra, 181
P. Enyart, 226
D. Erickson, 566
T. Erickson, 644
K. Estep, 455
E. Euler, 606
L. Everhart, 566
D. Faries, 674
J. Farley, 437
R. Faust, 160
D. Ferebee, 606
E. Fey, 576
C. Fisk, 527
E. Floyd, 35
E. Frame, 271
G. Frazier, 233
M. Fulfer, 538
G. Gaddini, 527
J. Gale, 528
R. Garcia, 36
S. Garrison, 644
R. Gatewood, 2
E. Geer, 676
J. Geiglein, 644
E. Ghores, 538
P. Gonzales, 538
R. Gonzales, 677
R. Gonzales de Sanchez, 272
W. Goodsby, 2
C. Gourde, 456
D. Grabill, 72
R. Graham, 456
D. Gray, 608
J. Green, 680
H. Gunter, 576
D. Guthmiller, 682
B. Hackbart, 39
G. Hall, 86
P. Hall, 299
R. Hammond, 250
M. Hardaway, 541
J. Harvey, 122
G. Hatch, 39
T. Hatcher, 272
C. Hayes, 497
K. Hays, 497
D. Hedrick, 686
A. Hegrenes, 528
D. Helvie, 300
G. Henderson, 446
G. Herber, 94
E. Herrington, 609
H. Hicks, 39
V. Hicks, 126
J. Hill, 528
D. Hines, 456
L. Hiscoe, 577
T. Hoefft, 73
J. Hogan, 103
L. Hollibaugh, 73
R. Hollingsworth, 645
T. Holt, 551
J. Hoover, 645
D. Hovater, 3
J. Hubbs, 273
B. Huber, 181
G. Hudson, 611
E. Imber, 686
D. Iness, 687
B. Jacobson, 274
M. Jaques, 500
C. Jenkins, 457
G. Johannessen, 88
D. Johnson, 3
M. Johnson, 127
R. Johnson, 645
W. Johnson, 577
G. Jolly, 241
G. Jones, 541
J. Kabrich, 578
P. Kane, 613
B. Kanna, 4
D. Kemple, 241
L. Keys, 646
N. Kimsey, 274
F. King, 74
R. Kirkwood, 457
D. Kiser, 578
B. Kissas, 596
R. Kittle, 458
D. Kittson, 529
H. Knapp, 127
L. Knapp, 127
R. Kniffen, 300
F. Knoblauch, 646
C. Knowland, 646
P. Korbulic, 578
T. Kvokov, 302
J. LaMarsh, 5
S. Lambert, 695
A. Lamothe, 695
R. Landers, 613
R. Landor, 128
H. Landrum, 437
J. Lane, 42
P. Langa, 696
B. Langley, 74
O. Langston, 163
J. Ledford, 647
D. Lindberg, 276
T. Locascio, 74
S. Logsdon, 569
L. Long, 458
R. Lucht, 570
H. Lynch, 206
L. Mackay, 647
J. Malone, 167
B. Mangun, 43
J. Manley, 458
J. Mardis, 698
E. Marsden, 637
C. Martin, 648
G. Martin, 149
N. Martin, 597
I. Mathews, 85,128
D. McAlpin, 637
H. McCann, 192
J. McCollum, 648
R. McDaniel, 701
S. McDermott, 579
E. McJunkin, 648
F. McKinnon, 438
J. McKnight, 503
G. McNamara, 207
J. Milburn, 649
M. Miller, 286
O. Milligan, 90
M. Mirich, 503
D. Mitchell, 503
F. Mitchell, 94
Z. Mooney, 167
J. Moore, 459
M. Morehead, 649
R. Morgan, 649
M. Moyer, 168
T. Muir, 439
R. Mullen, 459

MEMORANDUM OPINIONS (Continued)

L. Mulvaney, 76
J. Murphy, 704
A. Naylor, 704
C. Neimi, 617
D. Nelson, 650
M. Nelson, 571
B. Neuman, 580
M. Nichols, 251
A. Nims, 581
L. Nirschl, 128
H. Olive, 447
P. Oropallo, 46
L. Owens, 129
A. Pache, 231
S. Parish, 705
G. Park, 244
R. Parkinson, 468
D. Partin, 459
J. Patton, 460
D. Peters, 211
D. Peterson, 8
J. Peterson, 460
A. Petit, 194
L. Petty, 8
J. Phipps, 711
D. Praszek, 47
A. Preston, 650
R. Price, 129
L. Prisk, 438
J. Pruitt, 10
J. Rae, 718
G. Randall, 718
J. Reed, 638
P. Rehberg, 460
G. Reineccius, 252
G. Replogle, 542
J. Reynolds, 168
E. Richards, 474
W. Richmond, 461
R. Ringo, 306
L. Rini, 461
W. Ripp, 47
C. Roach, 650
S. Robson, 48
B. Rogers, 221
B. Roll, 509
R. Rook, 90
C. Rose, 597
B. Rupp, 79
J. Russell, 211
C. Sanderson, 211
R. Sandusky, 725
C. Sawyer, 726
D. Sawyer, 651
G. Saxe, 543
J. Scheckells, 253
K. Schmidt, 254
D. Schmitt, 254
F. Scoville, 212
F. Setness, 475
J. Shandley, 543
G. Shay, 50
E. Sherman, 212
D. Shertzer, 82
C. Shirey, 50
V. Shoemaker, 543
J. Shumaker, 170
W. Simmonds, 213
A. Smith, 129
D. Smith, 476
R. Smith, 638
T. Smith, 513
R. Smylie, 136,638
N. Snyder, 90
J. Spanu, 213
B. Stacey, 544
V. Stanley, 544
C. Steffen, 639
C. Stephens, 130
R. Stern, 651
A. Stoneman, 24
G. Stose, 470
J. Strong, 438
L. Sullivan, 11
P. Taylor, 242
D. Tegman, 279
L. Thomas, 544
S. Thoming, 215
R. Thompson, 651
T. Thompson, 254
N. Thornton, 280
N. Tindle, 152
A. Townsend, 625
W. Trueax, 215
L. Tucker, 639
C. Turpen, 130
L. Turpin, 732
A. Uecker, 733
C. Ulness, 85
R. Vandall, 627
W. Van Winkle, 627
J. Veden, 652
M. Verhoef, 652
R. Vibbert, 451
S. Wadley, 85
L. Walker, 451
B. Walsh, 91
S. Walton, 653
B. Wasson, 452
J. Weatherspoon, 231
P. Wehrly, 115
L. Watterberg, 114
R. Weigand, 738
Y. Weiser, 115
L. Widenmann, 283
D. Williams, 308
L. Wilson, 738
G. Winslow, 91
J. Wise, 653
N. Wright, 628
K. Yarbrough, 519
M. Young, 740

NON-COMPLYING EMPLOYER
Vocational rehabilitation
Work Experience program, 369

NON-SUBJECT/SUBJECT WORKERS
See also: EMPLOYMENT RELATIONSHIP
Borrowed servant doctrine, 810
Casual employment, 60
FELA coverage, 201
Federal remedy exclusive, 201
Joint federal, state coverage, 201
Oregon employer, employee, out-of-state work, 488
Vocational Rehabilitation Division
Work experience program, 369

OCCUPATIONAL DISEASE CLAIMS
See also: AGGRAVATION (WELLER); PSYCHOLOGICAL CONDITIONS & FACTORS
Causation
Methodology or proving case, 586,625
Significant predominant causation test, 586,615,657,708,737
Compensable, 304,549
Infection as disease, 256
Not compensable, 68,256,297,484,517,615,691,797
Requirements for compensability, 17,81,132,223,256,304,517
Successive claims, 139
Successive employment exposures, 107,153,682
Symptoms alone not enough, 193
Time for filing See: CLAIMS, FILING
Traumatic injury distiguished, 220

OCCUPATIONAL DISEASE, CONDITION OR INJURY
See also: HEART ATTACKS, HEART DISEASE
Definition, 582
Achilles' tendonitis, 139
Acromioclavicular joint disease, 857
Allergies, 217
Arthritis, post-traumatic, 806
Bakers' asthma, 101
Blindness, hysterical, 450
Bronchitis, 256
Buerger's disease, 609
Bursitis, 549,797
Carpel tunnel, 80,297,615,716
Chicken pox, 793
Chronic myofascitis, 131
Coronary artery disease See: HEART ATTACKS, HEART DISEASE
Dermatitis, 707
Epicondylitis, 132,699,857
Epididymitis, 499
Hernia, 514,562,662
Hypertension, 690
Multiple sclerosis, 676

Osteomyelitis, 346
Physical discomfort not disease, 582
Prostatitis, 14
Pseudarthrosis, 364
Psychological condition, 582
Schizophrenia, 706
Sinusitis, 223,256
Tendonitis, 297,549
Tenosynovitis, 815
Thoracic outlet syndrome, 682,724
Thrombophlebitis, 101,131

OFFSETS
OAR 435-54-320, 221
PPD against PTD, 568
Referee duty to correct D.O., 273
TTD
Against PTD, 568
Overlap on two claims, 75
Permissible, 55,273

ORDER ON REVIEW
Abated, 22,259,474,475,573
Republished, 228
Vacated, 440,452

OWN MOTION RELIEF
(NOTE: A listing of the decisions of the Board under Own Motion Jurisdiction appears on page 891.)
Determination
Foot, ankle amputation, 473
Hip & leg, 86
OAR 436-65 applied, 473
Determination following hearing, 226
Jurisdiction, 192
No D.O. where reopened after aggravation rights expired, 64
Offsets See: OFFSETS
Order to Show Cause, 130
Reconsideration, 731
Referee's authority limited, 36
Referred for hearing on jurisdictional issue, 434
Reopen only if condition materially worsened, 555
Reopen only if time loss due, 198,271,302
Time loss benefits limited where retired, 198,271,302,551

PAYMENT
Lump sum, 350

PENALTIES
Delay accept/deny
Reasonable, 478
Unreasonable, 324

PENALTIES (Continued)
Delayed payment
Reasonable
Unreasonable, 5,478,505,667,669,733
Denial wrong not unreasonable, 295,731
Failure to comply with discovery order, 182
Failure to provide medical information, 55
Failure to request .307 Order, 155,295
Interim compensation
Reasonable/unreasonable standard, 478,505
No"unreasonable"claims processing provisions, 196
Refusal of payment
Reasonable, 104,132,492,617,711
Unreasonable, 5,205,523,666,671,733
TTD
Department's authorization of suspension validates conduct, 615
Tardy denial
Reasonable/unreasonable standard, 478

PPD (GENERAL)
"Dry" aggravation
Evaluate since last arrangement of compensation, 621
Eye: scheduled vs. unscheduled, 722
Hip: scheduled vs. unscheduled, 97,658
PPD hearing while in voc rehab, 655,704
Pain
Disabling
Non-disabling, 121
Payments
Suspend when on TTD, 146,616
"Permanency" defined, 530
Psychological component to physical injury, 63,548
Referee determines before aggravation, 55
Requirement of impairment, 121,567,582
Requires relationship between symptoms & injury, 693,697
Scheduled injury
Impairment for unscheduled injury, 523
Not considered in loss of earning capacity, 598
Spreads to unscheduled area, 453
Symptoms from unscheduled injury, 696
Shoulder: scheduled vs. unscheduled, 110,554,595
Simultaneous PTD and PPD awards, 640

PPD (SCHEDULED)
Impaired area
Arm, 63,110,228,255,595
Eye, 303
Finger, 609
Foot, 204.685.723
Hand, 12,54,188,558,664
Leg, 86,97,103,151,228,473,660,720
Medical evidence of impairment required, 188
Psychological component, 63,497

Rating disability, 12,151
Of hand, 609
Spread to unscheduled area, 452,660
Woodman test, 452,660

