

VAN NATTA'S WORKERS' COMPENSATION REPORTER

VOLUME 34

(Pages 433-942)

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

APRIL-JUNE 1982

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CONTENTS

Workers' Compensation Board Decisions	433
Court Decisions	781
Subject Index	894
Case Citations	911
Van Natta Citations	916
ORS Citations	919
Administrative Rule Citations	921
Larson Citations	922
Own Motion Jurisdiction	923
Memorandum Opinions	926
Claimants Index	930

CITE AS:

34 Van Natta ____ (1982)

On or about March 13, 1980 claimant, by and through her attorney, requested reopening of her claim pursuant to the Board's own motion jurisdiction. ORS 656.278. The Board denied the requested reopening by order of May 9, 1980. The claimant requested reconsideration of that order, and on September 30, 1980 the Board issued an order referring the request for reopening to the Hearings Division for an evidentiary hearing.

A hearing was held and the Referee issued a recommendation to the Board. By order of October 6, 1980 the Board reopened claimant's claim, remanding the claim to SAIF for acceptance and payment of compensation. Counsel for claimant subsequently requested an award of an attorney's fee, pursuant to OAR 438-47-070(2), for services rendered in connection with the Board's reopening of the claim.

The Board has previously announced a policy of awarding an attorney's fee at the time of claim closure by Own Motion Determination, rather than at the time of own motion reopening. Hazel Stanton Lovell, WCB Case No. 80-11084, Order Denying Attorney Fees (May 20, 1981). In support of his request for an award of an attorney's fee on reopening, claimant's attorney argues that this case is distinguishable from the usual own motion case contemplated by the Board in Lovell. We agree.

When a claim is reopened by the Board on its own motion in response to a written request from claimant's attorney, without the necessity of an evidentiary hearing, it is appropriate to await the ultimate determination of the claim before awarding an attorney's fee. Where, as here, in order to secure reopening for a client, it is necessary to represent the claimant in a hearing that is the functional equivalent of a hearing on a denied claim, there is considerably more attorney involvement than own motion cases not referred for evidentiary hearing. In this referred-for-hearing situation, it would be unfair to delay the attorney's remuneration for what may be a considerable period of time.

Accordingly, when the Board refers a claimant's request for own motion relief to the Hearings Division and claimant's attorney is thereby instrumental in obtaining reopening by the Board, claimant's attorney is entitled to an award of an attorney's fee at the time of such reopening. Our holding in Lovell, supra, is so modified.

ORDER

Claimant's attorney is awarded a reasonable attorney's fee in an amount equal to 25% of the compensation awarded claimant on own motion reopening, not to exceed the sum of \$750. Said attorney's fee shall be paid out of claimant's temporary total disability payments and not in addition hereto.

At the time of Own Motion Determination, the Board will consider awarding counsel an additional fee in the event that claimant is awarded additional permanent disability.

VIRGINIA A. KISER, Claimant
Jerry E. Gastineau, Claimant's Attorney
R. Michael Healey, Defense Attorney

WCB 80-08295
April 1, 1982
Order of Dismissal

The Board dismisses claimant's request for review on the grounds that it either has been withdrawn or abandoned.

On December 18, 1981 Referee Mannix received from claimant a letter designated "Request for Review" after issuance of his order.

Claimant subsequently corresponded with the Referee, giving some indication that she did not wish to have his order reviewed. Due to claimant's apparent lack of understanding of the review process, the Board corresponded with claimant attempting to explain her substantive and procedural rights under the Workers Compensation Act. As part of the Board's correspondence to claimant, clarification was requested as to whether claimant actually intended to withdraw her request for Board review or whether she wished to have the Board proceed to review the Referee's order. Claimant has failed to complete and return this request for clarification to date. As indicated in the Board's letter to claimant, the Board deems this inaction to constitute withdrawal of claimant's request for review, assuming such a request was ever intended.

ORDER

Claimant's request for review is dismissed.

CHARLES O. PEOPLES, Claimant
Richard T. Kropp, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

Own Motion 82-0012M
April 1, 1982
Order Deferring Action on
Own Motion Request

Claimant, by and through his attorney, has requested the Board to exercise its own motion jurisdiction pursuant to the provisions of ORS 656.278 and to reopen his claim for an alleged worsened condition related to his March 26, 1966 industrial injury.

There is currently a request for hearing pending before the Hearings Division in WCB Case No. 81-10604. It is the Board's policy to defer any decision regarding own motion relief until such time as there is no litigation pending.

Therefore, we defer action on this own motion request and request that the Referee who holds the hearing in WCB Case No. 81-10604 submit a copy of his/her order to the Board. After issuance of that order, the parties may advise us of their positions regarding own motion relief.

IT IS SO ORDERED.

DONALD M. BROWNELL, Claimant
Keith E. Tichenor, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-06509
April 5, 1982
Order on Review

Reviewed by Board Members McCallister and Lewis.

The SAIF Corporation seeks Board review of Referee Neal's order which disapproved its denial of claimant's claim for injury to his low back, left hip and right hernia.

On or about March 10, 1980 claimant, then a sixty-two year old punch press operator, injured himself while lifting five gallon buckets of scrap metal to empty into a hopper. He experienced increasing pain in his right groin, lower back and left hip which eventually caused him to seek medical attention.

RIGHT HERNIA

Claimant had a prior bilateral hernia operation in 1960 and another right hernia operation in 1975. In December, 1979 Dr. David Thompson, internist, noted claimant's recurrent right inguinal hernia and possible need for surgery. However, it was not until the March, 1980 lifting incident that surgery was actually required.

Claimant was referred by his orthopedist, Dr. Robert Post, to a surgeon, Dr. George Gross, who repaired the hernia on May 29, 1980. Since the recurrent hernia did not require surgery until the time claimant had to pick up heavy buckets of scrap, Dr. Gross was of the opinion that the lifting incident is what caused the strain.

Therefore, like Referee Neal, the Board finds that claimant's recurrent right hernia is compensable.

LOWER BACK

On May 12, 1980 Dr. Post examined claimant and noted his complaints of lower back pain associated with the bucket lifting incident. At that time claimant also had radiating pain down the back of his thighs to the knee. X-rays of the lumbar spine showed demineralization with mild degenerative change and apparent complete spondylosis of the L5 vertebra.

On October 3, 1980 Dr. Jerome Brem, rheumatologist and internist, examined claimant and found joint pain in the lower back that was worsened with extension and left lateral flexion of the back. X-rays showed a significant degree of osteoporosis of the back caused by hemochromatosis (a rare disease of iron metabolism disorder), and sclerosis (hardening) indicating arthritis of the L5 and S1 vertebrae. Dr. Brem also reported:

"It is possible that there had been a fracture of the body of one of the vertebrae or the posterior elements or joints of the fifth lumbar or first sacral region. The X-rays suggested some past healing of a fracture of inflammatory focus that in context suggested a fracture, but I could not see unequivocal evidence of a fracture on the X-rays... My feeling is that the event that happened to his back sounds like a fracture. The osteoporosis of the back gave plausibility to having a fracture happen but it seems to have occurred while at the job and be related to his activity there."

Dr. Post saw claimant again on October 15, 1980 following the rheumatologic evaluation and further treatment with anti-inflammatories. He reported that claimant's back no longer bothered him.

On January 7, 1981 Dr. Post reported, "[t]he patient [claimant] did seem to have a low back and left posterior iliac problem which he related to the incident in question and which seems to respond to treatment and would therefore seem to be a discrete injury to the low back." He added that he had no evidence that the back injury had not stemmed from the lifting incident, and that there was no direct reference to low back problems prior to the lifting incident.

The medical evidence indicates that claimant suffered a fractured vertebra associated with the bucket lifting incident superimposed on a brittle lower spine caused by non-work related hemochromatosis. (Dr. Thompson's November 25, 1980 report stated that work neither caused the disease nor caused it to progress.) The injury seems to have resolved itself by now.

Claimant has established that his low back injury was related to his work injury and, therefore, the Board finds it to be compensable.

LEFT HIP

On examination May 12, 1980 Dr. Post reported that X-rays showed degenerative arthritis of both hips with some suggestion of collapse of the left femoral head consistent with an old avascular necrosis with a lot of medial joint space narrowing and mild superior narrowing. On the right there were some sclerotic and cystic changes.

As stated earlier, in October, 1980 Dr. Brem diagnosed claimant as having hemochromatosis. He found that to be the cause of the osteoporosis, arthritis and related hip pain. Dr. Brem did not feel he could easily relate the hip problem to claimant's work activity according to his January 26, 1981 report.

In Dr. Thompson's report of November 25, 1980, after discussing claimant's hip joint discomfort, he stated, "It is my opinion that the hemochromatosis and associated joint abnormalities are not caused by his work.... I do not think that his work will affect his medical condition, in terms of causing the disease itself, to progress."

Dr. Post stated his conclusions in his January 7, 1981 report:

"He has had a persistent left hip pain problem since the incident in question, but the X-ray indicates a condition that certainly pre-existed and may or may not have been related to his 'arthritic' history. I never saw this man prior to the incident in question, so I don't know what his gait looked like, but now he has a very marked Trendelenburg lurch. My understanding is that he attributes the worsening of his hip pattern to the incident in question, but even so this would simply be an aggravation of a pre-existing condition but with some apparent acceleration of symptomatology. (Emphasis added.)

"Again, I am not sure to what extent he had hip pain or problems before the incident in question nor exactly what the patterns of 'arthritis' were before that time. Certainly his symptomatology is worse since then. (Emphasis added.)

* * *

"Obviously, this patient had pre-existing problems with his abdominal wall, (radiologically if not symptomatically) in the left hip, and apparently in the spine as well, from his history of 'arthritis.' While it would seem unusual to develop such diverse problems as recurrent hernia, aggravation of the pre-existing arthritic or avascular necrotic hip, and back injury all on the basis of the same incident, this is the history as presented by the patient, and I have no evidence to the contrary.

Dr. Thompson's records reflect the presence of a recurrent inguinal hernia in December of 1979 so certainly that problem was not entirely new. On the other hand, I see no direct reference to low posterior iliac or hip problems prior to the incident in question in March of 1980. (Emphasis added.)

Were it not for contrary opinions of Dr. Brem, the specialist who diagnosed claimant's hemochromatosis, and Dr. Thompson, the Board find claimant's hip symptoms to be compensable on the following theory: Although claimant's hemochromatosis was pre-existing, it was also asymptomatic before the bucket lifting incident; therefore, since the work injury triggered the disabling symptoms, the symptoms are compensable. Patricia L. Lewis, WCB Case No. 80-10226, 34 Van Natta 202 (March 15, 1982); Lorena Iles, 30 Van Natta 666 (1981). However, on the basis of the entire record the Board finds that claimant's employment neither caused the underlying disease of hemochromatosis nor its symptoms of disabling pain.