PPD (UNSCHEDULED)
Impaired area
Back (low)
No award, 567,697
5-25%, 4,52,207,214,249,277,280,448,474,581,594,687,726
30-50%, 10,44,62,160,190,203,226,268,275,281,607,660, 674,694,697
55-100%, 31,141,209,442,461,556,854,861
Back (upper)
No award
5-25%, 523,624,678
30-50%
55-100%
Eye, 303,722
Head, 228,303
Hip, 86
Neck
No award, 114
5-25%, 55,57,82
30-50%
55-100%
Psychological
Arising from injury or disease, 95,98,160,275,450
Shoulder, 1,54,55,108,110,255,464,523,532,554,595,693
Unclassified, 123,162,221,496,504,662,723
Factors discussed
Age, 44,
Aptitudes/adaptability, 4,123,209
Asymptomatic condition, made permanently symptomatic, 464
Attitude, 95,98
Burden of proof, 123
Credible claimant testimony only, 532
Disabling pain, 214
Education (higher), 1,4
Employments precluded, 123
Impairment required, 582
Income, 268
Loss of earning capacity, 531
Medical evidence of claimed limitation, 62,594
Motivation, 203,226,607
Pre-existing conditions, 141,160,556
Previous injury, 861
Psychological, 556
Retirement, 35,63,95,207
Scheduled impairment not considered, 598
Weight, 226,277

PERMANENT TOTAL DISABILITY
Award (1st instance)
Affirmed, 172,182,233,631,640,706,711,815
Made, 66, 530,548,719,868
Reduced by Board, 8,98,143,228,633
Refused, 95,103,141,329,552
Reversed, 586
Benefits, beneficiaries, 104
Effective date, 373,522
Factors discussed
Economic conditions, 711
Education, 711
Futile to attempt work, 66,233,631
Motivation, 98,143,182,228,329,530,553,633,640,711,719,815,868
Pre-existing conditions, 141,182,815
Psychological, 182,530,706
Retirement, 31,95
Social/vocational, 182,868
Subsequent injury, 172
Reevaluation
Appeal from Determination Order, 317
Board policy not to re-evaluate, 598
Burden of proof, 598
Reduced, 598

PSYCHOLOGICAL CONDITIONS & FACTORS
Arising from injury
Denial affirmed, 114
Compensability
Adverse reaction to reasonable supervision, 582,584,584A,585, 604,608,613,737
Adverse reaction to unreasonable supervision,593
Disease required, 582,604
Methodology of proving case, 586,625
Significant preponderance of causation test, 582,584,585,586, 593,604,613,625,634,737
Work factors not stressful, 586
Work and nonwork causation, 582,584,613
Scheduled injury component, 63
Unscheduled disability, 95,98,530

RECONSIDERATION
Abatement of Order on Review, 218,513
Denied, 30,181,206,559,619,620,624,642,647,710
Order on, 295,519,529,533,556,641
Request for, 24

REMAND
By Board
For additional evidence, 95,96,132,273,468,542,570
For hearing, 131,198,249
Referee's order doesn't stand, 30,249
Request denied, 136,180,245,250,447,476,508,705
Vacated, 150

By Court of Appeals, 47,72,79,93,96,106,248,294,346,350,369
375,446,522,619,640
By Supreme Court, 331

REOPENING CLAIM WITHIN ONE YEAR OF DETERMINATION ORDER
See also: MEDICALLY STATIONARY
After hearing, 291
Compared with aggravation, 291
Denial affirmed, 15
Denial reversed, 210
No Own Motion Jurisdiction, 192
Unemployment unrelated to injury, 15

REQUEST FOR HEARING
Dismissed with prejudice, 244
Good cause, late filing, 153,178,246,682,728
On Determination Order
Lump sum payment, 350
When compensability on appeal, 299
Misdirected, not jurisdictional defect, 286
PPD issue while in voc rehab, 655
Time for filing, 139,298,739

REQUEST FOR REVIEW--BOARD
Dismissal, 113,541,729
Dismissal
Without prejudice, 574
Expedited review
Denied, 580
Motion to dismiss denied, 191,433,470,636
Nullified, 187
Request for cross-review withdrawn, 571
Service on parties, 636
Timeliness, 191,541,729
Untimely brief allowed, 580
Untimely brief stricken, 533
Withdrawn, 93,100,135,141,179,180,193,194,465,468,470,513,
518,549,554,620,684

RES JUDICATA
See also: COLLATERAL ESTOPPEL
Aggravation claim, 680
Determination Order, 567
Issue not ripe at time of stipulation, 199
Limited application, 291,520,671
Order of referee, 122
Order on Review, 134
Pain Center treatment, 291
Reconsideration of PTD doesn't bar hearing on D.O., 317
Stipulation silent on issue, 108,198

SETTLEMENTS & STIPULATIONS
Board to keep jurisdiction, 150
Claimant's oral agreement not binding on beneficiaries, 574
DCS of aggravation claim does not bar later aggravation
claim, 198

SETTLEMENTS & STIPULATIONS (Continued)
Disputed claim settlements
Criteria for, 88,872
Issues not foreclosed by stipulation, 623
Referee's authority vs. jurisdiction, 703
Res judicata, 108,198
Settlement not final until approved by referee, 574,703
Third Party Claim considerations, 259,261

SUBJECT WORKERS See NON-SUBJECT/SUBJECT WORKERS

SUCCESSIVE INJURIES See AGGRAVATION/NEW INJURY

TEMPORARY TOTAL DISABILITY
See also: MEDICALLY STATIONARY
Computation
First day injury, 658
Intent at time of hire, 494,658
On-call, 494
During layoff, 163
Garnishment, 757,763
Increased, 221,546
Interim compensation, 5
Defined, 136
On "claim" made after Request for Hearing, 291
Pending denial, 669
Limitations not sufficient, 1
Medical verification
Required, 1,515,582,617
Based on history, 864
Offset overpayment See OFFSETS
Own Motion cases See OWN MOTION RELIEF
Post-retirement entitlement doubtful, 36
Release for regular work terminates, 518,523
Stationary date discussed, 188,546
Suspend PPD, 148,616
Suspension
By Department Order, 42,724
Rescinded, 519
Unilateral, 523,724
Vascillating doctor, 712
Vigorous activity precludes, 74

THIRD PARTY CLAIM
See also: SETTLEMENTS & STIPULATIONS
Carrier's duty, 259
Indemnity, 314
Statutory distribution, 261

TORT ACTION
Immunity, 823

VOCATIONAL REHABILITATION
No arbitrary refusal of services, 57
PPD hearing while enrolled, 655,704
Work experience program, 369

OWN MOTION JURISDICTION

The following Board decisions under Own Motion Jurisdiction are not published in this volume. They are listed here according to the action taken. These decisions may be ordered from the Workers' Compensation Board using the numbers provided.

ABATEMENT (July-September)
K. Lawson, 81-0214M

AMENDMENT
(July-September)
L. Beatty, 81-0056M
J.R. Connor, 81-0097M
H. Curry, 81-0215M
G.R. Dow, 81-0205M
E.R. Eyster, 81-0158M
L. McDonald, 81-0162M
C. Plummer, 81-0084M
C. Simmons, 81-0100M
(October-December)
H.O. Brown, 81-0266M
H.E. Curry, 81-0215M
R.H. Howard, 81-0252M
K. Lawson, 81-0214M
V. Michael, 81-0201M

DENIED REOPENING
(July-September)
M.A. Anderson, 81-0136M
H. Combs, 80-7559
J. Courtney, 81-0169M
W.E. Crowder, 81-0179M
E.R. Eyster, 81-0158M
S. Gentry, 81-0222M
W. Grove, 81-0145M
R. Huber, 81-0199M
R.D. Johnson, 80-7552
H. Karn, 81-0111M
T. Kvokov, 81-0170M
S.L. Lawhead, 81-0066M
Ra. Lee, 81-0188M
O. Moyer, 81-0042M
L. Pence, 81-0195M
C. Piercy, Jr., 81-0152M
J.E. Robertson, 80-10062
J.M. Skophammer, 81-0234M
T. Smith, 81-0025M
M.H. Snead, 81-0224M
H. Steen, 81-0047M
F.E. Walker, 81-0083M
B.L. Weathers, 80-09977
R. Weddle, 81-0155M
I.O. Williams, 81-0132M
W. Zumbrun, 81-0178M

DENIED REOPENING
(October-December)
M. Alexander, 81-0264M
N. Anderson, 81-0238M
A.L. Babb, 81-0250M
T. Boatman, 79-02304
J. Byrnes, 81-0120M
J. Crombie, 81-0281M
W.E. Crowder, 81-0179M
J.P. DeLeon, 81-0216M
J. Etherington, 81-0326M
D. Gray, 81-0214M
P.E. Holmstrom, 81-0277M
R. Jackson, 81-02016
S. Kimbrel, 81-0317M
S.L. Lawhead, 81-0066M
R. Lewis, 81-0295M
F. Mahoney, 81-0308M
M. Messinger, 81-0324M
K. Miller, 81-0255M
E. Molchanoff, 81-0256M
K. Nuse, 81-0271M
C. Piercy, 81-0152M
V. Powers, 81-0220M
I. Pragal, 81-0321M
R.D. Renne, 81-0304M
L. Smith, 81-0275M
C. Spears, 81-0244M
L. I. Taylor, 81-0236M
J. Weckerle, 81-0221M
C. Welter, 81-0133M
K. Wentz, Claim A 42CC 77681 MR
H. Weston, 81-0307M
N.L. Wilson, 81-0297M

DETERMINATION
(July-September)
H. Alderson, 81-0035M
O. Barlow, Claim A 141676
M. Bischoff, 81-0175M
J. Bradford, Claim C 399637 C
B. Bush, 81-0109M
P. Carrol, 81-0228M
K.E. Chace, Claim C 435281
M.D. Chapman, 81-0207M
L. Cody, 81-0019M
J. Conner, 81-0097M
J.C. Crow, 81-0051M
H. Curry, 81-0215M
E. Davis, 81-0237M

DETERMINATION (Continued)
J.R. Donaldson, 81-0183M
E. Doughty, 81-0118M
G.R. Dow, 81-0205M
E. Enze, 81-0189M
J. Foley, 81-0243M
G. Freeman, 81-0190M
E. Goodman, 81-0132M
D. Gray, 81-0214M
I.M. Halligan, Claim C 386 085
M. Howland, 81-0165M
P. Johansen, 80-0071
A.C. Johnson, 81-0143M
W.L. Jones, 81-0192M
A. Kephart, 81-0173M
K. Lawson, 81-0214M
B.I. Mahler, 81-0185M
S. Marriott, Claim C29752L
I.I. Mathews, 81-0191M
M. McCasland, 81-0226M
B.J. McMahon, 81-0059M
R.A. Nash, 81-0011M
D. Neville, 81-0227M
E. Nixon, 81-0230M
C. Plummer, 81-0084M
R. Sattler, 81-0124M
F. Steinhauser, 81-0101M
D.E. Stevens, 81-0020M
A.K. Stone, 81-0204M
L. Stone, 81-0206M
P.B. Stone, 81-0242M
J.P. Sullivan, Claim C 375513
R. C. Wright, 81-0174M
(October-December)
K. Barnett, 81-0212M
W. Bartel, 81-0269M
R. Brenneman, 81-0147M
D. Britzius, 81-0098M
H.O. Brown, 81-0266M
P. Buchanan, 80-0003M
C. Bucholz, 81-0045M
W. Buckingham, 81-0270M
P. Burge, 81-0151M.
G.T. Christensen, 81-0268M
J.L. Dozhier, 81-0260M
N. Freeman, 80-0005M
W. Gardner, 81-0246M
H.B. Howell, 81-0273M
D.R. Johnson, 81-0054M
R. Josi, 81-0314M
A. Kephart, 81-0173M
W.J. Lish, 81-0095M
M. Myrick, 81-0267M
V. Schmidt, 81-0327M
C. Simons, 81-0291M
S. Souder, 81-0313M
E. Tippett, 81-0210M
J. Wall, 81-0263M
R.K. Warnock, 81-0186M
D. Weber, 81-0089M
J. Williams, 81-0161M
D. Wilson, 81-0055M
W. Yeldig, 81-0298M

DISMISSED (October-December)
D. Hatton, 81-0253M

INTERIM ORDER (october-December)
A.E. Earle, 81-0278M
D. Goodrich, 81-0218M

REPUBLISHED ORDER (October-December)
W.W. Terry, 81-0177M

RECONSIDERATION (October-December)
R.J. Bencoach, 81-0093M
R.N. Crooks, 81-0075M
J.R. McCool, Claim C 300516

REFERRED FOR HEARING
(July-September)
M. Blake, 81-0200M
J. Brosseau, 81-0213M
W. Casey, 81-0154M
R.E. Eggiman, 81-0208M & 81-02222
R.E. Lee, 81-0142M
M. Spillman, 81-0232M
P. Sunquist, 81-0180M
G. Van Mechelen, 81-0225M
(October-December)
M. Aarnas, 81-0279M
G. Barlup, 81-04798, 8105601 & 81-06696
M. Fischer, 81-0259M
K.I. Hansen, 81-0262M
M.R. Kocher, 81-0268M
A. Merritt, 81-0289M
D. Monroe, 81-0245M
R.E. Rogers, 81-0311M
T.M. Younts, 81-0299M