ORDER

The Referee's order dated April 27, 1981 is modified in that the SAIF Corporation's June 20, 1980 denial of claimant's hip claim is approved. The denial of claimant's low back and right inguinal hernia claims of the same date remain disapproved.

CHARLES L. BERRY, Claimant
Dave Vinson, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-03132
April 5, 1982
Denial of Reconsideration

The Board has received a motion for reconsideration of its Order on Review dated March 17, 1982.

Having considered the motion, it is hereby denied.

IT IS SO ORDERED.

DAVID R. PETSHOW, Claimant
Gary M. Galton, Claimant's Attorney
Larry Dawson, Defense Attorney
Dennis Reese, Defense Attorney

WCB 80-08903 & 81-00263
April 5, 1982
Order on Review

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of that portion of Referee Braverman's order and Order on Reconsideration which allows Liberty Mutual to offset an overpayment of temporary total disability against any future award of permanent partial disability. In addition, claimant requests an award of an attorney's fee for efforts expended at the Hearings and Board levels should he prevail on the offset issue. The claimant also asks for an increased attorney's fee against the carrier, Northwest Farm Bureau.

The carrier, Liberty Mutual, cross-appeals that portion of the Referee's order and Order on Reconsideration which ordered them to accept claimant's claim of July 17, 1980 as an aggravation of his previously compensable injury and which awarded claimant's attorney a fee of \$1,400.

Although Northwest Farm Bureau did not cross-appeal, in their brief, they request the Board to reduce the \$250 attorney's fee awarded to claimant for their delay in the payment of compensation.

The Referee entered his order June 1, 1981. On July 17, 1981 an Order on Reconsideration was entered which in part revised the prior order. We affirm the Referee's order as revised by his Order on Reconsideration.

Claimant submitted a supplemental citation of authorities after completion of the scheduled briefing, in support of his argument that the Referee and the Board are without jurisdiction to grant Liberty Mutual a credit against any future permanent partial disability award for the temporary disability compensation paid during the period of July to December, 1980.

Claimant cites the recent case of Reynolds-Croft, Inc., v. Bill Morrison Company, 55 Or App 487 (1981), in support of his argument. In Reynolds-Croft the Court held that the Board lacked jurisdiction to require one carrier to reimburse another for an overpayment of benefits. That case is not in point with the case presently before the Board.

Reynolds-Croft involved a request for hearing filed by SAIF seeking an order requiring reimbursement from Royal Globe Insurance Company. The court found that in this procedural context, a worker's right to receive compensation or the amount thereof was not directly in issue, and therefore, the Board lacked jurisdiction to hear the dispute. ORS 656.704(2). By the terms of ORS 656.307(1), the Director of the Workers Compensation Department had exclusive jurisdiction to resolve this dispute.

Reynolds-Croft is distinguishable from this case in that here the issue of reimbursement has arisen in the context of proceedings initiated by claimant in which claimant's right to receive compensation and the amount thereof are clearly in issue.

The Board has recently clarified its authority and that of Referees to order adjustments or reimbursements between carriers upon determination of a responsible insurer in .307-type cases whether or not a .307 order has issued. Marvin DeVoe, WCB Case Nos. 80-06033 and 80-10625, 34 Van Natta 141 (February 26, 1982).

ORDER

The Referee's order dated June 1, 1981 as revised by the Order on Reconsideration entered July 17, 1981 is affirmed.

DAVID R. PETSHOW, Claimant	WCB 80-08903 & 81-00263
Gary M. Galton, Claimant's Attorney	April 27, 1982
Larry Dawson, Defense Attorney	Denial of Reconsideration
Dennis Reese, Defense Attorney	

The Board has received a motion for reconsideration of its Order on Review dated April 5, 1982.

Having considered the motion, it is hereby denied.

IT IS SO ORDERED.

DIANE LEE BARNES, Claimant	Own Motion 82-0042M
Daniel James DeNorch, Claimant's Attorney	April 7, 1982
SAIF Corp Legal, Defense Attorney	Order Deferring Action on Own Motion Request

Claimant, by and through her attorney, has requested the Board to exercise its own motion jurisdiction pursuant to the provisions of ORS 656.278 and reopen her claim for vocational rehabilitation and to grant her an increase in permanent partial disability.

There is currently a request for hearing pending before the Hearings Division in WCB Case No. 81-08957. It is the Board's policy to defer any decision regarding own motion relief until such time as there is no litigation pending.

Therefore, we defer action on this own motion request and request that the Referee who holds the hearing in WCB Case No. 81-08957 submit a copy of her order to the Board. After issuance of that order, the parties may advise us of their positions regarding own motion relief.

IT IS SO ORDERED.

GARY O. BROWN, Claimant
SAIF Corp Legal, Defense Attorney

Own Motion 82-0046M
April 7, 1982
Order Deferring Action on Own
Motion Request

Claimant, by and through his attorney, has requested the Board to exercise its own motion jurisdiction pursuant to the provisions of ORS 656.278 and to reopen his claim for an alleged worsened condition related to his September 23, 1971 industrial injury.

There is currently a request for hearing pending before the Hearings Division in WCB Case No. 82-01961. It is the Board's policy to defer any decision regarding own motion relief until such time as there is no litigation pending.

Therefore, we defer action on this own motion request and request that the Referee who holds the hearing in WCB Case No. 82-01961 submit a copy of his/her order to the Board. After issuance of that order, the parties may advise us of their positions regarding own motion relief.

IT IS SO ORDERED.

JOHN CAMERON, Claimant
Douglas Green, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-11124
April 7, 1982
Supplemental Order

The Board issued its Order On Review herein on March 17, 1982. Review was requested by SAIF, and the Board affirmed the Referee's order awarding claimant 30% unscheduled permanent partial disability. The Board neglected to award claimant's attorney a carrier-paid attorney's fee. Claimant's attorney is entitled to an attorney's fee for services rendered on Board review. ORS 656.382(2)

ORDER

Claimant's attorney is allowed \$500 as and for a reasonable attorney's fee for services performed on Board review, payable by SAIF. Said amount is payable in addition to and not in lieu of the attorney's fee allowed by the Referee.

THOMAS COATS, Claimant
David D. Lipton, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

Own Motion 82-0041M
April 7, 1982
Order Deferring Action on
Own Motion Request

Claimant, by and through his attorney, has requested the Board to exercise its own motion jurisdiction pursuant to the provisions of ORS 656.278 and to reopen his claim for an alleged worsened condition related to his February 4, 1975 industrial injury.

There is currently a request for hearing pending before the Hearings Division in WCB Case No. 82-01834. It is the Board's policy to defer any decision regarding own motion relief until such time as there is no litigation pending.

Therefore, we defer action on this own motion request and request that the Referee who holds the hearing in WCB Case No. 82-01834 submit a copy of his order to the Board. After issuance of that order, the parties may advise us of their positions regarding own motion relief.

IT IS SO ORDERED.

DAVID DUKATZ, Claimant
Charles Maier, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-02174
April 7, 1982
Order on Review

Reviewed by Board Members McCallister and Barnes.

Claimant seeks Board review of Referee Danner's order which affirmed the SAIF Corporation's denial of February 9, 1981.

After de novo review, the Board affirms the conclusion reached by the Referee. The Referee ends his order with the statement: "Standing and walking are activities normally done on a regular day-to-day basis and are not unique to this occupation, (James V. SAIF, 290 Oregon 343)." This leaves the reader with the distinct impression that virtually no "foot" claims would be compensable. We do not subscribe to this idea, but rather consider the degree to which the employment caused the disabling condition. In this case, we find claimant has merely failed to sustain his burden of proof and would, therefore, affirm the Referee's decision.

ORDER

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

CHARLOTTE ERICKSON, Claimant
SAIF Corp Legal, Defense Attorney

Own Motion 82-0063M
April 7, 1982
Own Motion Order

Claimant, through her attending physician, submitted medical information to SAIF indicating a need for future treatment and claim reopening for a worsened condition related to her September 4, 1968 industrial injury. Claimant's aggravation rights have expired. SAIF has referred the matter to the Board for consideration under its own motion jurisdiction, pursuant to ORS 656.278.

The medical information submitted on claimant's behalf from Dr. Chester indicates that claimant's surgery was related to her industrial injury.

SAIF has authorized the recommended surgery. We conclude that claimant is not entitled to compensation for temporary total disability because she has been retired for a number of years. Therefore claimant is entitled to all benefits due under the provisions of ORS 656.245 but her request for claim reopening is hereby denied.

IT IS SO ORDERED.

RUTH FEVEC, Claimant
Charles Colett, Claimant's Attorney
Ridgway K. Foley, Jr., Defense Attorney

WCB 81-03461
April 7, 1982
Order of Dismissal

A request for review, having been duly filed with the Workers Compensation Board in the above-entitled matter by the carrier, 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 HEDLUND, Claimant
Robert Udziela, Claimant's Attorney
Darrell Bewley, Defense Attorney

WCB 79-09967
April 7, 1982
Order on Remand

On review of the Board's Order dated June 3, 1981, the Court of Appeals reversed the Board's Order and reinstated the Order of the Referee dated August 11, 1980.

Now, therefore, the above-noted Board Order is vacated, and the above-noted Referee's Order is republished and affirmed.

IT IS SO ORDERED.

JAMES A. MARTIN, Claimant
Donald R. Moeller, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

Own Motion 82-0054M
April 7, 1982
Order Deferring Action on
Own Motion Request

Claimant, by and through his attorney, has requested the Board to exercise its own motion jurisdiction pursuant to the provisions of ORS 656.278 and to reopen his claim for an alleged worsened condition related to his October 16, 1970 industrial injury.

There is currently a request for hearing pending before the Hearings Division in WCB Case Nos. 82-00016 and 82-01250. It is the Board's policy to defer any decision regarding own motion relief until such time as there is no litigation pending.

Therefore, we defer action on this own motion request and request that the Referee who holds the hearing in WCB Case Nos. 82-00016 and 82-01250 submit a copy of his order to the Board. After issuance of that order, the parties may advise us of their positions regarding own motion relief.

IT IS SO ORDERED.

VICTOR VANDERSCHUERE, Claimant
Rolf Olson, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

Own Motion 82-0025M
April 7, 1982
Order Deferring Action on
Own Motion Request

Claimant, by and through his attorney, has requested the Board to exercise its own motion jurisdiction pursuant to the provisions of ORS 656.278 and to reopen his claim for an alleged worsened condition related to his May 25, 1971 industrial injury.

There is currently a request for hearing pending before the Hearings Division in WCB Case No. 82-1484. It is the Board's policy to defer any decision regarding own motion relief until such time as there is no litigation pending.

Therefore, we defer action on this own motion request and request that the Referee who holds the hearing in WCB Case No. 82-1484 submit a copy of his order to the Board. After issuance of that order, the parties may advise us of their positions regarding own motion relief.

IT IS SO ORDERED.

DONALD WAGY, Claimant
David G. Cromwell, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-04385
April 7, 1982
Order Denying Motion to Remand

Claimant requested Board review and thereafter moved the Board for an order remanding this claim to the Referee for the submission of additional evidence, pursuant to ORS 656.295(5).

The basis for claimant's request for remand is that, in spite of diligent efforts to obtain a definitive statement of a causal relationship between the claimant's work activity and his carpal tunnel syndrome, claimant was not able to secure such a statement from his physician until after the hearing had been held.

Claimant has failed to show that the proffered evidence was not obtainable prior to the hearing. Accordingly, claimant's Motion to remand must be denied. Robert A. Barnett, 31 Van Natta 172 (1981).

ORDER

Claimant's motion to remand for further evidence taking is denied.

ROBERT OLIVER, JR., Claimant
Donald Atchison, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

Own Motion 82-0074M
April 8, 1982
Order Deferring Action on
Own Motion Request

Claimant, by and through his attorney, has requested the Board to exercise its own motion jurisdiction pursuant to the provisions of ORS 656.278 and to reopen his claim for an alleged worsened condition related to his September 22, 1973 industrial injury.

There is currently a request for hearing pending before the Hearings Division in WCB Case No. 82-00035. It is the Board's policy to defer any decision regarding own motion relief until such time as there is no litigation pending.

Therefore, we defer action on this own motion request and request that the Referee who holds the hearing in WCB Case No. 82-00035 submit a copy of his order to the Board. After issuance of that order, the parties may advise us of their positions regarding own motion relief.

IT IS SO ORDERED.

BRUCE ARNBERG, Claimant
Dennis Black, Claimant's Attorney
John W. Eads, Jr., Defense Attorney

WCB 78-10043
April 12, 1982
Order on Review

Reviewed by Board Members McCallister and Barnes.

The employer seeks Board review of Referee Johnson's order which remanded claimant's aggravation claim to it for acceptance and payment of compensation. The employer seeks reversal of this order.

Claimant sustained a compensable injury to his back on September 6, 1972. He had an earlier injury to his back in 1969. The last award or arrangement of compensation was on April 13, 1977. Claimant has been granted awards totalling 160° for 50% unscheduled disability. Claimant's aggravation rights expired on November 9, 1978.

Claimant saw Dr. Saez, a neurologist, throughout 1977 and 1978. He found no objective worsening during those years, merely an increase in complaints of pain. Claimant filed his aggravation claim on October 2, 1978, one month prior to the expiration of his aggravation rights. Dr. Saez's reports are totally consistent with those of the other doctors on claimant's case in 1977 and 1978. The only information which could possibly show a worsened condition is a report of Dr. Turcke, dated June 20, 1978. He finds some change in claimant's condition when comparing x-rays of June 1978 with those taken in June 1968 and October 1972. This falls short of proving claimant's claim. It only shows a worsening since 1972; claimant's burden is to show a worsening since April 1977.

The lay testimony at the hearing was credible. However, it merely shows that claimant has a substantial amount of pain. We believe this is to be expected in a worker with a 50% permanent partial disability award and fails to further claimant's contention.

Claimant contends that two reports and a deposition of Dr. Schachle support his claim. Claimant was first seen by Dr. Schachle, a chiropractor, in November 1979. Dr. Schachle states the belief that claimant's condition has worsened. However, we are not persuaded by Dr. Schachle's opinion because she bases her conclusion on claimant's history alone, with no record of the 1969 injury or any other doctors' reports. Dr. Schachle first examined claimant some seven years after the 1972 injury and over two and a half years after the last arrangement of compensation in 1977. Considering the passage of time and the long medical case history we give little weight to Dr. Schachle's opinion. Had she been aware of the past medical history, our opinion might be different. It is one thing for her to treat claimant's condition but another to evaluate causation, and the causation question deserves a more careful analysis of the entire case history.

Based on the above findings, we conclude claimant has failed to prove a compensable aggravation claim as a result of his September 1972 industrial injury.

ORDER

The Referee's order dated July 22, 1981 is reversed. Claimant's claim for aggravation of his September 6, 1972 injury is denied.

KRISTI CLAY, Claimant
David Hittle, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 78-04129
April 12, 1982
Order on Review

Reviewed by Board Members Barnes and McCallister.

The SAIF Corporation seeks Board review of Referee Howell's order which set aside its denials dated May 23, 1978 and January 24, 1980 pertaining to claimant's aggravated low back condition and medical treatment related thereto. The claim was remanded to the carrier for processing including payment of temporary total disability and medical treatment benefits. Additionally, SAIF seeks review of Referee Nichols' Interim Order which ordered the carrier to supply duplicate medical reports to claimant's second attorney, when the carrier had already supplied the same reports to the claimant's first attorney.

The Board finds that the record supports the Referee's conclusion that the episodic worsening of claimant's low back condition since January 16, 1978, the date of the original claim closure, and the resultant need for treatment were due to the January 3, 1977 compensable injury. Claimant's low back, hip and thigh complaints have been present since her work injury. The appearance of additional findings such as decreased knee reflexes, especially in the left knee, does not necessarily indicate that claimant is now suffering from a new and different injury. On the contrary, it may indicate a worsened nerve root compression stemming from the original injury. Claimant's treating doctors, Drs. Riechers and Maukonen, have reported that claimant's low back condition is related to her original injury. Therefore, we agree that the claim should be remanded to the carrier for processing and payment of benefits.

On the issue regarding the production of documents to the claimant, we affirm Referee Nichols' Interim Order. That order is based on certain factual representations that were apparently made to Referee Nichols during a telephone conference with opposing counsel. The record now before us does not contain anything we regard as "evidence" that documents those factual representations one way or the other. We thus conclude that there is no basis in the record for disturbing Referee Nichols' Interim Order.

ORDER

Referee Howell's order dated May 27, 1981 is affirmed.

Referee Nichols' Interim Order dated March 30, 1981, as corrected April 13, 1981 is affirmed.

Claimant's attorney is awarded an attorney's fee of \$450 for services rendered on Board review, payable in addition to compensation.

SHAWNEE L. LUELLEN, Claimant
Jeffrey Mutnick, Claimant's Attorney
Paul Roess, Defense Attorney

WCB 80-09635
April 12, 1982
Amended Order on Review

Our Order on Review dated March 31, 1982 is hereby amended to show that Weyerhaeuser Company, not SAIF Corporation, requested review in the above entitled case.

IT IS SO ORDERED.

LOREN STEVENS, Claimant
Pamela McCarroll Thies, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-09763
April 12, 1982
Order on Review

Reviewed by Board Members McCallister and Barnes.

Claimant seeks Board review of Referee Ail's order affirming SAIF Corporation's denial of compensation. The issue in this case is whether claimant's injuries arose out of and in the course of his employment. We adopt the facts as set forth in the Referee's Order.

Claimant was directed by his foreman to stop, on his way back from lunch, at a mobile home supplier to set up a meeting to discuss a new product. Once claimant finished his lunch break and set out for the supplier's place of business, he was on a venture for the benefit of his employer. His traffic accident occurred en route from the supplier back to his employer's headquarters. There was no personal element whatsoever in this leg of claimant's journey.

The Referee cited Gumbrecht v. SAIF, 21 Or. App. 389 (1975), as being applicable to this case. We disagree. Gumbrecht is, in fact, just the reverse of this situation. The claimant in Gumbrecht, with the encouragement of her employer, stopped on her way home from work to purchase items needed for a coworker's birthday party. She continued on toward home after making the purchases and fell while crossing the street. In Gumbrecht, even if the claimant was on a trip for her employer, the business purpose ended when she made her purchases. Thereafter, she was on a purely personal mission, i.e. on the way home.

In the present case, claimant was on personal business until he had finished his lunch. Upon embarking on the employer's assignment, he was again in the course of his employment and the injury he suffered during that time was a compensable injury.

Larson discusses the situations involved in Gumbrecht and the present case by stating:

"Of course, in a one-way journey, if the accident had happened after the business call had been made and while claimant was on the final leg of his journey home, the injury would be clearly non-compensable..." He goes on to say, "[w]hen the situation is reversed, with a completed personal errand put behind, and a business destination remaining to be reached, there is the clearest kind of coverage." 1 Larson, Workmen's Compensation Law § 19.24, p.4-299-300.

ORDER

The Referee's order dated June 26, 1981 is reversed. The SAIF Corporation's denial is set aside and this claim is remanded for acceptance and payment of benefits. Claimant's attorney is awarded \$1600, as a reasonable attorney's fee, for services rendered at the hearing and on Board review, to be paid by the SAIF Corporation.

PHILLIP J. BARRETT, Claimant
Rolf Olson, Claimant's Attorney
Marshall Cheney, Defense Attorney

WCB 81-03112
April 14, 1982
Order on Review

Reviewed by Board Members McCallister and Barnes.

The employer seeks Board review of Referee Nichols' order which granted claimant an award of permanent total disability effective the date of the hearing (September 22, 1981).

Claimant, now 37 years of age, was injured March 9, 1979 while employed as a utility man for this employer. He was prying on a board when the object he was prying came down hard and jarred his back. Dr. Winkler, the initial treating doctor, diagnosed severe lumbosacral strain. Claimant subsequently saw Dr. Teal who: (1) diagnosed acute but resolving lumbosacral strain; (2) released claimant for work on May 7; and (3) reported there would be minimal permanent impairment.

In September, 1979 Dr. Raaf examined claimant. This examination found very little objectively. In November, 1979 Dr. Berkeley examined claimant. He found no evidence of radicular symptoms and recommended claimant have a myelogram. The myelogram was interpreted to be negative for spinal pathology.

The Orthopaedic Consultants examined claimant and January 4, 1980 reported that: (1) there was moderate functional interference upon examining claimant; (2) prior x-rays were normal; (3) claimant's condition could be considered medically stationary; (4) it was difficult, because of the functional interference, to assess claimant's impairment with any degree of certainty but rated it as minimal; and (5) recommended a psychological evaluation. (The record does not indicate this recommendation was ever followed.)