REOPENED

(July-September)

C. Aleshire, 81-0203M
D.L. Anderson, 81-0182M
L. Beatty, 81-0056M
C. Bucholz, 81-0045M
K. Chace, 81-0125M
R.H. Howard, 81-0252M
J. Idlewine, 81-0197M
R. Little, 81-0176M
R. Lee, 81-0142M
V. Michael, 81-0201M
R. Salvetti, 81-0223M
R.A. Schenck, 81-0198M
C. Simmons, 81-0100M
W.W. Terry, 81-0177M
C. Tinner, 81-0181M
E.M. Tippett, 81-0210M
W. Vanderpool, 81-0211M
K. Warnock, 81-0186M
J.M. Zeleznick, 81-0139M

(October-December)

D.L. Anderson, 81-0182M
E. Arveson, 81-0293M
T.L. Beacham, 81-0272M
K.R. Blacketer, 81-0294M
V. Bridges, 81-0049M
H. Cook, 81-0323M
H. Curry, 81-0215M
J.L. Dozhier, 81-0260M
J. Eby, 81-0249M
J.H. Elwell, 81-0320M
H. Fanger, 81-0318M
W. Gardner, 81-0246M
E. Grady, 81-0248M
W.E. Harshman, 81-0288M
J.M. Helm, 81-0274M
A. Horne, 81-0254M
H.C. Jones, 81-0233M
A. Landers II, 81-0265M
J. Lundsford Wall, 81-0263M
D. Miller, 81-0301M
F. Nahorney, 81-0008M
A.M. Norton, 81-0129M
R. Rahm, 81-0287M
V.M. Schmidt, 81-0236M
J. Stockton, 81-0296M
A. Thayer, 81-0319M
R.D. Vincent, 81-0261M
H. Wells, 81-0276M
L. M. White, 81-0247M

VACATING ORDER (October-December

E. Nixon, 81-0230M

CASE CITATIONS

(Volumes 32 and 33)

PAGE

Abbott v. SAIF, 45 Or App 657 (1980)----676
Albiar v. Silvercrest Industries, 30 Or App 281 (1977)----636,729
Anderson v. SAIF, 5 Or App 580 (1975)----357
Anderson v. West Union Village Square, 44 Or App 685 (1980)---671
Anlauf v. SAIF, 52 Or App 115 (1981)---138,346
Armstrong v. SIAC, 146 Or 569 (1934)---111

Audas v. Galaxie, Inc., 2 Or App 520 (1970)---523
Austin v. SAIF, 48 Or App 7 (1980)--748,801
Autwell v. Tri-Met, 48 Or App 99 (1980) rev den 290 Or 211 (1980) ---219,799,857

Bankston v. Hooper, 46 Or App 431 (1980)---672
Barker v. Wagner Mining Equip., 6 Or App 275 (1971)---396
Batdorf v. SAIF, 54 Or App 496 (1981)---788

Bault v. Teledyne Wah-Chang, 53 Or App 1 (1981)---214
Beaudry v. Winchester Plywood Co., 255 Or 503 (1970)---549,586,799,806
Bentley v. SAIF, 38 Or App 473 (1979)---598
Berliner v. Weyerhaeuser, 43 Or App 474 (1979)---801
Berov v. SAIF, 51 Or App 333 (1980)---245
Blair v. SAIF, 21 Or App 229 (1975)---29

Boling v. Nork, 232 Or 461 (1962)--823
Bowman v. Oregon Transfer Co., 33 Or App 241 (1978)---331
Bowser v. Evans Product Co., 270 Or 841 (1974)---768
Boyce v. Sambo's Restaurant, Inc., 44 Or App 305 (1980)---188,609
Bracke v. Baz'r, Inc., 51 Or App 627 (1981)---107
Brady v. Oregon Lumber Co., 117 Or 118 (1926---584A

Brandow v. Portland Willamette Co., 44 Or App 393 (1980)---102
Brazeale v. SIAC, 190 Or 565 (1951)---331
Bresnan v. Bresnan, 42 Or App 739 (1979)---757
Broadway Cab Co. v. SAIF, 52 Or App 689 (1981)---36,198
Brown v. EBI, 289 Or 455 (1980)---153
Brown v. SAIF, 51 Or App 389 (1981)---245,693

Buell v. SIAC, 238 Or 492 (1964)---317
Burks v. Western Irrigation, 36 Or App 587 (1978)---95
Butcher v. SAIF, 45 Or App 313 (1980)---228,548,815
Calder v. Hughes & Ladd, 23 Or App 66 (1975)---155,833
Calvin v. Calvin, 6 Or App 572 (1971)---757,763
Carter v. Crown Zellerbach Corp., 52 Or App 215 (1981)---357

Carter v. SAIF, 52 Or App 1027 (1981)---249
Cavins v. SAIF, 272 Or 162 (1975)---380
Christensen v. SAIF, 27 Or App 595 (1976)---55,797
Citizens Ins. v. Signal Ins. Co., 261 Or 294 (1972)---314
State v. Clark, 286 Or 33 (1979)---559
Clark v. U.S. Plywood, 288 Or 255 (1980)---584A

Clayton v. Compensation Dept., 253 Or 397 (1969)---357
Coday v. Willamette Tug & Barge Co., 250 Or 39 (1968)---357,782

Coombs v. SAIF, 39 Or App 293 (1979)---226,317
Cutsforth v. Kinzua Corp., 267 Or 423 (1973)---559
Dean v. Exotic Veneers, 271 Or 188 (1975)---671
Deaton v. SAIF, 33 Or App 261 (1978)---21
Deitz v. Savaria Smith, 260 Or 538 (1971)---823
Edge v. Jeld-Wen, 52 Or App 725 (1981)---788

Elford v. SIAC, 141 Or 284 (1932)---331
Emmons v. SAIF, 34 Or App 603 (1978)---172
Etchison v. SAIF, 8 Or App 395 (1972)---584A
Farmers Insurance Co. v. Hopson, 53 Or App 109 (1981)---520
Fenn v. Parker Construction Co., 6 Or App 412 (1971)---396
Fields v. WCB, 276 Or 805 (1976)---434

Foley v. SAIF, 29 Or App 151 (1977)---782
Fossum v. SAIF, 45 Or App 77 (1980), 52 Or App 769 (1981), 289 Or 777 (1980)---586,682
Foster v. SAIF, 259 Or 86 (1971)---523
Francoeur v. SAIF, 17 Or App 37 (1974)---768
Francoeur v. SAIF, 20 Or App 604 (1975)---478
Frasure v. Agripac, 290 Or 99 (1980)---123,707

Frey v. Willamette Industries, 13 Or App 449 (1973)---364
Frosty v. SAIF, 24 Or App 851 (1976)---584A
Fulton Ins. v. White Motor Corp., 261 Or 206 (1972)---314
Gainer v. SAIF, 50 Or App 457 (1981)---373
Gettman v. SAIF, 44 Or App 295 (1980), 289 Or 609 (1980)---329,530, 598,655,868
Gilroy v. General Distributors, 35 Or App 361 (1978)---833

Gittelsohn v. City of Cannon Beach, 44 Or App 247 (1980)---671
Gormley v. SAIF, 52 Or App 1055 (1981)---793
Glazer v. SAIF, 15 Or App 574 (1970)---497
Glover v. Adult and Family Services Div., 46 Or App 829 (1980)---729
Grable v. Weyerhaeuser, 47 Or App 1 (1980)---331
Grable v. Weyerhaeuser, 291 Or 387 (1981)---243,477,486,501,508,562

Green v. Market Supply Co., 257 Or 451 (1971)---823
Green v. Shell Oil Co., 271 Or 362 (1975)---823
Gressett v. Weyerhaeuser, 43 Or App 787 (9179)---298
Grudle v. SAIF, 4 Or App 326 (1971)---380
Hackney v. Tillamook Growers, 39 Or App 644 (1979)---584A,728
Halfman v. SAIF, 49 Or App 23 (1980)---396

Hamlin v. Roseburg Co., 45 Or App 581 (1980)---680
Hammond v. Albina Engine & Machine, 13 Or App 156 (1973)---655
Hammons v. Perini, 43 Or App 299 (1979)---29,40,357
Hannan v. Good Samaritan Hospital, 4 Or App 178 (1970)---605
Harris v. SAIF, 191 Or 254 (1951)---810
Henry v. SAIF, 36 Or App 91 (1978)---478

Henry v. SAIF, 39 Or App 795 (1979)---773
Holden v. Willamette Industries, 28 Or App 613 (1977)---331,586
Holmes v. SAIF, 38 Or App 145 (1979)---707

Page

Holmes v. SIAC, 227 Or 562 (1961)----317
Howard v. SAIF, 36 Or App 205 (1978)---103
Hutcheson v. Weyerhaeuser, 288 Or 51 (1979)---484,501,562,782,793
Inkley v. Forest Fiber Products Co., 288 Or 337 (1980)---51,107, 153,290,331,364,682,716
J.C. Compton Co. v. DeGraff, 52 Or App 317 (1981)---160
Jackson v. Tillamook Growers Co-op, 39 Or App 247 (1979)---488

Jacobson v. SAIF, 36 Or App 789 (1978)---714
James v. SAIF, 290 Or 343 (1981)---17,95,107,113,123,129,132,167,217, 219,256,304,517,549,562,585,586,593,604,635,707,737
Johnson v. SAIF, 267 Or 299 (1973)---533
Johnston v. Georgia-Pacific Corp., 35 Or App 231 (1978)---439
Jones v. Emmanuel Hospital, 280 Or 147 (1977)---136,478,669
Jones v. Flannigan, 270 Or 121 (1974)---671

Jones v. SAIF, 40 Or App 311 (1979)---757
Jordan v. Western Electric, 1 Or App 441 (1970)---396
Keefer v. SIAC, 171 Or 405 (1943)---546
Kempf v. SAIF, 34 Or App 877 (1978), rev den 284 Or 521 (1978)---777
Kizer v. Guarantee Chevrolet, 51 Or App 9 (1981)---290
Kolar v. B & C Contractors, 36 Or App 65 (1978)---833

Konell v. Konell, 48 Or App 551 (1980)---60
Korter v. EBI, 46 Or App 43 (1980)---478
Kosmecki v. Portland Stevedoring Co., 190 Or 85 (1950)---823
Kowcun v. Bybee, 182 Or 271 (1947)---396
Kringen v. SAIF, 28 Or App 19 (1977)---396
Lane v. Gleaves Volkswagen, 39 Or App 5 (1979)---584A

Lane Co. v. Heintz Const. Co., 228 Or 152 (1961)---777
Larsen v. SIAC, 135 Or 137 (1931)---331
Larson v. SIAC, 209 Or 389 (1957)---714,788
Leedy v. Knox, 34 Or App 911 (1978)---655,868
Lemons v. Compensation Dept., 2 Or App 128 (1970)---331
Livingston v. SIAC, 200 Or 468 (1954)---396

Locke v. SAIF, 21 Or App 725 (1975)---864
Long v. Industrial Indemnity Co., 20 Or App 24 (1975)---559
Lorentzen v. Compensation Dept., 251 Or 92 (1968)---331
Madwell v. Salvation Army, 49 Or App 712 (1980)---714,788
Mandell v. SAIF, 41 Or App 253 (1979)---346
Mathis v. SAIF, 10 Or App 139 (1972)---586

Mattson v. Roseburg Lumber Co., 43 Or App 497 (1979)---753
Mawhinney v. SAIF, 43 Or App 819 (1979)---782
McPherson v. Employment Div., 285 Or 541 (1979)---478
Mendenhall v. SAIF, 16 Or App 136 (1974)---655
Million v. SAIF, 45 Or App 1097 (1980)---198,671
Miner v. City of Vernonia, 47 Or App 393, rev den 290 Or 149 (1980)---369

Minor v. Delta Truck Lines, 43 Or App 29 (1979)---655
Monaco v. U.S. Fidelity and Guar., 275 Or 183 (1976)---777

Page

Montgomery v. SIAC, 224 Or 380 (1960)----396
Morris v. Denny's, 50 Or App 533 (1981)----373,815,868
Mosquedo v. ESCO Corp., 54 Or App 736 (1981)---571
Myers v. MHI Investments, Inc., 44 Or App 467 (1980) rev den 289 Or 107 (1980)---777
Myers v. SAIF, 34 Or App 13 (1978)---331
Neathemer v. SAIF, 16 Or App 402 (1974)---111,559
Nelson v. Douglas Fir Plywood Co., 260 Or 53 (1971)---396

Nollen v. SAIF, 23 Or App 420 (1975)---636
O'Connell v. SAIF, 19 Or App 332 (1974)---584A
Ohlig v. Marine & Rail Equipment, 47 Or App 363 (1980)---380
Olson v. SIAC, 222 Or 407 (1960)---331,782
O'Neal v. Sisters of Providence, 22 Or App 9 (1975)---132,586
Ore-Ida Foods v. Indian Head, 290 Or 909 (1981)---314

OSEA V. Workers' Compensation Dept., 51 Or App 55 (1981)---110
Owen v. SAIF, 33 Or App 385 (1978)---854
Patitucci v. Boise Cascade Corp., 8 Or App 503 (1972)---63
Patterson and Patterson, 286 Or 631 (1979)---833
Penifold v. SAIF, 49 Or App 1015 (1980)---245,707
Perdue v. SAIF, 53 Or App 117 (1981)---478

Perkins v. Willamette Industries, 273 Or 566 (1975)---823
Peterson v. SAIF, 52 Or App 731 (1981)---868
City of Portland v. Ruggero, 231 Or 624 (1962)---559
Puckett v. Wagner, 6 Or App 269 (1971)---509
Raines v. Hines Lumber Co., 36 Or App 715 (1978)---357,509,793
Ramseth v. Maycock, 209 Or 66 (1956)---331,584A

Riutta v. Mayflower Farms, Inc., 19 Or App 278 (1974)---357,782
Rivers v. SAIF, 45 Or App 1105 (1980)---645
Rogers v. SAIF, 289 Or 633 (1980)---19,331,396,584A,638,782
Rohrs v. SAIF, 27 Or App 505 (1976)---19,396
Russell v. SAIF, 281 Or 353 (1978)---722
Satterfield v. Satterfield, 54 Or App 184 (1981)---763

Sandstrum v. SAIF, 46 Or App 773 (1980), rev den 289 Or 677 (1980) ---757,763
Saxton v. Lamb-Weston, 49 Or App 887 (1980)---707
Schwehn v. SAIF, 17 Or App 50 (1974)---357
Sekermestrovich v. SAIF, 280 Or 723 (1977)---153
Shannon v. Moffett, 43 Or App 723 (1979)---317
Slechta v. SAIF, 43 Or App 443 (1981)---857

Smith v. Amalgamated Sugar Co., 25 Or App 243 (1976)---291,380,478
Smith v. Ed's Pancake House, 27 Or App 361 (1976)---68,243,324,331, 535,545,833,850
Smith v. Lew Williams Cadillac, 33 Or App 21 (1978)---102,559
Snow v. West, 250 Or 114 (1968)---314
Smith v. SAIF, 51 Or App 833 (1981)---854,861
Standley v. SAIF, 8 Or App 429 (1972)---331
State v. Sands, 10 Or App 438 (1972)---586
State ex rel Juv. Dept. v. Moyer, 42 Or App 655 (1979), rev den 288 Or 633 (1980)---833

Stritt v. SAIF, 37 Or App 893 (1978)---768
Stroh v. SAIF, 261 Or 117 (1972)---636
Stuhr v. SIAC, 186 Or 629 (1949)---584A
Stupefel v. Edward Hines Lumber Co., 288 Or 39 (1979)---217
Summit v. Weyerhaeuser Co., 25 Or App 851 (1976)---782
Swanson v. Westport Lumber Co., 4 Or App 417 (1971)---640

Syphers v. K-W Logging, Inc., 51 Or App 769 (1981)---198
Surratt v. Gunderson Bros., 259 Or 65 (1971)---523
Taylor v. Baker, 279 Or 139 (1977)---671,680
Taylor v. SAIF, 40 Or App 437, rev den 287 Or 477 (1979)---55,864
Templeton v. Pope & Talbot, Inc., 7 Or App 119 (1971)---364
Thompson v. SAIF, 51 Or App 395 (1981)---14,40,80,102,113,123,129,
132,217,256,304,517,549,707

Uris v. SCD, 247 Or 420 (1967)---17,714
Vader v. SIAC, 163 Or 492 (1940)---864
Vandehey v. Pumilite Glass & Building Co., 35 Or App 187 (1978)
---291,380
Wait v. Montgomery Ward, Inc., 10 Or App 333 (1972)---564,768
Walker v. Compensation Dept., 248 Or 195 (1967)---523
Waxwing Cedar Products v. Koennecke, 278 Or 603 (1977)---317
Weller v. Union Carbide, 288 Or 27 (1979)---14,120,139,155,217,219,
254,445,465,539,545,615,629,676,682,773,799,806,857
Weyerhaeuser Co. v. Lynch, 268 Or 142 (1971)---763
White v. SIAC, 236 Or 444 (1964)---396

Wick v. SAIF, 37 Or App 285 (1978)---744
Wilburn v. SAIF, 430 Or App 611 (1979)---680
Wilke v. SAIF, 49 Or App 427 (1980)---373
Williams v. Burns International Security, 36 Or App 769 (1978)---478,782
Williams v. SAIF, 31 Or App 1301 (1977)---478
Willis v. SAIF, 3 Or App 565 (1970)---396

Wilson v. SAIF, 48 Or App 993 (1980)---568
Wilson v. Weyerhaeuser, 30 Or App 403 (1977)---228,373,815,868
Wood v. SAIF, 30 Or App 1103 (1977)---815,847
Woodman v. Georgia-Pacific, 289 Or 551 (1980)---452,523,660,696
Wright v. SAIF, 289 Or 323 (1980)---271,744

VAN NATTA'S CITATIONS

(Volumes 32 and 33)

Donald R. Anderson, 31 Van Natta's 70 (1981)----304
Zelda Bahler, 31 Van Natta's 139, 33 Van Natta's 478 (1981)---
505,667,733
Larry J. Barnett, 33 Van Natta's 655 (1981)---704
Robert A. Barnett, 31 Van Natta's 172 (1981)---180,206,245,447,476,
490,508,542,570
David Bartell, 29 Van Natta's 876 (1980)---655
Cecil Black, Jr., 30 Van Natta's ___ (1981)---153,178

Edwin A. Bolliger, 33 Van Natta's 559 (1981)---586,701
Cynthia K. Bowman, 33 Van Natta's 582 (1981)---604
Clarence Carroll, 24 Van Natta's 276 (1978)---505
Chester Clark, 31 Van Natta's 10 (1981)---97,658
Rhoda Mae Collier, 30 Van Natta's ___ (1981)---728
Warren Collins, 17 Van Natta's 236 (1976)---505

Robert V. Condon, 30 Van Natta's ___ (1981)---21,85,705
Richard A. Davidson, 30 Van Natta's ___ (1981)---445,545,615
Walter J. Dethlefs, 31 Van Natta's 169 (1981)---132,304,517,586
Barbara Dill, 32 Van Natta's 248 (1981)---678
James Elsey, 27 Van Natta's 808 (1981)---609
Wayne M. Evenden, 32 Van Natta's 54 (1981)---248,678

Dennis Gardner, 31 Van Natta's 191 (1981)---82,110,123,664
Steven K. Gottfried, 32 Van Natta's 101 (1981)---304
Robert L. Green, 31 Van Natta's 54 (1981)---714
Shirley Guinn, 24 Van Natta's 35 (1978)---609
Robert K. Hedlund, 31 Van Natta's 97 (1981)---714
Norman W. Hickman, 32 Van Natta's 123 (1981)---586

Hilda Horn, 19 Van Natta's 138 (1976)---259
Lorena Iles, 30 Van Natta's ___ (1981)---682
Frank Jangula, 24 Van Natta's 387 (1978)---259
Derral D. Kelley, 28 Van Natta's 793 (1980)---655
Donna P. Kelley, 30 Van Natta's ___ (1981)---246
Henry Kochen, 9 Van Natta's 95 (1972)---259

Evelyn LaBella, 30 Van Natta's ___ (1981)---5,36,469
James Leppe, 31 Van Natta's 130 (1981)---574
Russell Lewis, 29 Van Natta's 226 (1980)---478
Curtis A. Lowden, 30 Van Natta's ___ (1981)---153,178
Denise Lundy, 26 Van Natta's 573 (1979)---509
Charles Maddox, 33 Van Natta's 585 (1981)---586

Henry McGarrah, 33 Van Natta's 584A (1981)---582,584,585,586,593,
604,608,613,625,635,737
William W. McKenney, 33 Van Natta's 542 (1981)---570
Joe Meeker, 30 Van Natta's ___ (1981)---196,505
Steven A. Mills, 29 Van Natta's 633 (1980)---609
Albert Moore, 13 Van Natta's 34 (1974)---505
Kay L. Murrens, 33 Van Natta's 586 (1981)---582,584,585,593,604,612
613,615,625,657,707,737

Joseph Needham, 32 Van Natta's 63 (1981)---497
Raphael Newtson, 31 Van Natta's 132 (1981)---628
Gerald E. Oar, 31 Van Natta's 170 (1981)---671
John D. O'Neil, 29 Van Natta's 456 (1980)---42
William A. Payne, 4 Van Natta's 195 (1970)---509
Irene Penifold, 29 Van Natta's 288,462,536 (1980)---707

Clara Peoples, 31 Van Natta's 134 (1981)---216,546
Dock A. Perkins, 31 Van Natta's 180 (1981)---67,228,233,530,548,631
Elfreta Puckett, 8 Van Natta's 158 (1972)---671
Rick A. Rabern, 30 Van Natta's ___ (1981)---286
George Riley, 27 Van Natta's 782 (1979)---252
Lesley L. Robbins, 31 Van Natta's 208 (1981)---273

Walter Rogers, 16 Van Natta's 92 (1976)---505
Barbara Rupp, 30 Van Natta's ___ (1981)---433,503
Robert Sanchez, 32 Van Natta's 80 (1981)---132,586
Leroy R. Schlecht, 32 Van Natta's 261 (1981)---259
Elizabeth Simmons, 11 Van Natta's 282 (1974)---131
Wilbur Slate, 20 Van Natta's 81 (1977)---505

Lon E. Smith, 29 Van Natta's 793 (1980)---739
Richard Stinson, 29 Van Natta's 469 (1980)---546
Sidney A. Stone, 31 Van Natta's 84 (1981)---42
John P. Swearinger, 29 Van Natta's 269 (1980)---655
Charles C. Tackett, 31 Van Natta's 61 (1981)---148,616
Barry B. Turnbull, 32 Van Natta's 217 (1981)---304

Allen Twigger, 27 Van Natta's 182 (1979)---205
William Valtison, 31 Van Natta's 213 (1981)---586
Richard Wehr, 29 Van Natta's 656 (1980)---655
Alfred West, 10 Van Natta's 232 (1973)---291
Cecil B. Whiteshield, 4 Van Natta's 203 (1970)---291
Willie E. Williams, 32 Van Natta's 171 (1981)---251

Willie Williams, 33 Van Natta's 533 (1981)---533
Lillian K. Winders, 32 Van Natta's 256 (1981)---304

ORS CITATIONS

(Volumes 32 and 33)

Page

ORS 2.520---331,380.
ORS 8.310(1)---810
ORS 8.310 (2)---810
ORS 8.310(4)---810
ORS 8.330---810
ORS 8.340---810
ORS 8.372---810
ORS 23.175---757
ORS 23.175(2)---757
ORS 23.760 et seq.---757
ORS 23.777---757,763
ORS 30.265---810
ORS 41.360(24)---833
ORS 174.110(2)---777
ORS 174.115---777
ORS 183.450(4)---116
ORS 240.185---810
ORS 655.520(3)---171,251
ORS 655.605---605
ORS 655.615(4)---369
ORS 656.004---757,763
ORS 656.004(20)---163
ORS 656.005(3)---104
ORS 656.005(7)---380
ORS 656.005(8)(a)---331,380, 396,584A
ORS 656.005(9)---261,380,478
ORS 656.005(16)---810
ORS 656.005(21)---492,748,801,864
ORS 656.005(31)---60
ORS 656.027---60
ORS 656.027(2)---96
ORS 656.027(3)(a) & (b)---60
ORS 656.027(4)---201
ORS 656.031(4)---369
ORS 656.039(1)---201
ORS 656.054---369
ORS 656.126(1)---163,488
ORS 656.154---259
ORS 656.154(1)(2) & (3)---823
ORS 656.156---369
ORS 656.202---369,707
ORS 656.204---104,439
ORS 656.206---380,598
ORS 656.206(1)(a)---329,868
ORS 656.206(2)---104
ORS 656.206(3)---98,143,182,329, 530,552,594,640,815
ORS 656.206(5)---104,317,598
ORS 656.208---104