Dr. Winkler remained claimant's treating physician. On June 4, 1980 he reported that claimant was now using a cane. He felt claimant had sustained a severe soft tissue injury. By October, 1980 Dr. Winkler was recommending some vocational rehabilitation.

On January 8, 1981 Dr. Raaf reported that his diagnosis continued to be lumbosacral strain. He felt that claimant's condition had become stationary. He found marked functional overlay. He rated claimant's impairment as minimal to mild. Dr. Raaf noted that claimant walked with a bizarre gait even with the use of a cane. He noted that claimant was exceptionally well muscled. He concluded there was no objective abnormal neurological signs and that claimant could be gainfully employed.

On January 30, 1981 Dr. Winkler agreed with Dr. Raaf's physical findings but felt that claimant was definitely disabled and precluded from his regular occupation. He recommended vocational retraining.

The claim was closed by a Determination Order of February 17, 1981 with an award of 32° for 10% unscheduled low back disability.

On March 10, 1981 Dr. Winkler found claimant permanently and totally disabled due to lumbosacral joint instability.

When examined on April 29, 1981 Dr. Berkeley reported claimant limped severely and "seemed to be unable to support himself without a cane. Yet this patient has extremely good muscular development in both upper and lower limbs and the trunk." Upon examination he found no lower extremity weakness. "Clinical presentation bizarre and his neurological examination is essentially normal." Dr. Berkeley recommended a CT scan. This CT scan was normal as were x-rays taken on May 20, 1981.

On July 17, 1981 Dr. Berkeley indicated that claimant's disability was moderate not mild. He felt claimant could return to employment, "if he could get help."

In reaching her conclusion that claimant is not capable of gainful employment and is permanently and totally disabled, the Referee found that, "The medical reports contain little in the way of objective evidence of impairment," but went on to say that the treating physician found claimant totally unable to return to work. She further found that "there is no evidence to show the functional component is not injury related or is treatable or non-permanent" and declared claimant permanently and totally disabled.

We agree with the Referee that the medical evidence presents very little in the way of objective medical findings, especially no medical evidence to support claimant's gross subjective complaints. We give little weight to the opinion of Dr. Winkler. He gives no basis for his conclusion. In Hammons v. Perini Corp., 43 Or App 299 (1970), the Court of Appeals held that no extra weight is to be given to the opinion of a "treating physician" when the ultimate medical question depends on expert analysis. We think this is such a case. Based on this record, we find Dr. Winkler's opinion that claimant is permanently totally disabled standing alone is not persuasive.

The Referee found that there was no evidence to show that the functional component is not injury related. That may be true but irrelevant as the burden is on claimant to prove causal relationship. Claimant never did have a psychological evaluation even though numerous physicians diagnosed functional overlay. Therefore this record is devoid of any proof that claimant's psychological component is injury-related or permanent in nature. We will not consider that condition in rating claimant's compensable disability.

The record is essentially absent objective medical findings. The medical evidence indicates impairment in the range of minimal to moderate. Claimant's complaints of leg weakness, necessitating the need for a cane to keep himself from falling, are purely subjective. The medical evidence indicates claimant has extremely good muscular development in both legs, no atrophy and no objective neurological findings. The treatment has been completely conservative, with no hospitalizations or surgery.

The record further reveals that claimant has sought no employment because he sees himself as completely disabled. He has not sought out the advice or services of vocational rehabilitation resources. Based on the lack of medical findings claimant has the responsibility under ORS 656.206(3) to establish that he is willing to seek regular and gainful employment and that he has made reasonable efforts to do so. This claimant has not proved his medical condition is so severe that he is excused from his obligations under ORS 656.206(3).

Based on the preponderance of the medical evidence we find claimant is capable of gainful employment and clearly lacks motivation to return to work or to seek rehabilitation. The evidence reflected in this record does not justify an award of permanent total disability. We conclude that claimant's permanent loss of wage earning capacity is not as great as claimant's subjective complaints would suggest. Since we have determined that claimant is not permanently and totally disabled, we must determine de novo the extent of his disability. Loss of wage earning capacity is measured by considering the effects of the physical injury upon the worker and taking into consideration other factors of age, education, trainability, motivation, etc. Using the guidelines set forth in OAR 436-65-600, et. seq., to assist us, we conclude claimant is entitled to an award of 40% unscheduled low back disability.

ORDER

The Referee's order dated October 6, 1981 is modified. Claimant is hereby granted an award of 128° for 40% unscheduled low back disability. This award is in lieu of all prior awards. Claimant's attorney is allowed 25% of the increase granted by this order over the award made by the Determination Order as and for a reasonable attorney's fee.

GEORGE BRASKY, Claimant
John S. Stone, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-00844
April 14, 1982
Order on Review

Reviewed by Board Members Barnes and McCallister.

The SAIF Corporation requests Board review of Referee Seifert's order which set aside its January 12, 1981 denial of claimant's aggravation claim. The issue on review is compensability.

Claimant sustained an injury to his low back on July 22, 1980 while he was moving steel beams for his employer. Dr. Eisendorf found marked tenderness over the sacroiliac joint, marked restriction in bending and negative straight leg raising. The diagnosis was acute lumbosacral strain, with mechanical weak back with traumatic aggravation and a transitional lumbar vertebra. Claimant returned to work on August 13, 1980. A closing examination was performed on October 23, 1980 by Dr. Eisendorf. He repeated his previous diagnosis, and stated that claimant had recovered from his moderately severe low back sprain with no evidence of any residual permanent disability and that he was ready for "full duty." Dr. Eisendorf cautioned, however, that claimant was considered a risk for further problems due to his mechanical weak back. The Determination Order of December 11, 1980 allowed claimant temporary total disability benefits only.

Claimant returned to Dr. Eisendorf on December 26, 1980 with complaints of back pain. The claimant had been relatively symptom free until December 24, 1980 when he was removing some Christmas gifts from the back of his pickup truck and jumped from the tailgate to the asphalt street. Severe back pain followed. Dr. Eisendorf diagnosed:

- "1) Aggravation of pre-existing low back sprain and mechanical weak back.
- 2) Right lumbar radiculopathy
- 3) Poss. prolapsed disc"

Straight leg raising was positive. This is the only medical report in the record that deals with the claimant's December, 1980 condition.

The next medical report is dated June 19, 1981 from Dr. Eisendorf. The claimant had been working on a boat when he suffered recurrent back pain while attempting to wipe some resin off the hull. Acute recurrent low back sprain and traumatic aggravation low back disease was the diagnosis. Dr. Eisendorf related this exacerbation to the claimant's July 22, 1980 industrial injury.

In his September 25, 1981 order, the Referee noted the proper test to be applied when a claimant suffers an industrial injury followed by a worsening of his condition by an off-the-job injury, to the same part of body, that test being found in Grable v. Weyerhaeuser, 291 Or 387 (1981). Although the Referee recited the

proper test, it would appear that he erred in its application. The Referee stated, "A contributing cause is interpreted to be a cause aiding in the production of a result," (Emphasis added), and went on to find the limited medical evidence sufficient to meet that standard.

We agree with the Referee that the evidence shows the claimant's industrial injury to be a contributing cause of his December, 1980 worsening. However, that is not the correct standard to be applied. Grable requires that the claimant establish his industrial injury to be a material contributing cause of his worsened condition, not merely a contributing cause. As such, the claimant must show that the industrial injury constitutes a notable portion of his worsened condition. The only medical evidence submitted by the claimant in relation to his December, 1980 worsening, is in Dr. Eisendorf's report of December 26, 1980 which we have quoted above. That report is insufficient to establish claimant's industrial injury to be a material contributing cause of his December worsening. The only reference in that report concerning claimant's prior industrial injury is the statement, "Aggravation of pre-existing low back sprain and mechanical weak back." Considering Dr. Eisendorf's previous finding that claimant had fully recovered from his industrial injury with no permanent residuals, and that he expected claimant to have further exacerbations due to his mechanical weak back and the more severe symptomatology following the December, 1980 incident, we conclude that something more in the way of explanation is required to be produced by the claimant other than a cryptic and conclusory statement. Dr. Eisendorf's definition of aggravation is not in evidence, and he does not relate the relative contribution of the industrial injury as compared to the claimant's mechanical weak back as a contributing cause.

The Referee also found that "...claimant's current back problem is a result of his prior industrial injury..." (emphasis added). It was not that issue, however, that was before the Referee. The issue was SAIF's denial of January 12, 1981 which denied claimant's December, 1980 aggravation claim. Claimant's counsel stated at the hearing:

"At this time we are going to be proceeding only with reference to SAIF's denial of January 12, 1981..."

and:

"I want to make this clear, however, that the only issue that we are concerned with is the December 24 incident. The reason I want to make that clear is because Dr. Eisendorf wrote a report dated June 19, 1981, Exhibit #21, in which he set forth the new incident of June 9, 1981."

It seems clear that Dr. Eisendorf's June 9, 1981 report is sufficient to constitute an aggravation claim under ORS 656.273(3), and that claimant's counsel intended to treat it as such. SAIF virtually admits as much in its brief. That being the case, SAIF was obliged either to accept or deny the claim within 60 days. ORS 656.263(4), (6). However, any dispute about acceptance or denial must be resolved in another hearing. Dr. Eisendorf's connection of claimant's June aggravation and his industrial injury has no bearing on claimant's December claim.

ORDER

The Referee's order dated September 25, 1981 is reversed. SAIF's January 12, 1981 denial is reinstated and affirmed.

MICHAEL A. BROOKS, Claimant
Thomas E. Sweeney, Claimant's Attorney
Daryll Klein, Defense Attorney

WCB 79-10425
April 14, 1982
Order on Remand

On review of the Board's order dated February 27, 1981, the Court of Appeals reversed the Board's order in part and remanded the claim to the Board for entry of an order in accordance with the Court's order.

NOW, THEREFORE, that portion of the Board's order holding that the employer is not responsible for payment of medical expenses related to the arthroscopy performed upon claimant's left knee is vacated, and the employer is hereby directed to pay for said medical services. The employer is not, however, required to assume the cost of medical services performed to repair the synovial plica in claimant's knee. That portion of the Board's order reducing the Referee's award of attorney fees is hereby vacated, and the Referee's award of \$750 for a reasonable attorney's fee is reinstated.

IT IS SO ORDERED.

CLEA B. CARPENTER, Claimant
Evohl F. Malagon, Claimant's Attorney
Steven Reinisch, Defense Attorney

WCB 79-00913
April 14, 1982
Order on Review

Reviewed by Board Members Barnes and McCallister.