Page

ORS 656.210---380,757
ORS 656.214(c)(d)---632
ORS 656.214(2)---151,204,380
ORS 656.214(2)(e)---204
ORS 656.214(2)(h)---303
ORS 656.214(3)---204
ORS 656.214(4)---609
ORS 656.214(5)---268,598,854,861
ORS 656.216---350
ORS 656.218---123
ORS 656.219(2)---317
ORS 656.222---151,861
ORS 656.226---232,439,777
ORS 656.230---350
ORS 656.234---757
ORS 656.236(1)---88,205
ORS 656.245---15,54,76,134,170,196, 198,210,215,247,248,259,271,272, 291,302,380,441,467,555,564,721,768
ORS 656.245(1)---306,748,768
ORS 656.245(2)---768
ORS 656.262(4)---324,478
ORS 656.262(5)---324,380,478,671
ORS 656.262(5)(b)---68
ORS 656.262(6)---139,380
ORS 656.262(7)---380
ORS 656.262(8)---196,324,478,511, 518,671
ORS 656.265---478,535
ORS 656.265(1)---833
ORS 656.265(3)---155
ORS 656.265(4)---364,535,716
ORS 656.265(4)(a)---535
ORS 656.268---192,276,331,380,440, 452,543
ORS 656.268(1)---748
ORS 656.268(2)---163
ORS 656.268(3)---131,196,748
ORS 656.268(4)---350
ORS 656.268(5)---655
ORS 656.271---131
ORS 656.273---48,123,131,291,317,380, 457,546,555,621
ORS 656.273(1)---309,331,753,820,829
ORS 656.273(3)---324,434,748,829
ORS 656.273(4)(b)---131
ORS 656.273(6)---515
ORS 656.273(7)---76
ORS 656.278---44,317,551,555,598
ORS 656.283(b)---52

ORS Citations--Volumes 32 and 33

Page

ORS 656.283(2)---286
ORS 656.283(3)---655
ORS 656.283(6)---598
ORS 656.289(3)---636,729
ORS 656.289(4)---88,872
ORS 656.295---346
ORS 656.295(5)---30,123,206, 508
ORS 656.298(5)---132
ORS 656.298(6)---276,346, 357,364,806
ORS 656.304---350
ORS 656.307---155,160,451, 810
ORS 656.313---21,85,705
ORS 656.313(1)---647
ORS 656.319---139,380, 478,739
ORS 656.319(1)(b)---729
ORS 656.319(2)---298,317, 497,748
ORS 656.325---519
ORS 656.325(1)---724
ORS 656.378(3)---317
ORS 656.382---380

Page

ORS 656.382(1)---324,478,518,669, 733
ORS 656.382(2)---478,523
ORS 656.382(3)---196
ORS 656.386(1)---51,52,346,380
ORS 656.386(2)---373,380
ORS 656.388(2)---346,380
ORS 656.388(4)---373
ORS 656.576---314
ORS 656.578---259
ORS 656.593---259,261
ORS 656.593(1) & (3)---259
ORS 656.593(1)(c)---259,261
ORS 656.593(1)(d)---259
ORS 656.802---584A,593,625,707
ORS 656.802(1)---271,707
ORS 656.802(1)(a)---17,123,256,517, 584A,806
ORS 656.802(1)(b)---744
ORS 656.802(2)---271,744
ORS 656.806---306
ORS 656.807---139
ORS 656.807(1)---364,716
ORS 659.---182

ADMINISTRATIVE RULE CITATIONS

(Volumes 32 and 33)

Page

OAR 436-35-000 et seq.----------123
OAR 436-53-005----------350
OAR 436-54-212(a)----------658
OAR 436-54-212(2)(a)----------494
OAR 436-54-212(2)(b)----------658
OAR 436-54-250----------350
OAR 436-54-270----------768
OAR 436-54-310(4)(b)----------505
OAR 436-54-320----------221,568
OAR 436-54-332----------155,295
OAR 436-54-332(6)----------295
OAR 436-65----------12
OAR 436-65-200 et seq.----------598
OAR 436-65-500(6)----------664
OAR 436-65-515(2)----------664
OAR 436-65-530(5)(a)----------664
OAR 436-65-532(1)----------12
OAR 436-65-535----------204
OAR 436-65-536(1) & (2)(c)----------204
OAR 436-65-537 to 436-65-540----------204
OAR 436-65-545(2)(a)----------685

Page
OAR 436-65-545(3)(a)----------685
OAR 436-65-545(3)(c)----------685
OAR 436-65-550----------720
OAR 436-65-550(1)----------151,473
OAR 436-65-555----------151
OAR 436-65-555(6)(c)----------473
OAR 436-65-575----------303
OAR 436-65-600 et seq.----------221,249,448,466,496,
504,532,548,552,556,624,633,662,674,687,694,696,711,723,726
OAR 436-65-601----------82,733
OAR 436-65-602----------674
OAR 436-65-604----------674
OAR 436-65-605----------674
OAR 436-65-607----------548,674
OAR 436-65-607(4) & (6)----------548
OAR 436-65-608----------674,733
OAR 436-65-615----------674
OAR 436-65-615(1)(a) & (b)----------733
OAR 436-65-665----------548
OAR 436-65-681----------123
OAR 436-65-998----------662
OAR 436-69-130----------724
OAR 436-69-320(2)----------467
OAR 436-69-335----------54,248,678,768
OAR 436-69-420(7)----------196
OAR 436-83-120----------48,68,139,286,380
OAR 436-83-125----------380
OAR 436-83-230----------286
OAR 436-83-300----------655
OAR 436-83-460----------55
OAR 436-83-480----------245,542,570
OAR 436-83-480(2)----------490
OAR 436-83-480(2)(b)----------206
OAR 436-83-525----------444,736
OAR 436-83-700(2)----------636
OAR 436-83-720(1)----------508
OAR 438-24-015(3) & (4)----------317
OAR 438-24-025 (1), (2) & (3)----------317
OAR 438-24-030 & 030(3)----------317
OAR 438-47-010----------138
OAR 438-47-010(2)----------153,276,301,512
OAR 438-47-045----------373
OAR 438-47-075----------641

LARSON CITATIONS

1 Larson, Workmen's Compensation Law, Section 13.11 (1972)---331
1 Larson, Workmen's Compensation Law, Section 15.41 (1972)---19,284
1B Larson, Workmen's Compensation Law, Section 48 (1980)---810
3 Larson, Workmen's Compensation Law, Section 78.10 (1973)---636
4 Larson, Workmen's Compensation Law, Section 95.12 (1976)---55,324,
331,850

CLAIMANTS INDEX (Cumulative for Volumes 32 and 33)

Claimant (WCB Number and/or Court Citation)-----Page(s)
Aaby, Clovis (79-04913)-----95
Abrams, Mark S. (80-10962)-----179
Acuna, Kay E. (79-9668)-----639
Adamson, Lorraine [80-1338 & 54 Or App 52 (1981)]-----396
Ainsworth, Randy (80-6450)-----223
Akres, George (80-08452)-----244
Albarez, Angel B. (79-07651)-----598
Albert, Joseph (79-09720)-----452
Aldrich, Thomas (80-01339)-----476
Alire, Joseph T. (80-9060)-----224
Allen, Dee (79-09150 & 79-09151)-----149
Allen, Marilee A. (80-03928)-----231
Allen, Roy C. (80-11129)-----224
Allensworth, Alvin E. (80-11070)-----642
Allison, Gaylord (80-06116 & 80-06880)-----462
Ambrose, Dwight G. (80-00486)-----12
Ammon, William H. (80-05566)-----477
Anfilofieff, Juan (78-04612)-----96
Arata, Carla (81-01436)-----654
Archer, John (80-05008)-----244
Armstrong, Ray (80-01476)-----245,462
Armstrong, Walter (80-03601 & 80-06022)-----51
Arnaud, Garland J. (79-10623)-----629
Arndt, Willi (79-07833)-----286
Arnold, Alfred (80-03803)-----534
Arrigoni, John (81-03211)-----654
Arroyo, Socorro (80-09868)-----573
Attebery, Sandra P. (80-02816)-----200
Avila, Henry (81-03414)-----593
Ayer, Virginia (79-09912)-----65
Ayers, Mark A. (80-5968)-----642
Baca, Robert (80-01748)-----232
Bacorn, Doris M. (80-04438)-----556
Baer, Ralph L. (80-2528)-----643
Bahler, Zelda M. (79-06095)-----24,478
Bailey, Roy (78-07290)-----483
Baker, Harry E. (80-04867)-----152
Baker, Kenneth (80-04731)-----97
Baldwin, Raymond L. (80-02005)-----65
Ballinger, Roger (80-08724 & 80-09824)-----520,573
Bangs, Larry (80-537)-----442
Barber, Bertha J. (80-04539 & 80-04540)-----288
Barella, Michelle L. (80-9617)-----602
Barger, Douglas D. (80-10253)-----655
Baril, Russell G. (80-04580)-----433
Barnett, David (80-10902)-----224
Barnett, Larry J. (79-00387)-----655
Barnett, Robert A. (79-11012 & 79-07210)-----657
Barrong, Robin Lee (80-08730)-----643

CLAIMANTS INDEX

Claimant (WCB Number and/or Court Citation)-----Page(s)
Batdorf, Wayne R. [79-05894 & 54 Or App 496 (1981)]-----782
Bauder, Charles D. (78-06397)-----522
Bault, Boyd [77-6376 & 53 Or App 1 (1981)]-----309
Bea, Randall (80-04658)-----454
Beaman, Roy L. (80-05215)-----534
Beasley, John (80-01299)-----288
Beck, Theodore H. (79-05947)-----643
Beemer, Dianna (80-01872)-----463
Beeson, Arley J. (80-08228)-----433
Bellinger, Lesley (80-8545 & 81-5344)-----658
Bellmore, Charles (80-0441)-----484
Benavidez, Guillermo (79-10201)-----25
Benedict, Tracy (80-08964)-----558
Bennett, Geri (80-05125)-----91
Benson, Vincent, Jr. (78-01364)-----268
Berliner, Dennis [79-9454 & 54 Or App 624 (1981)]-----801
Berov, Valentin S. (80-00169)-----25
Bess, Mary (80-04185)-----153
Binder, Karen V. (80-08841)-----631
Binks, Judith E. (80-9248)-----522
Birdsell, James E. (80-01873)-----484
Bishop, Barry (80-01178)-----484
Bissonette, Bernie (80-07114)-----218
Blair, David (79-08936)-----97
Blake, Charles E. (80-10545)-----594
Blaylock, Wilana M. (80-8050)-----454
Bogner, Judy A. (80-07904)-----288
Bohnke, Pauline (80-02336)-----98
Bolden, Jefty (81-00669)-----658
Bolliger, Edwin (78-09001)-----559
Boock, Elmer (81-01515)-----434
Booth, B. (79-01980)-----119
Borzea, Patrick J. (80-09400)-----486
Bosworth, Edwin T. (80-04714)-----487
Boucher, Carl L. (79-04796)-----52
Bowman, Cynthia K. (80-06844)-----582
Bowman, Joan C. (80-07302)-----488
Boyd, Vaughn H. (80-01134)-----561
Brackley, Kenneth (81-00693)-----603
Bradbury, W. Leonard (80-06805)-----246
Brandon, Vivian (79-03341)-----603
Brandow, Joseph J. (80-09917)-----603
Brannon, Jimmie L. (80-01135)-----65
Brennen, Ronald F. (80-10210)-----119
Breshears, Neil G. (80-01917)-----573
Brewer, Ishbel (80-10782 & 81-00759)-----535
Bristow, Lemuel (79-7372)-----179
Broadway Cab Co. (79-01978)-----522
Brown, Barry M. (81-00765)-----574
Brown, Larry W. (80-04542)-----659
Brown, Max (80-0916)-----100
Brown, Michael (79-10780)-----26
Brown, Pamela J. (80-10111)-----66

CLAIMANTS INDEX

Claimant (WCB Number and/or Court Citation)-----Page(s)
Brown, Robert W., Jr. (80-10310)-----179
Brown, William T. (78-02247)-----66,94
Browne, Frederick E. (80-00878)-----92
Brugia, Greta (80-01097)-----561
Bryant, Gloria A. (80-07906 & 80-04013)-----435
Bryant, Raymond (79-08083)-----471
Buchanan, Randy L. (80-08280)-----247
Bunce, William (80-00051)-----546
Burkenbine, Loyd (80-06028)-----464
Caba, James (80-00970)-----455
Cadwallader, Ward (80-06749)-----488
Caffey, William L. (80-07258)-----442,548
Cain, Leonard (78-5150)-----660
Calkins, Wallace (80-00776)-----562
Capehart, David A. (80-11634)-----594
Carbajal, Jose (79-03751)-----1
Carpenter, Philip S. (80-03900 & 80-04190)-----443
Carter, Howard S. (80-10965 & 80-09402)-----443
Carter, J.D. (78-04946)-----248
Carter, Lola M. (80-10461)-----662
Carter, Minnie K. (Deceased)(78-04667)-----574
Case, Ruth M. (80-01141)-----490
Casorio, Antonio (80-6974E)-----631
Castleberry, Charles A. (80-02453)-----575
Castner, Richard A. (81-04083)-----662
Castro, Ralph (78-03909)-----604
Caudell, Douglas D. (80-2716)-----664
Cecil, Vernon E. (80-03981)-----131
Cessnun, Sherri (80-02242 & 80-03891)-----29
Chamberlain, Patrick (80-3902)-----180
Chambers, Richard (80-05788)-----492
Chandler, John (80-03349 & 80-03350)-----149
Chastagner, Larry (80-07911)-----119
Childress, Ray C. (80-5663)-----632
Chochrek, Stephen c. (80-05127)-----289
Christopher, Terry L. (80-07027)-----180
Clark, Bradley F. (80-5825)-----493
Clark, David O. (80-05748)-----100
Clark, Florence M. (80-02769)-----153
Clark, James (79-09346)-----444
Clark, Thomas (80-8771)-----471
Clevenger, Brian S. (80-07862)-----666
Cobbin, Daniel T. (80-06752)-----200
Cochell, Larry (80-04312)-----667
Coen, Joann (80-8622)-----472
Colbert, Arye Nell [79-7258 & 54 Or App 763 (1981)]-----829
Cole, Lee (80-01786)-----200
Connor, James R. (81-0097M)-----473
Cook, Keith (79-10047)-----548
Cooke, Donnie (78-09761)-----523
Cooksey, Lesly A. (80-07912)-----289
Cooley, Edward D. (80-1143)-----526
Cooper, Charles E. (80-08230 & 80-07744)-----444

CLAIMANTS INDEX

Claimant (WCB Number and/or Court Citation)-----Page(s)
Cooper, Colleen M. (80-07966)-----465
Cooper, Merle [79-8266 & 54 Or App 659 (1981)]-----806
Copenhaver, James (80-05221)-----605
Cornwell, Lafayette (80-01399)-----100
Corwin, Josephine Smith (79-08050)-----30
Craven, David (80-07259)-----455
Crawford, Clifford (79-02692)-----14
Crawford, Michael (80-04913)-----537
Crisman, Timothy D. (80-03571)-----201
Crooke, Wesley E. (80-04302)-----290
Croxell, Gale R. (80-05964)-----120
Curths, Glen (80-843)-----526
Curtis, Robert (80-04108)-----66
Cyr, Ray P. (79-09349 & 80-02708)-----290
Dalton, Alvin E. (80-09066)-----435
Davidson, Laura J. (80-00266)-----15
Davis, Allen (80-07823)-----564
Davis, Ivan (79-10748)-----232
Davis, James T. (80-07363)-----291
Davis, Kelly G. (80-04022)-----669
Day, Randy (80-00737)-----101
Dean, William (80-02825)-----30
Del Rio, Ada C. (80-10596)-----138
Derson, Joseph L. (79-04282)-----201
Dill, Barbara (80-08714)-----248
Dines, Edward S. (79-02450 etc.)-----566
Dolton, Michael (78-1509)-----493
Domney, David (79-08125)-----132
Donais, Robert (80-01637)-----92
Donais, Robert E. (81-00783)-----537
Donovan, Warren (81-0310M)-----632
Douglas, Gloria E. (79-07056)-----139
Douglas, Mary B. (80-10592)-----493
Doyle, Richard (80-06890)-----15
Dozier, Ronny L. (80-02053 & 80-02054)-----68
Drake, Fay (80-06756)-----537
Dreier, Lorne R. (80-08504)-----93
Driskell, Jerry L. (80-06122)-----71
Duckett, Gail L. (80-02774)-----284
Duncan, Jan (80-08463)-----436
Dunn, Daniel C. (80-04110 & 80-04111)-----120
Dury, James W. (80-08233)-----494
Dyer, William A. (80-02384)-----232
Dyke, John E. (80-10073)-----465
Eagle, Hettie M. (79-07148)-----671
Eatwell, Kathryne (79-08058)-----595
Eber, James [79-4969 & 54 Or App 940 (1981)]-----847
Edge, Ervin (79-04080)-----294
Edmonds, Alice (80-05142)-----436
Edwards, Michael (80-03813)-----121
Egge, Lance David (79-07880)-----180,495
Ekman, Raymond W. (81-01267)-----673
Eldred, James J. (79-06049)-----31

CLAIMANTS INDEX

Claimant (WCB Number and/or Court Citation)-----Page(s)
Elliott, Kenneth L. [79-08090 etc. & 54 Or App 980 (1981)]----850
Elliott, Patrick (80-01598 & 80-04905)-----155,218,295
Ellis, Jon (80-04076)-----466
Emra, Anna (80-01927)-----121,181
Enyart, Phyllis M. (80-789)-----226
Erickson, Debra J. (80-09623)-----566
Erickson, Timothy A. (79-06812 & 80-08849)-----644
Estep, Katherine (80-08146)-----455
Euler, Emile H. (79-10877)-----606,641
Evenden, Wayne M. (80-00700)-----54
Everhart, Leon E. (80-08667)-----566
Everts, George A. (79-10988)-----93
Faries, Danny W. (80-10917)-----674
Farley, James A. (80-06984)-----437
Faulk, Jimmy [77-3712 etc. & 54 Or App 77 (1981)]-----741
Faust, Raymond (79-07609)-----160
Ferebee, Daniel R. (80-06306 & 80-06307)-----606
Ferguson, Bessie L. (79-09965)-----203
Fey, Ellen L. (80-06411)-----576
Fisk, Clarence E. (80-9446 & 80-9445)-----527
Floeter, Michael W. (80-06986)-----297
Floyd, Eddie (80-05063)-----35
Frachiseur, Perry M. (80-04673)-----268
Fraijo, David J. (80-06516)-----496
Fraley, Jerry N. (80-08564)-----607
Frame, Earl F. (80-02458)-----271
Frazier, George L. (80-02722)-----233
Fry, Arthur L. (80-07455)-----204
Fulfer, Melvin A. (81-03812)-----538
Futrell, Ray (80-2723 & 80-2724)-----674
Gaddini, Gene (80-8685)-----527
Gale, James W. (80-9582)-----528
Gallea, Cindy L. (80-07747)-----54
Garcia, Richard (80-01587)-----36
Garrison, Susan (80-11150)-----644
Gatewood, Rozella (80-06989)-----2,86
Geer, Edward (80-10975)-----676
Geiglein, John Gary (80-03408)-----644
Gemmell, Roscoe (79-03690)-----36
Gettman, Harry [77-4221 etc. & 53 Or App 185 (1981)]-----329
Ghores, Edwar (80-09673)-----538
Giesbrecht, Allen (80-8237)-----676
Giger, Jess A. [78-9716 & 53 Or App 402 (1981)]-----346
Gilbert, Marie (79-10786)-----134
Girouard, Paul E. (80-03579)-----55
Givens, Shirley L. (80-06162)-----445
Glover, Frank (81-04565)-----549
Gobler, Dianna (79-03896)-----608
Gonzales de Sanchez, Romelia (79-09700)-----272
Gonzales de Sanchez, Romelia (Claim 87-CN-17170 S)-----271
Gonzales, Patricia (80-00115)-----538
Gonzales, Roy (79-06053)-----677
Goodsby, William M. (80-04202)-----2

CLAIMANTS INDEX

Claimant (WCB Number and/or Court Citation)-----Page(s)
Gordon, Shirley (79-10162)-----678
Gottfried, Steven K. (80-01702)-----101
Gourde, Colleen J. (80-7710)-----456
Grabill, Donald L. (80-00061)-----72
Grable, Michael [291 Or 387 (1981)]-----331
Graham, Cleo I. (80-06277)-----595
Graham, Ralph (80-01645)-----456
Granville, Alton (81-02677)-----135
Gray, David N. (79-10962)-----608
Gray, Michael (79-10635)-----141
Green, Joan M. (79-10880)-----680
Gressett, J.D. (80-00402)-----298
Griffin, Earl H. (78-09905)-----57
Grissom, Tommy F. (78-8968 & 79-4810)-----233
Guerra, Ralph F. (80-8629)-----680
Gunter, Howard (80-09271)-----576
Gunter, William G. (80-11336)-----549
Guthmiller, David E. (81-00903)-----682
Hackbart, Bradley A. (80-05146)-----39
Haley, Kent L. (79-04345)-----584
Hall, Gary M. (80-10652)-----86
Hall, Kathleen M. (80-04718)-----539
Hall, Leo A. (81-0144M)-----86
Hall, Phyllis E. (80-08467)-----299
Hall, Raymond A. (79-09045)-----249
Haller, Robert O. (79-00245)-----249
Hamel, Frank A. [79-00690 & 54 Or App 503 (1981)]-----788
Hammond, Robert F., Jr. (79-7799)-----250
Hams, Bernice (80-4835 & 80-5263)-----682
Hankins, Phyllis A. (80-4836)-----633
Hanner, Delores A. [79-6689 & 54 Or App 556 (1981)]-----797
Hanselman, John M. (80-06418)-----93
Hardaway, Milton (80-02015)-----541
Harmon, Orry W. [80-742 & 54 Or App 121 (1981)]-----748
Harmon, Ruth (79-08273)-----684
Harris, Earl L. [80-2710 & 53 Or App 618 (1981)]-----357
Harris, Miner Lee [79-9167 & 55 Or App 158 (1981)]-----861
Harris, Paul (Deceased)(80-03228)-----439
Hart, Donald (80-3943)-----685
Harvey, James (80-04766)-----122
Hatch, Guy L. (80-04767)-----39
Hatcher, Thomas (80-10166)-----272
Hayes, Clyde (80-6369)-----497
Hays, Kenneth L. (80-08691)-----497
Hedlund, Robert K. [79-09967 & 55 Or App 313 (1981)]-----864
Hedrick, Dennis (81-00415 & 81-02625)-----686
Hegrenes, Arnold (79-4849)-----528
Helmstetler, Iola C. (80-09075)-----567
Helvie, Don D. (79-10435)-----300
Henderson, Gwendolyn (80-171)-----446
Henrie, Glen, Jr. (79-09434)-----141
Henthorne, Samuel G. (77-07327)-----72
Herber, Gertrude O. (79-09968)-----94