The carrier seeks Board review of Referee Fink's order which set aside its denial of benefits. The sole issue is the compensability of the claim.

We affirm and adopt the Referee's order subject to the following comments.

Briefly, we find the facts to be that claimant, age 63 at the time of the incidents herein, was employed as a safety foreman at Klamath Cold Storage, and had been employed at the same facility for approximately 29 years. Throughout that period of time, claimant was exposed to small amounts of ammonia which leaked from the cooling engines. On December 29, 1977, claimant sustained a massive exposure to ammonia when he opened the door to an engine room in which a large amount of ammonia had accumulated. Claimant was rendered unconscious, received emergency hospital care, and lost several days work. After returning to work, over the next three months, claimant was exposed to ammonia on a daily basis, and sustained two more substantial exposures to ammonia. Claimant was hospitalized again following one of these exposures. On April 6, 1978, claimant ceased working. Claimant had smoked cigarettes for approximately 40 years, had mild emphysema, and apparently had been exposed to tuberculosis at some early period in his life. Claimant now experiences extreme shortness of breath upon exertion or exposure to cold.

The carrier contends that claimant's condition should be considered a disease, and that the symptoms he experiences are caused by either a pre-existing heart disease or chronic obstructive pulmonary disease (COPD) not caused or worsened by work exposure to ammonia. The Referee adroitly avoided classifying the claim as an injury or a disease and merely found the claim to be compensable. The claimant contends that we should affirm the Referee and seems to argue that the claim should be

considered an injury. We find the distinction to be irrelevant here because claimant has satisfied his burden of proof under either characterization.

The carrier relies on the opinion of Dr. Emil Bardana, who categorically denied that virtually any exposure to ammonia could cause asthma, emphysema, or, the more general condition, COPD. Dr. Bardana attributed the symptoms claimant experiences to either a heart disease or pre-existing asthma.

We do not find Dr. Bardana to be persuasive in this case. First, there is little or no evidence to support Dr. Bardana's assumption that claimant has heart disease or pre-existing asthma. Prior to the significant ammonia exposures, claimant's physician, Dr. Marx, had prescribed heart medication to be taken on an "as needed" basis, but there is no other evidence of a heart disorder. Claimant also had been hospitalized at least twice

prior to the December, 1977 ammonia exposure and had been variously diagnosed as suffering from COPD or emphysema. Claimant had not been diagnosed as suffering from asthma. While the symptoms of emphysema and asthma can overlap, it seems more likely to us that Dr. Marx, an internist with experience treating pulmonary patients, treated claimant over a sufficient period of years to be able to distinguish the two disorders. Dr. Bardana felt that claimant had developed asthma in the fall of 1977 as a result of a viral infection, and further testified that the late 1977 - early 1978 exposures to ammonia did not worsen the disease. It is difficult to reconcile such testimony with the fact that prior to the massive ammonia exposures claimant was not sensitized to exertion or cold but after the exposures to the ammonia he experienced respiratory responses to those factors.

The other difficulty with Dr. Bardana's opinions is that they were too dogmatic. Dr. Marx quoted from medical texts indicating considerable uncertainty within the medical professions concerning the relationship between such factors as exposure to industrial chemicals and the development of COPD. By contrast, Dr. Bardana offered the categorical denial that any relationship could exist between exposure to ammonia and the development of pulmonary disorders. We find that, as between the degree of certainty expressed in the medical texts and Dr. Bardana, Dr. Bardana's persuasiveness suffers in the comparison. Dr. Marx offers a cogent explanation of the relationship between the ammonia exposures and the symptoms claimant continued to experience, which explanation is more consistent with the facts and the current state of medical knowledge.

One final note on the evaluation of the medical evidence. The carrier made much of the fact that a post-exposure test of claimant's lung function done by Dr. Bardana showed a lung volume in excess of normal for a man of claimant's age. As Dr. Marx pointed out, the test results merely show that when not exerting himself or exposed to the cold, claimant has normal lung function, which is one of the characteristics of asthma. It is also common for persons with emphysema to have overall larger lung volume because of the body's effort to overcome the loss of air into the tissue surrounding the aveoli.

We conclude that claimant proved the elements of an industrial injury in that he established that in the course of his employment he was unexpectedly exposed to large volumes of ammonia at times and places readily identifiable, causing injury requiring medical care and at least temporary disability. The evidence is also consistent with a finding that claimant developed asthma or COPD as the proximate result of exposure to ammonia or that the asthma or COPD worsened in that it became sensitized to two new factors, arising out of and in the scope of his employment and to which claimant was not ordinarily exposed other than in the course of his employment.

ORDER

The Referee's order dated November 19, 1980 is affirmed. Claimant's attorney is awarded \$300 as a reasonable attorney fee for services rendered on Board review, payable by the carrier.

HAROLD CURRY, Claimant
SAIF Corp Legal, Defense Attorney

Own Motion 81-0251M
April 14, 1982
Order to Show Cause

The above claim is currently open, having been ordered reopened by the Board's Own Motion Order dated December 22, 1981.

The Board has received information to the effect that: (1) Claimant had scheduled an appointment with Dr. Gill on referral from his treating doctor; (2) the SAIF Corporation scheduled an appointment for an independent medical examination of claimant; (3) by coincidence, claimant's appointment with Dr. Gill and the time scheduled for SAIF's independent medical examination were the same date and time; (4) claimant advised a SAIF representative that he would be unable to attend the independent medical examination because of his prior appointment with Dr. Gill; and (5) a SAIF representative, without claimant's knowledge or consent, then called Dr. Gill's office and rescheduled claimant's appointment to see Dr. Gill so that claimant would be able to attend SAIF's independent medical examination.

If those facts are true, SAIF's conduct would appear to at least amount to an unreasonable interference in the doctor/patient relationship in the course of claimant's compensable treatment. Stronger adjectives could also be used.

ORDER

The SAIF Corporation shall show cause, if any exists, in writing to be filed with the Board within seven days of the date of this order why it should not be required to pay temporary total disability compensation due under the Board's Own Motion Order dated December 22, 1981 at 125% of the applicable rate as and for a penalty for the alleged conduct described in this order.

ROSE M. FOSTER, Claimant
Richard W. Condon, Claimant's Attorney
George Goodwin, Defense Attorney

WCB 81-03992
April 14, 1982
Order on Review

Reviewed by Board Members McCallister and Barnes.

Claimant seeks Board review of Referee Peterson's order which approved EBI's denial of claimant's back injury claim and affirmed a Determination Order which granted no permanent partial disability for a hernia.

The claimant suffered a left inguinal hernia as the result of a lifting incident of August 9, 1980. The claim was accepted and processed to a Determination Order which issued April 24, 1981. The Determination Order granted temporary total disability only. During the course of recovery from the hernia, claimant developed low back pain and claimed she had injured her back at the time of the August 9, 1980 lifting incident. EBI denied the back claim.

The Referee found that the claimant had failed to establish compensability of the back problem and failed to establish entitlement to any permanent partial disability for the hernia. We agree and affirm.

At the hearing the employer/carrier alleged an overpayment in the amount of \$605.92 resulting from additional temporary total disability paid between the period that the Determination Order terminated time loss benefits and the time that the Determination Order issued. The Referee found the offset issue need not be reached since there was no finding of permanent partial disability. The employer/carrier requests the Board make a finding confirming the existence of the overpayment in the amount of \$605.92 so that the employer may offset this against any compensation that claimant may receive in the future relating to her August 9, 1980 injury. We will so order.

ORDER

The Referee's order dated August 24, 1981 is affirmed. The employer is authorized to offset \$605.92 against any disability benefits which become due claimant as a result of the August 9, 1980 injury.

GARY E. FULLER, Claimant
Elden M. Rosenthal, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-02309
April 14, 1982
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.

MICHAEL L. GRABLE, Claimant
John C. DeWenter, Claimant's Attorney
J.W. McCracken, Defense Attorney

WCB 79-00866
April 14, 1982
Order on Remand

The Board issued its Order on Review herein on January 15, 1980. The Court of Appeals affirmed the Board's order without opinion. Grable v. Weyerhaeuser Company, 47 Or App 1 (1980). The Supreme Court granted review and reversed and remanded the Court of Appeals' decision. Grable v. Weyerhaeuser Company, 291 Or 387 (1981). The Court of Appeals found this claim compensable and reversed and remanded to the Board with instructions to accept this claim for aggravation. 55 Or App 627 (1982).

NOW, THEREFORE, the Board's order of January 15, 1980 hereby is vacated, and this claim for aggravation is remanded to the employer for acceptance and payment of benefits according to law.

IT IS SO ORDERED.

REBECCA HACKETT, Claimant
Douglas Green, Claimant's Attorney
James Huegli, Defense Attorney

WCB 80-04498
April 14, 1982
Order on Review

Reviewed by the Board en banc.

The claimant seeks Board review of Referee Leahy's order which upheld the employer/carrier's denial of compensability. Claimant contends her left foot condition is compensable. We agree and, therefore, reverse.

Claimant was born with extra bone in her left foot, a condition called exostosis. However, the condition did not cause claimant any distress until the work exposure at issue here. On March 18, 1980 claimant's employer, Pendleton Woolen Mills, changed her job to one involving the use of a treadle requiring claimant to depress a large pedal with both feet in a repetitious manner. Claimant testified that these duties caused her left foot to swell, become tender and painful. This was documented in Dr. Dunlop's initial report of March 24, 1980. Dr. Sirounian surgically removed the extra bone on June 10, 1980.

Two consulting physicians, Drs. McNeill and Butler, both agree claimant's foot was made symptomatic by her work, but both think her underlying condition was not worsened by her work. Dr. Butler did not examine claimant. Dr. McNeill examined her post-operatively but was "unable to tell the status of this foot because of pain and swelling" from surgery. Claimant and Dr. Dunlop both attest to effusion or swelling immediately following the work activities on March 18, 1980. This swelling is ignored in the reports of Drs. Butler and McNeill.

The Referee upheld the denial, relying on Weller v. Union Carbide, 288 Or 27 (1979). We believe that Weller is inapplicable because claimant's foot condition was asymptomatic before her work activities on March 18, 1980. We held Weller to be inapplicable when a condition is previously asymptomatic in Lorena Iles, 30 Van Natta's 666 (1981). We recently elaborated on the rationale of Iles in Patricia L. Lewis, WCB Case No. 80-10226, 34 Van Natta's 202 (March 15, 1982).

"The significance of a condition being previously symptomatic is that there is usually prior treatment, meaning that there is a baseline from which to measure whether the claimant's underlying condition has worsened within the meaning of Weller. If Weller also applied when the underlying condition was previously asymptomatic, there would almost never be any baseline information about the prior extent of the underlying condition and thus the claimant would almost never be able to prove any worsening of that condition. For this reason we have previously ruled in Iles that Weller is inapplicable to previously asymptomatic conditions. We adhere to that conclusion and find it here dispositive."

Alternatively, if the requirements of Weller are applicable, we find that they are satisfied on this record. Weller involved a situation where there was an alleged worsening of symptoms in a context where symptoms meant only subjective evidence (pain) of a worker's condition. By contrast, here we think the swelling claimant experienced following the work incident of March 18, 1980 is objective documentation of claimant's worsened condition.

In a proposed order furnished to the parties prior to the issuance of this order, the Board suggested that claimant was not entitled to compensation for medical services and time loss through the recovery period following the June 10, 1980 surgery because we inferred that claimant's condition had returned to its pre-injury status prior to the surgery. We suggested that from our general knowledge of medical procedures, such elective surgery would not have been done unless the swelling had gone down. After reconsidering the evidence, it appears that the only reason claimant was referred for surgery was because the pain and swelling in claimant's foot was not responding to more conservative treatment. Claimant was examined as late as seven days prior to the surgery, and pain and swelling was found at that time. It is highly unlikely that pain and swelling that had continued for two and a half months and that had not responded to drug and physical therapy suddenly resolved itself within the period of one week between the last recorded examination and the surgery.

If the evidence indicated that the pain and swelling were responding to conservative treatment to the extent that claimant was symptom-free while engaging in her pre-injury activities, we would find that the workers compensation system had discharged its obligation to this claimant. However, the evidence indicates that in order to successfully treat the aspects of claimant's condition which were clearly work-related, it was incidentally necessary to correct the underlying, pre-existing condition.

ORDER

The Referee's order dated November 5, 1980 is reversed. The employer's denial is set aside and this claim is remanded to the employer for payment of benefits in accordance with this order until closed pursuant to ORS 656.268.

Claimant's attorney is awarded \$1,700 as a reasonable attorney's fee for prevailing in a case involving the compensability of a claim, following payable by the employer.

CHAIRMAN BARNES DISSENTING IN PART:

I agree that claimant's claim is compensable to the extent of medical treatment and time loss between her March 18, 1980 at-work incident and her June 10, 1980 surgery. I disagree with that portion of the majority opinion that holds that the workers compensation system is responsible for claimant's June 10, 1980 surgery and subsequent time loss.

This case illustrates a recurring problem in workers compensation. There are numerous cases in which a worker's overall medical condition consists of a combination of work-related and non-work-related problems. One recurring example is a worker with a pre-existing medical problem not caused by work but which is aggravated by work. Another recurring situation is a worker with a pre-existing medical problem which is neither caused nor aggravated by work and an additional, related medical problem that is caused by work.

In these situations, I believe the rule should be: Workers compensation duties have been discharged when a worker is returned to pre-injury status even though that pre-injury status may include a pre-existing, noncompensable medical problem. To state the clearest illustration, suppose a worker is diabetic and taking 40 units of insulin per day, there being no suggestion that the diabetes condition is work related; suppose that worker suffers a compensable injury; suppose the worker's insulin dosage must then be increased to 60 units a day, it being generally accepted in medicine that a trauma can increase the body's need for insulin. I submit the workers compensation system would be responsible for paying for the additional 20 units of insulin per day, the increased dosage being a collateral but compensable consequence of the industrial injury. But when the worker recovered from the trauma to the point that the insulin need returned to the pre-injury dosage of 40 units a day, I submit that the workers compensation system would have no further responsibility to provide medical care or other benefits because of the worker's diabetes condition. It certainly could not seriously be contended that the workers compensation system should be permanently responsible for paying for the same dosage (40 units) that the worker had been taking pre-injury and would continue to take post-recovery for reasons unrelated to work.

The majority's contrary approach does extend the duties of the workers compensation system to correction of at least some pre-existing conditions, those where "the evidence indicates that in order to successfully treat the aspects of claimant's condition which were clearly work-related, it was incidentally necessary to correct the underlying, pre-existing condition." This results in a potentially substantial amendment to ORS 656.245. Before today's decision, the statute used to state that the workers compensation system was responsible for "medical services for conditions resulting from the injury." After the majority's amendment, it now provides that the workers compensation system is now additionally responsible for some conditions (those "incidentally necessary to correct") not resulting from the injury.

In my diabetes hypothetical it is relatively easy to draw the line between compensable and noncompensable medical treatment; in this case, I admit, it is much harder to draw that line. But so long as our society persists in setting up one insurance program for work-related problems and other insurance programs for non-work-related problems, I believe the line has to be drawn. In this case I would draw the line by holding that claimant is only

entitled to medical services and temporary total disability benefits between March 18, 1980 and June 10, 1980, the latter date being when claimant's pre-existing, congenital exostosis condition was surgically corrected. I infer that claimant's condition had returned to pre-injury status by June 10, 1980 and, as stated above, do not think the workers compensation system has any greater duty than that. There are admittedly facts in the record that cut against the inference I draw, but I submit that my inference is at least as strong on this record as the majority's inference that it was "incidentally necessary to correct" claimant's exostosis in order to treat her compensable condition.

Finally, although the majority perplexingly does not so state, I assume today's decision overrules Gloria E. Douglas, 32 Van Natta's 139 (1981). That case was strikingly similar to this case. The worker in Douglas had a bone spur in her foot. The combination of the bone spur and claimant's work activities produced tendonitis, which was initially treated conservatively. Ultimately the bone spur was surgically removed. In a portion of the Referee's order which the Board affirmed and adopted on review, the Referee found that the bone spur surgery and resulting time loss were not compensable:

"Responsibility for the medical services, temporary disability and any permanent disability related to the surgery on the claimant's heel is, however, a different matter. That surgery was performed for removal of a bone spur (Exhibit 10). There is no evidence the claimant's work activity affected the bone spur in any way, and Dr. Harris reported there was no change in the x-ray appearance of the spur (Exhibit 16). It is reasonable to conclude that the only way the claimant's work activity affected the bone spur was to call attention to its existence by the production of varying degrees of inflammation; that within a short time after she ceased work in June, 1979 the claimant's condition was just what it would have been had she never worked for Bumble Bee Seafoods. Nothing in Dr. Harris' opinion indicates otherwise, despite his

statements that the claimant's work materially contributed to the need for surgery. I believe more is required by the criteria of Weller [v. Union Carbide, 288 Or 27 (1979)]. Therefore, the employer is not responsible for the medical services, time loss and any permanent disability generated by the removal of the bone spur in the claimant's right heel."

I submit that the Referee and Board were correct in Douglas and that the Board majority is mistaken today. Therefore, I respectfully dissent.

MICHAEL K. JANES, Claimant
Richard Kropp, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-09355
April 14, 1982
Order on Review

Reviewed by Board Members McCallister and Barnes.

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.

Claimant suffered minor episodes of neck and back pain for several years prior to his alleged industrial injury. On August 27, 1980 he sustained back, neck and shoulder pain when rising from his couch at home. The following day he saw Dr. Ray, a chiropractor, who examined claimant and took x-rays. Claimant went in for chiropractic manipulations on August 29 and September 2, 4 and 8. Each visit produced gradual, but definite, improvement in his condition.

Claimant began working for Contractors, Inc. on September 2, 1980. His primary job duty was to operate a hand-held earth compactor called a "pogo stick" which caused vibration of his body. Claimant filed a claim on September 11, 1980 alleging an injury on the day before. He stated the "constant vibration and pounding evidently caused sprain of neck and lower back (according to doctor)."

There are two opposing medical opinions in this record. Dr. Ray, claimant's treating chiropractor, found his condition was caused by work activities. Dr. Horniman, a family physician, saw claimant only on October 2, 1980, and felt he was stationary and could return to work. He felt claimant's condition was not due to work, as claimant had been under chiropractic care prior to starting work with the employer. He did not feel claimant's pre-existing condition had worsened and found no evidence of either back or neck pathology.

Dr. Ray's reports and deposition testimony fall short of proving claimant's case. Dr. Ray's 827 report, dated September 12, 1980 indicated he first treated claimant on September 11, 1980 and gave a detailed report of x-ray findings. He failed to mention he had seen claimant five times within the two-week period prior to September 11 and that the x-rays were taken August 28, 1980.

In his October 2, 1980 report he stated:

"Mr. Janes reported to this office on 8-28-80 for an exam, diagnosis, and treatment. He stated that since beginning a job as a manual laborer and using a 'jack hammer', he had been experiencing neck, thoracic and lumbar pain of a constant nature. After work on 8-28-80, he stated he was in some pain and laid down on the couch at home to rest. He then rose from the couch and immediately felt sharp burning pains radiating throughout the cervicothoracic spine. He then sought treatment on 8-28-80 at this office."

This history is, of course, totally incorrect as claimant did not begin work for the employer until September 2 and was not working for anyone on August 27.

On October 22, 1980, Dr. Ray submitted basically the same report as he did on October 2 with one addition. He stated:

"I may add that in the letter to Mr. Janes by Ms. Savage on 10-6-80 she states that 'Further, your low back and neck condition was not materially or significantly changed from its previous condition due to your work activities as a laborer for Contractors, Inc. on or about September 10, 1980.' This statement is absolutely without fact and is erroneous. I feel Ms. Savage is completely out of line with this statement. Since I have been the attending physician in this case, I know clinically that Mr. Janes' low-back and neck condition was materially and significantly changed from its previous condition due to his work activities as a laborer on or about September 10, 1980."

Although Dr. Ray is quite emphatic in his conclusion, we are not persuaded that the evidence supports such a conclusion. In his deposition, Dr. Ray had to back track to correct the errors in history in his written reports. He still maintained that claimant's condition was caused by his work and was the carrier's responsibility. He was positive of this based on his examinations and x-rays. The only set of x-rays were taken on August 28, five days before claimant went to work for the employer. No others were taken from which to prove a worsened condition on September 10.

We also note that Dr. Ray would not release claimant to regular work until December 5, 1980. When Dr. Horniman saw claimant on October 2, 1980, he found no objective evidence of disability and felt claimant was overacting and exaggerating his symptoms. In his deposition, Dr. Horniman said claimant was capable of performing his regular job on the date of that office visit.

The totality of the "evidence" offered by Dr. Ray has failed to persuade us that claimant's claim is compensable. Claimant has, at most, shown a worsening of his symptoms on September 10, 1980, but no worsening of the underlying condition.