CLAIMANTS INDEX

Claimant (WCB Number and/or Court Citation)-----Page(s)
Hermann, Olive [79-4231 & 53 Or App 672 (1981)]-----369
Herrington, Edward (79-06434)-----609
Hewitt [79-7248 & 54 Or App 398 (1981)]-----777
Hickman, Norman W. (78-06990)-----123
Hicks, Hubert (80-06993)-----39
Hicks, Julia I. (79-09110)-----497
Hicks, Vida (79-00920)-----126
Hile, Dennis H. (81-01686)-----541
Hilger, Albert J. (79-10472 & 80-06171)-----556
Hill, Jim (80-6228)-----528
Hilterbrand, Herbert (79-05516)-----143
Hines, David (79-7957)-----456,529
Hiscoe, Lorraine (80-09841)-----577
Hitomi, Hiroshi George (79-10101)-----609
Hoefft, Thomas G. (79-02746)-----73
Hogan, James E. (78-03921)-----103
Holder, Barbara (80-00244)-----205,259
Hollibaugh, Leslie E. (79-07306)-----73
Hollingsworth, Robert (80-11433 & 80-8197)-----645
Holt, Terry L. (80-06519)-----551
Hoover, Jay (80-09200)-----645
Hopson, William E. [77-5580 etc. & 53 Or App 109 (1981)]-----317,446
Hovater, Donal C. (80-03121 & 80-03122)-----3
Howard, Arden (79-01446)-----58
Howard, Ruth M. (77-00591)-----103
Hubbs, James (80-01043)-----273
Huber, Betty J. (79-11072)-----181
Hudson, Gregory O. (80-06591)-----611
Humphrey, Thomas E. (80-02689)-----499
Hunt, Joe (80-0007M)-----226
Hunt, Joe L. (89-9453)-----226
Hunter, David S. (80-02213)-----273
Hunter, Gary W. [79-4980 etc. & 54 Or App 718 (1981)]-----810
Imber, Eleanor (81-01789)-----686
Iness, Doris Sue (77-6947)-----687
Ireland, Afton (80-05495)-----40
Ivie, Kenneth [80-04388 & 55 Or App 60 (1981)]-----857
Jackson, Milford (80-02779)-----104
Jacobson, Beverly (80-04264)-----274
James, Dianne (77-06474)-----635
Jaques, Melburn (80-02977 & 79-09740)-----500
Jenkins, Charles (80-07221)-----457
Jennen, Susan A. (79-05868)-----612
Jentis, Hope (80-09988)-----687
Johannessen, Gerd (80-04596)-----88
Johns, Arlie H. [80-08634 & 55 Or App 431 (1981)]-----88,872
Johnson, Darrell C. [79-2615 & 54 Or App 179 (1981)]-----753
Johnson, Delmar C. (79-09216)-----3
Johnson, Michael T. (78-06133)-----127
Johnson, Richmond C. (80-09632)-----612
Johnson, Robert G. (80-07324)-----645
Johnson, Shirley B. [79-7925 & 53 Or App 627 (1981)]-----364
Johnson, Shirley B. [79-7925 & 54 Or App 620 (1981)]-----799

CLAIMANTS INDEX

Claimant (WCB Number and/or Court Citation)-----Page(s)
Johnson, William B. (80-07036)-----577
Jolly, Gertrude (80-06994)-----241
Jones, Dorothy (80-04097)-----567
Jones, Gordon A. (80-03318)-----541
Justrom, Roger (80-00914)-----466
Kabrich, Jack L. (81-00319)-----578
Kane, Patricia A. (80-10925)-----613
Kanna, Betty J. (80-07794)-----4
Karasch, Roger J. (80-08567)-----690
Kemery, Dennis C. (79-03851)-----106
Kemple, Dennis (78-07534)-----241
Keys, Larry D. (81-00495)-----646
Kimsey, Nancy (80-05585)-----274
King, Frank M. (80-06150)-----74
King, Michael J. (80-07413)-----433,636
Kinnaman, Beverly P. (80-05082)-----693
Kirkwood, Robert L. (80-02080)-----457
Kiser, Douglas W. (80-02551)-----578
Kissas, Beneta (80-08636)-----596
Kittle, Ronald F. (81-01439 & 81-01440)-----458
Kittson, Dorotha A. (80-4842)-----529
Knapp, Helen M. (78-05601)-----127,222,228
Knapp, Lynn S. (80-10332)-----127
Knickerbocker, Telphen N. (80-07480)-----568
Kniffen, Ron (80-02979)-----300
Knoblauch, Francis J. (81-01293)-----646
Knowland, Charles A. (80-06592)-----646
Koch, Delbert V. (78-10015)-----182
Kolander, Elizabeth (80-03870)-----4
Korbulic, Paul (80-08742)-----578
Kramer, Charles E. (80-04555)-----301
Kranz, David H. (80-03910)-----219
Kratzmeyer, Billy J. (80-04934)-----41
Kvokov, Timofei (80-02499)-----302
Kyzer, Thomas A. (80-06017)-----694
Lackie, Paul E. (79-08648)-----160
Lafferty, Jim (79-10756)-----530
Lakehomer, Richard L. (80-03181)-----531
LaMarsh, John L. (80-05800)-----5
Lambert, Sharon G. (79-03855)-----695
Lamothe, Anita A. (80-07474)-----695
Lancaster, Floyd (80-01505 & 80-05713)-----162
Landers, Richard C. (80-5456 & 80-3584)-----613
Landor, Russell (80-02258)-----128
Landriscina, Anthony [79-1775 & 53 Or App 558 (1981)]-----350
Landrum, Hal D. (80-06372)-----437
Lane, Jerry Lee (80-05587)-----42
Langa, Pamela L. (80-6944)-----696
Langley, Billey L. (80-02523)-----74
Langston, Olive E. (80-04325)-----163
Larsen, Betty E. (80-08432)-----696
Larson, Ole [79-07895 & 54 Or App 861 (1981)]-----843
Lathrop, Donald (80-10830)-----187

CLAIMANTS INDEX

Claimant (WCB Number and/or Court Citation)-----Page(s)
Lavin, James P. [79-7425 & 54 Or App 375 (1981)]-----773
Leach [78-7706 & 53 Or App 14 (1981)]-----314
Leary, Daniel (80-1939)-----613
Ledford, J.B. (80-09204)-----647
Lee, Ronald E. (80-08638)-----532
Lemly, Mike (80-06766)-----579
Lenox, Esther [77-1507 & 54 Or App 551 (1981)]-----793
Leonard, Cleatus B. (80-02260)-----275
LeRoy, Michael [79-4980 etc. & 54 Or App 718 (1981)]-----810
Lindberg, Darylene M. (80-06821)-----276
Lindsey, Melvin H. (80-02601)-----163
Lindsey, Richard J. (80-08519)-----42
Lines, Marvin F. [77-7218 & 54 Or App 81 (1981)]-----744
Linn, J.M. (81-01707)-----501
Livesay, Charles L. [79-10108 & 55 Or App 390 (1981)]-----868
Locascio, Thomas (78-09327)-----74
Logsdon, Shirley M. (79-08175)-----569
Long, Larry (80-06326)-----458
Looper, Harold B. (78-5162)-----228
Lopez, Jesus A. (79-07806)-----697
Lopez, Louis (79-08684)-----60
Lucht, Rodney H. (80-02365)-----570
Lundmark, Steven (80-04474 & 80-03297)-----107
Lynch, Henry A., Jr. (79-02098)-----206
Lyons, Olive B. (80-06327)-----188
Mackay, Linda D. (81-02371)-----647
Maddox, Charles (77-02861)-----585,586,647
Maier, Melissa L. (80-00277)-----17
Mailloux, Orwell R. (79-10361)-----108
Malone, Joy (80-00278)-----167
Mangun, Beverly (80-02981)-----43
Manley, Joseph (80-09593)-----458
Mansker, Howard (81-0184M)-----75
Mardis, John (80-07720)-----698
Marsden, Edward (80-01839)-----637
Martin, Clarence Carl (80-08201)-----648
Martin, Eugene R. (80-00369)-----110
Martin, Glen R., Jr. (80-02855)-----149
Martin, Lavelle G. (81-0029M)-----44
Martin, Niels P. (78-08866 & 78-09938)-----597
Martindale, Kathleen (80-03532)-----467
Martishev, Dan (80-11645)-----190
Matheny, Clifford (80-05897)-----519
Mathews, Iona (80-06675)-----85,128
McAlpin, Danny J. (80-6769)-----637
McArthur, Charles G. (80-05966)-----191
McBride, Lee M. (80-05943)-----206,699
McCann, Herbert I. (80-6770)-----192
McClanahan, Gerald D. (80-09849)-----699
McCollum, James L. (80-2083 & 80-2856)-----648
McDaniel, Ray (79-11076)-----701
McDermott, Stephen (80-06179)-----579
McGarrah, Henry (79-05440)-----584A

CLAIMANTS INDEX

Claimant (WCB Number and/or Court Citation)-----Page(s)
McGhee, Charles (79-09025)-----5
McGhee, David F. (80-9284)-----615
McIver, Dorothy (81-014M)-----192
McJunkin, Eldon L. (80-9233)-----648
McKenney, William W. (80-11397 etc.)-----468,542
McKenzie,George (80-06287)-----62
McKinnon, Fred (80-02502 & 79-07856)-----438,519
McKnight, James A. (79-06360)-----503
McMichael, William (79-09744)-----533,580
McNamara, George (80-01658 & 79-10681)-----207
Merideth, Frederick D. (81-00781)-----250,447
Milburn, Joseph (79-09940)-----649
Miller, Lloyd L. (80-01112)-----193
Miller, Margie A. (80-07138)-----286
Miller, Neil R. (80-09803)-----701
Miller, Paul (78-08806)-----207
Miller, Wayne D. (78-05239)-----440
Milligan, Orley B. (78-02484)-----90
Minnick, Gary L. (80-08251)-----209
Mirich, Michael D. (80-11535)-----503
Mitchell, Dorothy (81-02379)-----503
Mitchell, Fletcher (79-03476 & 79-05455)-----94
Mitchell, Thomas L. (78-02298)-----95
Molchanoff, Ethel (81-0256M)-----551
Monroe, Clarice M. (79-06698)-----276
Mooney, Zelda B. (79-03594)-----167
Moore, John L. (79-02417)-----459
Moore, Phyllis J. (78-06372)-----703
Moore, Ulan R. (80-10724)-----111
Morehead, Maria M. (80-08715)-----649
Morgan, Richard A. (79-09470)-----649
Morris, Olive H. [78-6247 & 53 Or App 863 (1981)]-----373
Mosbrucker, Margaret J. (80-07558)-----302
Mosqueda, Geraldo [79-08138 & 54 Or App 736 (1981)]-----820
Mowry, Robert L. (79-10891)-----144
Moyer, Mike (80-02762)-----168
Muffett, Wesley C. (80-00805)-----615
Muhammed, Abdullah (80-11446)-----616
Muir, Terry A. (80-00554)-----439
Mullen, Robert (80-04692)-----459
Mulvaney, Larry (80-02694)-----76
Murphy, Jeff B. (80-09085)-----704
Murrens, Kay L. (79-01573)-----586
Musgrove, Thomas A. (80-10805)-----616
Naylor, Andrew L. (80-07340)-----704
Neal, Leon (80-09515)-----570
Needham, Joseph (80-01948)-----63
Neimi, Clair (80-05944)-----617
Nelson, David (80-03537)-----650
Nelson, Marcia C. (80-04740)-----571
Neuman, Beverly J. (80-04646)-----580
Nichols, Marilyn (80-04693)-----251
Nims, Arthur (80-06239)-----581

CLAIMANTS INDEX

Claimant (WCB Number and/or Court Citation)-----Page(s)
Nirschl, Lauri A. (80-9366)-----128
Nordstrom, Carolyn (80-03187)-----44
Ohlig, James [291 Or 586 (1981)]-----380
Olive, Herb (78-9336)-----447
Olson, Betty (80-08901)-----468,571
Oropallo, Patrick F. (80-06867)-----46
Orozco, Anastacio (80-04516)-----193
Owen, James A. (80-09965)-----303
Owens, Leland D. (78-05543 & 78-10313)-----129
Pachal, Franklin J. (80-04460)-----76
Pache, Anne (80-3456)-----231
Paddock, Willis L. (80-01901)-----18
Paine, Carroll (80-06329)-----504
Painter, Bill (80-05271)-----704
Palmquist, Jo Ann (80-1739)-----617
Palmquist, Joanne (81-00774)-----705
Paresi, Kristie (77-06083)-----593
Parish, Stanley (80-03872)-----705
Park, Geneva (80-06536)-----244
Parker, Robert A. (80-00711)-----259,474,619
Parkinson, Margaret T. (79-09004)-----552
Parkinson, Robert J. (81-1802)-----468
Parks, Jenness (80-01261)-----304
Parries, Susan (80-06240)-----19
Partin, Donald S. (80-01798)-----459
Partlow, Evelyn M. (80-00083)-----178
Patterson, Steve (79-10402)-----706
Patton, John H. (80-05357)-----460
Payne, Tommy G. (79-08743)-----46
Pederson, Michael D. (79-10812)-----47
Penick, Robert (80-06726)-----210
Penifold, Irene (78-09826)-----707
Perdue, Earl W. [79-6785 & 53 Or App 117 (1981)]-----324,619
Peters, Daniel T. (80-01262)-----211
Peterson, Dorothy L. (79-06703)-----8
Peterson, Jack W. (80-07937)-----469
Peterson, Jerry (80-09429)-----460
Peterson, John R. (79-09942)-----150
Petit, Arven (80-2898)-----194
Petty, Lyle E. (80-07089)-----8
Petz, Elmer W. (79-01374)-----8
Phillips, Walter C. (80-02130)-----505,710
Phipps, James (81-01993)-----711
Planque, Dean (81-01379)-----508
Poe, Theodis E. (80-00559 etc.)-----113
Porter, Tom D. (79-10997)-----712
Powell, John M. (80-03380)-----714
Praszek, Daniel (80-05036)-----47
Pratt, Dwight C. (80-11302)-----470
Preston, Andrew L. (80-10184)-----650
Price, Robert J. (80-01903)-----129
Prisk, Leroy G. (80-06330)-----438
Pruitt, John O. (80-02939)-----10