ORDER

The Referee's order dated October 7, 1981 is reversed. The SAIF Corporation's denial of October 6, 1980 is reinstated and affirmed.

JEFFREY D. JONES, Claimant
Peter O. Hansen, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-00200
April 14, 1982
Denial of Reconsideration

The Board has received a motion for reconsideration of its Order on Review dated March 26, 1982.

Having considered the motion, it is hereby denied.

IT IS SO ORDERED.

IONE M. MANUEL, Claimant
Elton T. Lafky, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 78-07662
April 14, 1982
Order Dismissing Request for Review

The SAIF Corporation has requested review of the Presiding Referee's Order Vacating Order of Dismissal entered herein on February 22, 1982. The Board lacks jurisdiction to review this order at this time because it is not a final order. David Bartell, 29 Van Natta 876 (1980).

ORDER

SAIF Corporation's request for review is dismissed as premature.

JAMES F. RAIFSNIDER, Claimant
Richard A. Carlson, Claimant's Attorney
Rohn M. Roberts, Defense Attorney

WCB 79-09409, 79-01579 & 78-08036
April 14, 1982
Order on Remand

On review of the Board's order dated March 4, 1981 the Court of Appeals reversed the Board's order in part.

NOW, THEREFORE, that portion of the Board's order finding that claimant's low back condition is not compensable is hereby vacated, and the claim for injury to claimant's low back is remanded to the carrier for acceptance and payment of benefits according to law.

IT IS SO ORDERED.

RICHARD J. CAREY, Claimant
Rolf Olson, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 79-01602
April 19, 1982
Order on Review

Reviewed by the Board en banc.

The SAIF Corporation seeks Board review of Referee Fink's order which remanded claimant's hearing loss claim to it for acceptance and payment of compensation.

We affirm and adopt the Referee's order with the following additional comments.

As in Herb Ferris, WCB Case No. 80-05978, 34 Van Natta 470 (decided this date), there is some confusion in the parties' arguments in this case about the legal tests for compensability versus responsibility. The test for compensability is whether the work environment generally and cumulatively was the major contributing cause of the claimant's hearing loss. See SAIF v. Gygi, 55 Or App 570 (1982). The test for responsibility is whether a specific work environment could have involved injurious noise exposure. See Inkley v. Forest Fiber Products, 288 Or 337 (1980).

Claimant worked most recently for and asserts this claim against Beaver Creek Meat Company. While there he was usually exposed to sound levels of about 75 decibels, according to SAIF's tests, or about 78 to 86 decibels, according to claimant's test. In prior similar employment claimant had been exposed, according to his testimony, to similar sound levels. It is probable that claimant had some sound induced hearing loss even before he started working at Beaver Creek. In any event, claimant's hearing loss increased while working at Beaver Creek. We conclude that claimant's working environment generally and cumulatively was the major contributing cause of his hearing loss.

Turning to the responsibility issue, SAIF is apparently arguing that there was no last injurious exposure at Beaver Creek because the docimeter results show sound levels below the OSHA limit of 90 decibels. We do not agree that, just because sound exposure at Beaver Creek was within OSHA limits for all workers, it could not have caused harm to this worker who had prior significant noise exposure and probable hearing loss.

ORDER

The Referee's order dated December 18, 1980 is affirmed. Claimant's attorney is awarded \$500 as a reasonable attorney fee for services rendered at this Board review, payable by the SAIF Corporation.

BOARD MEMBER McCALLISTER DISSENTING:

I disagree with the opinion of the majority. I would reverse the Referee's order and affirm SAIF's denial.

My disagreement, and the reasons I reach a different conclusion in this case is based on the following:

(1) Claimant elected to proceed against Beaver Creek Meat Company to prove compensability of a sensori-neural type hearing loss characteristic of that which can be caused by exposure to sound waves (hereafter noise).

The characteristics of noise which is of a kind which could cause sufficient acoustic trauma to result in loss of hearing acuity is loudness, frequency and duration of exposure, that is, quality and quantity. This can be precisely measured as was done in this case.

(2) The only evidence in this record that claimant ever was exposed to injurious levels of noise anyplace (on or off the job) is based on his testimony. In that regard claimant's subjective impression of the quantity and quality of sound to which he was exposed before and after he became employed at Beaver Creek Meat Company is summed up in his statement: "I have always worked around a lot of noise." (Emphasis added)

(3) The sound level surveys conducted at Beaver Creek Meat Company demonstrate exposure well below levels permitted by the Occupational Health Noise Exposure Standards (22-019(a)). In fact, the docimeter reading indicated that on the day claimant wore the instrument he was exposed to but 6% of the permissible maximum under those standards. Claimant testified the noise level in the plant the day the docimeter was worn was typical of the noise level since he had worked at Beaver Creek. I find the docimeter reading most persuasive because it most closely approximates the workers actual exposure.

(4) The medical evidence establishes only that claimant has a hearing loss which, in Dr. Camp's opinion, is "consistent with noise induced impairment." Dr. Camp later reported "---- no other cause in his history or the physical examination could account for the ----- hearing loss ---- other than continuous noise exposure in an employment field where the decibel level is close to the maximum allowable by OSHA regulations." (Emphasis added)

(5) Dr. Camp never did respond to claimant's inquiries regarding his greater susceptibility theory. Thus the best that can be said for the claimant's "greater susceptibility theory" is that on this record it remains only a theory. The majority seems to adopt this unsupported theory. Based on this record the conclusion this worker or any worker is more or less susceptible to acoustic trauma from any noise level is unsupported by the evidence.

(6) Lastly, and most importantly, as the Board ruled in Herb Ferris, WCB 80-05978 (decided this date): "The first step towards proving that a noisy work environment caused hearing loss is to prove the sound level in the work environment." Here, I would take that pronouncement a step further and say that once the sound level in the work environment has been proved the worker must prove by competent medical evidence that the exposure was injurious in fact to the extent that it either caused or materially worsened the condition. In making that determination it is my belief that the Health Standards for Occupational Noise Exposure [27-019(a)] should be determinative on the question of injurious exposure absent convincing evidence to the contrary.

MAURICE EDWARDSON, Claimant
Richard A. Sly, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-10509
April 19, 1982
Order on Review

Reviewed by Board Members Barnes and McCallister.

The SAIF Corporation seeks Board review of Referee Leahy's order which required payment for medical services for treatment for claimant's compensable heart attack.

The Referee's order was correct. SAIF v. Mathews, 55 Or App 608 (1982).

Claimant raises an additional issue on review -- a request that we order the payment of interest on the attorney's fee awarded claimant's attorney by the Referee which has not been paid pending Board review. We do not believe we have authority to grant that requested relief. Claimant cites ORS 82.010 as authority for such interest payment. However, this statute is not applicable to administrative workers compensation orders.

Claimant also renews his request, rejected by the Referee, that a penalty be assessed against SAIF. We agree with and adopt that portion of the Referee's order rejecting the request for a penalty.

ORDER

The Referee's order dated August 5, 1981 is affirmed. Claimant's attorney is awarded \$250 for services rendered on Board review, payable by SAIF Corporation.

HERB FERRIS, Claimant
James L. Francesconi, Claimant's Attorney
Dennis VavRosky, Defense Attorney
Roger R. Warren, Defense Attorney

WCB 80-05978
April 19, 1982
Order on Review

Reviewed by Board Members Barnes and McCallister.

Wausau Insurance Companies, the former carrier for Willamette Industries, seeks Board review of Referee Peterson's order which found claimant's hearing loss claim to be compensable and Wausau to be responsible. Willamette Industries has since become self-insured and is a party to this proceeding because, if claimant's hearing loss is compensable, Willamette Industries could be found responsible under the last injurious exposure rule.

The first issue is what are the issues. The Referee stated: "The real question, then, is not compensability. It is responsibility." On the contrary, we deem the threshold issue to be compensability. Both Wausau and Willamette have denied compensability. The responsibility issue comes second; it is only reached if claimant sustains the burden of proving the compensability of his hearing loss claim.

The Referee's understanding of the issues affected his analysis. The Referee twice stated that noise exposure in claimant's employment could have caused his documented hearing loss, apparently relying on Inkley v. Forest Fiber Products, 288 Or 337 (1980). We have previously ruled, however, that the "could have" test of Inkley is solely a carrier responsibility test, not a compensability test. Evelyn M. LaBella, 30 Van Natta 738, affirmed without opinion, 54 Or App 779 (1981). In other words, claimant in this case must prove that work exposure was the major contributing cause of his noise-induced hearing loss, see Gygi v. SAIF, 55 Or App 570 (1982); it is not sufficient to establish compensability to show only that work exposure could have caused claimant's hearing loss.

The first step toward proving that a noisy work environment caused hearing loss is to prove the sound level in the work environment. We deem it generally inadequate to attempt to prove sound levels by lay testimony to the effect that subjectively a given environment seemed "noisy." See Williams v. SAIF, 22 Or App 350 (1975). Sound can be objectively and scientifically measured; sound is constantly so measured in context of industrial safety. Certainly and obviously scientific measurement of sound levels is a higher form of evidence than the subjective impression of a witness about sound levels. If scientific measurement evidence is available but not offered, at the very least it should be presumed that "higher evidence would be adverse from inferior being produced." ORS 41.360(6).

Measurement evidence was available and offered in this case by the employer. The Referee allowed claimant's motion to strike this evidence from the record. We regard claimant's objection to this evidence as going to weight, not admissibility, and believe the Referee erred in excluding the evidence; however, that ruling is not assigned as error, so we proceed on the understanding that there is no evidence in this record of scientific measurement of sound levels in claimant's work environment.

The Referee found that while working at Willamette Industries claimant "was exposed to very high noise levels." The evidentiary support for this finding is far from clear. Claimant testified about his subjective impression of the quantity and quality of sound to which he was exposed. For reasons stated above, however, we do not find the type of evidence sufficient to sustain claimant's burden of proof in this case.

The only other material in the record that could be regarded as evidence of sound levels consists of certain comments in reports from Drs. Meyers, Huewa and Chowning. For example, Dr. Meyers states in passing in his May 1, 1979 report that claimant had "approximately 20 years employment in industrial noise exceeding 90 dba." Nothing in this record explains the source of this information; there is absolutely no suggestion that any of the doctors personally conducted any measurement of sound levels at Willamette Industries. Given that claimant successfully objected to the employer's evidence of sound levels in part on the ground that the employer's witness had not personally calibrated the test machine, it is at best passing strange for claimant to attempt to rely on sound level "data" in doctors' reports without offering any information at all about how this "data" was obtained. Under these circumstances, we do not find the doctors' reports to be persuasive evidence of the sound levels to which claimant was exposed in his employment.