CLAIMANTS INDEX

Claimant (WCB Number and/or Court Citation)-----Page(s)
Pruitt, Patricia (79-10619)-----716
Pugh, Ira I. (81-00953)-----620
Pyle, June (80-05114)-----21
Rae, Jon H. (80-09904)-----718
Randall, Grace (80-10089)-----718
Reed, David L. (79-09063)-----251,452,533
Reed, John M. (80-07045)-----638,642
Rehberg, Pamela (79-00835)-----460
Reibold, Donald J. (80-05552)-----719
Reimer, Robert W. (80-11453)-----720
Reineccius, Geraldine I. (79-10367)-----252
Replogle, Genelle (80-01264 etc.)-----542
Reynolds, James S. (80-05949)-----168
Rice, John (80-04971)-----242
Richards, Edward J. (79-6016)-----474
Richardson, Donna C. (80-06004)-----277
Richmond, Walter R. (80-01520)-----461
Riley, George L. (80-06988)-----252
Ringo, Ramona J. (80-06334)-----306
Rini, Laura (80-06603)-----461
Ripp, William J. (80-01426)-----47
Riskin, Ken (80-01427)-----721
Roach, Clemon A. (80-10092)-----650
Roberts, Bryan (80-09210)-----722
Robinette, Robin F. (79-04246)-----195
Robinson, Loyce D. (81-0150M)-----64
Robson, Stan (79-09524)-----48
Rodriquez, Abran (80-08676 & 81-00369)-----194
Rogers, Bettie L. (80-08127)-----221
Roll, Bernetta (80-09372)-----509
Rook, Robert J. (80-06335)-----90
Rosa, Mary L. (80-01116)-----79
Rose, Chat (79-07432)-----597
Rowe, William G. (80-00665)-----474
Rupp, Barbara (80-01803)-----79
Russ, Peter J. (80-03289)-----509
Russell, Joyce A. (80-06434)-----211
Russell, Orlando (81-10049)-----723
Sain, William C. (80-10383)-----470
Samard, Carol (80-02227)-----724
Sanchez, Max N. (80-01996)-----10
Sanchez, Robert (80-00224)-----80
Sanderson, Curtis (80-03957)-----211
Sandusky, Richard (79-3294 etc.)-----725
Satterfield [54 Or App 184 (1981)]-----757
Sawyer, Charles R. (79-1464)-----726
Sawyer, Donald (81-01955)-----651
Saxe, Gerald (80-06489)-----543
Schaefer, Bill J. (80-01431)-----243
Schaffer, Lucine (80-08314)-----511
Scheckells, Jill (80-3638)-----253
Schlecht, Leroy R. (79-06304)-----261,475,620
Schmidt, Kevin J. (80-04284)-----254

CLAIMANTS INDEX

Claimant (WCB Number and/or Court Citation)-----Page(s)
Schmitt, Dennis E. (80-09813)-----254
Schuld, Matt N. (80-03545)-----48
Scofield, Dale [78-3310 etc. & 54 Or App 804 (1981)]-----833
Scovill, Frank (80-10138)-----212
Seiber, John T. (81-03087)-----554
Senger [77-1-300 & 54 Or App 752 (1981)]-----823
Setness, Frank (81-01049)-----475
Sexton, Walter (80-05509)-----21
Shandley, Jerel (80-05131)-----543
Shanks, Wallace L. (79-08112 & 79-11111)-----512
Shay, George T. (80-01908)-----50
Sherman, Erwin W. (80-04132 & 80-04133)-----212
Shertzer, Dina L. (79-07497)-----82
Shipman, Charles R. (80-00668)-----113
Shirey, Charles (79-10771)-----50
Shockley, Joan (80-01070)-----169
Shoemaker, Vernal J. (80-05639)-----543
Shoptaugh, Glenda (80-04422)-----513
Shumaker, Jack (80-04961)-----170
Simmonds, William C. (80-7050)-----213
Sims, Rayford (80-06552)-----461
Singer, Leona F. (80-05952)-----726
Sizemore, Joseph A. (80-07096 & 80-05363)-----621
Slater, Darrell M. (79-09187)-----82
Slaughter, Michael (80-1527)-----728
Smith, Allan D. (80-08592)-----129
Smith, Charles R. [79-3919 & 54 Or App 261 (1981)]-----768
Smith, Darrell L. (80-06871)-----476
Smith, Donnie (79-09325)-----448
Smith, Johnny [77-1889 & 54 Or App 730 (1981)]-----815
Smith, Richard E. (79-07199)-----638
Smith, Terry (80-08080)-----513
Smylie, Roy (80-10714)-----136,638
Snyder, Norman (80-05765)-----90
Spanu, Joseph (79-10412)-----213
Stacey, Bill (80-05427)-----544
Stanley, Vern E. (80-00815 & 80-08593)-----544
Steen, Hazel (81-0047M)-----130
Steffen, Connie J. (79-08967)-----639
Stephens, Charles A. (80-03919 & 80-03920)-----130
Sterba, Gary (81-06814 etc.)-----729
Stern, Rebecca (80-418)-----651
Stockton, Anna (77-03805)-----450,513,624
Stockwell, Reid F. (80-02514)-----624
Stoneman, Alice (80-00286)-----24
Stose, Glenn R. (80-08176)-----470
Strong, Jerry (80-06787)-----438
Sullivan, Louis (79-03739)-----11
Swindell, Terry D. (80-00270)-----151
Tangeman, Edward J. (80-05560)-----214
Tate, Jessie M. (80-08390)-----554
Taylor, Patricia L. (80-02665)-----242
Teel, Robert (80-02438)-----730

CLAIMANTS INDEX

Claimant (WCB Number and/or Court Citation)-----Page(s)
Tegman, David (80-07385)-----279
Thomas, Louise (79-09141)-----544
Thoming, Shirley A. (79-06378)-----215
Thompson, Robert G. (80-7288)-----651
Thompson, Thomas J. (80-7289)-----254
Thornton, Nancy (79-06568)-----280
Thurston, James (79-09759)-----146
Tindle, Nina L. (80-06436)-----152
Townsend, Alan R. (79-09947 & 80-01573)-----625
Trueax, William (79-10734)-----215
Tucker, Lorena E. (80-2944)-----639
Tunheim, Jeanie (80-06498)-----216
Turnbull, Barry B. (80-02231)-----217
Turnbull, James D.(80-01327 & 81-0330M)-----731
Turnquist, Helen (79-01686)-----625
Turpen, Charles (78-06900)-----130
Turpin, Larry Leon (80-06080)-----732
Uecker, Arthur K. (80-08995 & 80-11047)-----733
Ulness, Carol S. (79-02634 & 79--7106)-----85
Van Over, Timothy M. (79-09275)-----736
Van Winkle, William (79-06027 & 79-06516)-----627
Vandall, Robert (80-06653)-----627
Vanderzanden, Stanley P. (80-6147)-----733
Vanlandingham, Charles (80-04652)-----170
Veden, James (80-9615)-----652
Verhoef, Mel (80-09567)-----652
Vibbert, Royce (80-10689)-----451
Vincent, Rocky (80-06570)-----514
Vollstedt, Bruce (80-03840)-----196
Voss, Robert A. (79-07439)-----581
Wadley, Stanley (80-07492)-----85
Wakefield, Jon (80-09768)-----306
Waldron, Clifford (80-07436)-----280
Walker, Lafayette (80-08746 & 80-09568)-----451
Walsh, Beverly (80-00865)-----91
Walton, Susan (81-04278)-----653
Wasson, Betty (80-6341)-----452
Watkins, Susan M. (80-09142)-----737
Watson, Alex (81-0209M)-----198
Watson, R. Jay (80-04902)-----148
Watterberg, Lucinda (79-06535)-----114
Weatherspoon, Julia (80-05960)-----131
Webster, Sharon S. (79-10543)-----640
Wehrly, Prudence (80-03048)-----115
Weigand, Richard (80-11469)-----738
Weimorts, Samuel R. (80-04053)-----198
Weir, Wayne L. (80-09864)-----582
Weiser, Yvonne (79-09899)-----115
West, Alfred (81-0284M)-----555
Wheatley, Joyce M. (80-01744)-----221
White, Fred L. (79-11095)-----515
White, Jon L. (80-3644)-----281
Whitman, Ray [80-03300 & 55 Or App 5 (1981)]-----854

CLAIMANTS INDEX

Claimant (WCB Number and/or Court Citation)-----Page(s)
Whitney, James L. (80-05773)-----516
Widenmann, Leo R. (80-07196)-----283
Wilhite, Betty (80-07531)-----517
Williams, Deloise (80-07438)-----308
Williams, Dixie I. (79-10615)-----116
Williams, Douglas (79-08974 & 79-10449)-----571
Williams, Marian A. [79-7248 & 54 Or App 398 (1981)]-----777
Williams, Willie E. (80-0341-IF)-----171,533
Wills, Brian J. (80-07735)-----545
Wilson, Gregory L. (80-06609)-----255
Wilson, Lester J. (80-06346)-----738
Wilson, Stephen (80-09144)-----739
Winders, Lillian K. (79-10576)-----256
Winebrenner, Blanche (79-04570)-----172
Winner, Gary (80-03791)-----11
Winslow, George S. (80-00194)-----91
Wischnofske, Donald C. (80-00424)-----136
Wise, Joyce (80-09610)-----653
Wood, Roxanne (80-05047)-----518
Woodruff, Randy R. (80-11602)-----628
Wright [54 Or App 248 (1981)]-----763
Wright, Nellie (80-8998)-----628
Wright, Thomas (80-06399)-----518
Yarbrough, Kenneth (81-1709)-----519
Yeager, Howard (79-4381E)-----640
Young, Millie (80-3005)-----740

NAME	NUMBER	PAGE
Watterberg, Lucinda	79-06535	114
Weatherspoon, Julia	80-05960	131
Wehrly, Prudence	80-03048	115
Weigand, Richard	80-11469	738
Weimorts, Samuel R.	80-04053	198
Weiser, Yvonne	79-09899	115
West, Alfred	81-0284M	555
Wheatley, Joyce M.	80-01744	221
White, Fred L.	79-11095	515
White, Jon L.	80-3644	281
Whitman, Ray	80-03300 55 Or App 5 (1981)	854
Whitney, James L.	80-05773	516
Widenmann, Leo R.	80-07196	283
Wilhite, Betty	80-07531	517
Williams, Deloise	80-07438	308
Williams, Dixie I.	79-10615	116
Williams, Douglas	79-08974 & 79-10449	571
Williams, Marian A.	79-7248 54 Or App 398 (1981)	777
Williams, Willie E.	80-0341-F	171,533
Wills, Brian J.	80-07735	545
Wilson, Gregory L.	80-06609	255
Wilson, Lester J.	80-06346	738
Winders, Lillian K.	79-10576	256
Winebrenner, Blanche	79-04570	172
Winner, Gary	80-03791	11
Winslow, George S.	80-00194	91
Wischnofske, Donald C.	80-00424	136
Wise, Joyce	80-09610	653
Wood, Roxanne	80-05047	518
Wright	54 Or App 248 (1981)	763
Wright, Nellie	80-8998	628
Wright, Thomas	80-06399	518
Yarbrough, Kenneth	81-1709	519
Young, Millie	80-3005	740