In conclusion, we find that claimant has not proven that noise exposure in his working environment was the major contributing cause of his hearing loss because we further find no proof of the sound level, excessive or otherwise, to which he was exposed while working.

ORDER

The Referee's order dated May 29, 1981 is reversed.

TAE KIM, Claimant
R. Kenney Roberts, Attorney
Order Denying Remand

WCB 80-05266 & 81-04723
April 19, 1982
Order Denying Remand

Claimant has moved the Board to allow the submission of additional evidence not included in the record before the Referee. The Board regards a motion for submission of additional evidence on review as a motion for remand to the Referee for further evidence taking. Robert A. Barnett, 31 Van Natta 172 (1982).

Barnett requires that in order to merit remand for the submission of additional evidence, ". . . it must be clearly shown that material evidence was not obtainable with due diligence before the hearing." Claimant has made no such showing; therefore, his request for remand must be denied.

After claimant made his request for submission of additional evidence, he corresponded with the Board indicating that it was his understanding that counsel for the carrier had agreed to the inclusion of the additional evidence as part of the record on review. Counsel also corresponded with the Board, making clear that any such understanding on the part of claimant was a misunderstanding, and that the carrier objected to the submission of the proffered additional exhibits. Absent stipulation of the parties, the Board has no authority to consider evidence not contained in the record made before the Referee. Barnett, supra.

ORDER

Claimant's motion to remand for further evidence taking is denied. The Board will proceed to review this claim in due course pursuant to claimant's request for review.

TAE HYUN KIM, Claimant
R. Kenney Roberts, Attorney

WCB 80-05266 & 81-04723
May 14, 1982
Order on Review

Reviewed by Board Members Lewis and Barnes.

The claimant seeks Board review of Referee Mannix's order which denied his requests for relief in all respects and dismissed the cases with prejudice.

The Board affirms and adopts the order of the Referee.

ORDER

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

DONALD LATHROP, Claimant
Pozzi, Wilson, et al, Claimant's Attorneys
Donald W. Hull, Defense Attorney

WCB 80-10830
April 19, 1982
Order on Review

Reviewed by Board Members McCallister and Barnes.

The claimant seeks Board review of Referee Menashe's order and Republished Order which granted claimant an award of 30% unscheduled permanent partial disability. Claimant contends that the award is inadequate.

We affirm and adopt the portion of the Referee's order dealing with the extent of claimant's disability.

The employer, in its brief, contends it is entitled to an offset for an overpayment of \$2,295.79. Citing Wilson v. SAIF, 48 Or App 933 (1980), the Referee disallowed the offset. The Referee's reliance on Wilson is questionable. See Telphen Knickerbocker, 33 Van Natta 568 (1981). We do agree with the Referee, however, that the defendant presented insufficient evidence from which to conclude that an offset for the alleged overpayment is justified.

ORDER

The Referee's orders dated June 22, 1981 and August 28, 1981 are affirmed.

WALLACE REED, Claimant
N. Thomas Wilson, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 78-10329
April 19, 1982
Order on Review

Reviewed by Board Members Barnes and McCallister.

Claimant has requested Board review of Referee Peterson's order which denied claimant's request to require the SAIF Corporation to recalculate his permanent total disability benefits based upon both his full and part-time employment. The Referee stated the issue as follows:

"Should a claimant who is awarded permanent total disability (PTD) status as a result of a compensable injury incurred in part-time employment have his PTD payments based upon the combination of his wages from that employment with the separate wages he was earning during the same period from full-time employment with a different employer?"

The controversy was submitted to the Referee based on the following stipulated facts:

"1. Wallace Reed was employed part time at Dick's Chevron, 1010 Main Street, Lebanon, Oregon, at a pay rate of \$2.50 per hour. He generally worked 15 hours per week. On January 3, 1976, he fell on the job and has claimed disability since that date.

"2. A determination of the Workers' Compensation Department was issued with an award of permanent total disability effective May 22, 1978.

"3. Mr. Reed filed a request for a hearing to contest the amount of the award payments on July 8, 1978.

"4. At the time of the injury, January 3, 1976, Wallace Reed was also employed, full time, for Albany International Industries, Inc., 840 30th S.W., Albany, Oregon, as a draftsman. He worked 40 hours per week at a rate of \$4.65 per hour and an additional eight hours per week at \$6.97 per hour - for a weekly gross income of \$241.76.

"5. Wallace Reed's disability award payments were, and have been, based solely on his part time income from Dick's Chevron.

"6. There was no significant similarity between Mr. Reed's employment duties at Dick's Chevron and at Albany International Industries, Inc., nor was there any business or legal relationship between the two employers."

In denying the requested relief, the Referee noted that the claimant conceded in his argument that when "a person has full time employment but is injured on a part time job Oregon has traditionally awarded disability benefits based upon the part time income." The Referee cited but refused to apply OAR 436-54-212(2)(f), since it became effective on January 11, 1980, well after the date of the injury. That rule provides:

"(2) The rate of compensation for workers employed with unscheduled, irregular or no earnings shall be computed on the wages determined in the following manner:

"(f) Employed two jobs, two employers:
Use only wage of job on which injury occurred if worker unable to work either job..."

The Referee found that the cited rule, although not retroactive, had merely served to reduce the informal agency practice, which has "...gained the force and effect of a rule" to writing. Being unable to find that practice unreasonable, the relief claimant requested was denied. While we agree with the final conclusion of the Referee, we would arrive there by a somewhat different means of passage.

There are three statutes applicable to this factual situation. Since we are dealing with a case involving permanent total disability, we turn initially to ORS 656.206 (1975). Subsection (2) of that statute deals with benefits payable to a worker permanently

and totally disabled. The statute states that the worker shall receive "...66 2/3% of wages not to exceed 100% of the average weekly wage..." (Emphasis added) ORS 656.206(2)(b) provides: "'Wages' means wages as determined under ORS 656.210." ORS 656.210 (1975) deals with temporary total disability, and has provisions for calculation of a worker's temporary total disability benefits based on a percentage of the worker's wages. That statute, however, is not specifically definitive of the term "wages." We therefore turn to ORS 656.005 (1975) which provides a listing of definitions for terms utilized under the Workers' Compensation Act. Subsection (27) of that statute provides:

"'Wages' means the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the accident, ..." (Emphasis added)

Tracking of the term "wages" for permanent total disability purposes, therefore, leads to the definition contained in ORS 656.005(27), and that statute could hardly be more clear in its terms. Therefore, when calculating a claimant's permanent total disability benefits, he will receive benefits based on his wages on the job he was working when injured.

Although there are no appellate court decisions on this specific issue, it is clear that this case does not present an entirely novel question. In Doris A. Hari, 18 Van Natta 284 (1976), the claimant was injured while working on a part time job at a pizza parlor. She also had a full time job as a receptionist. The claimant argued that her temporary total disability benefits should have been properly calculated on the basis of her combined weekly wages received from both jobs. The Referee ruled against the claimant, and the Board affirmed, stating that although it seemed harsh to refuse to combine the wages received on both jobs for benefit purposes, the applicable statutes (ORS 656.210 and 656.005) allowed no other method of calculation.

In Benedict Loerzel, 12 Van Natta 223 (1974), the Board affirmed the Referee's determination which allowed calculation of claimant's temporary total disability benefits based only on the wages received from the part time job claimant was working while injured, rather than combining those wages with the wages he also received from his full time employment. That determination was in turn affirmed by the Multnomah County Circuit Court.

In Vivian MacDougall, 15 Van Natta 117 (1975), the claimant was employed as a cocktail waitress with two different employers on both a full and part time basis. She was injured while working on her part time job. Claimant argued that because contributions were deducted from all of her earnings, that she was entitled to aggregate her total wages for determination of her temporary total disability benefits. The Board affirmed the determination of the Referee which allowed temporary total disability benefits based on her part time employment only.

All of these cases admittedly deal with determination of temporary total disability benefits only. ORS 656.206, however, provides that wages for purposes of permanent total disability, means wages as determined for purposes of temporary total disability. We are in agreement with the conclusions and statutory interpretations in the three above-mentioned cases, and therefore find them to be dispositive of the issue presented in this case.

Claimant's counsel has additionally cited 2 Larson, Workmen's Compensation Law, Sec. 61.31 (c) (1980), for the proposition that the "better" recent cases from other jurisdictions have concluded that benefits should be based upon the earnings from both employers. Examination of the cases cited by Larson reveals that those particular jurisdictions already had statutes in effect which could easily be interpreted to require such a result, and those courts have simply been reversing their former position of refusing to correctly apply those statutes. The applicable Oregon statutes provide no "escape clause" for a claimant in this position, and our sympathies are not adequate to change what we find to be the law.

ORDER

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

HERBERT SCHAFFER, Claimant
Noreen Saltveit, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-01462 & 81-01461
April 19, 1982
Order on Review

Reviewed by Board Members Barnes and McCallister.

The SAIF Corporation requests Board review of Referee Braverman's order which set aside its denial and remanded claimant's new injury claim to it for acceptance and payment of benefits.

The Referee found: (1) "A strict application of Weller [v. Union Carbide, 288 Or 27 (1979)] would defeat this claim," but (2) Weller was incorrectly decided and should be "abandoned" as a test in workers compensation cases. The Referee developed the latter point at considerable length and with some elegance; for example, "While Weller may have been conceived in the love of the law, it was born out of wedlock with the legislative intent of the remedial purpose of the Workers Compensation Act." The Referee's criticism was not limited to the Supreme Court; he called the decision of the Court of Appeals in Sheffield v. SAIF, 50 Or App 427 (1981), "magic."

We agree with the Referee's first finding. Claimant has not sustained his burden of proof under Weller. We disagree with the Referee's second finding in the sense that we do not believe that it is the prerogative of this Board or its Referees to issue orders advising the appellate courts about the correctness or incorrectness of their decisions.

ORDER

The Referee's order dated August 17, 1981 is reversed.

DONALD SCHMIDT, Claimant
James P. O'Neal, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-09477
April 19, 1982
Order of Dismissal

The claimant has requested review of Referee Danner's order of January 15, 1982. The request for review was filed with the Board on April 12, 1982, more than 30 days after the date of the Referee's order. It is not timely.

ORDER

The claimant's request for review is hereby dismissed as untimely.

RICHARD C. DRAKE, Claimant
Jon Woodside, Claimant's Attorney
Ridgway Foley, Defense Attorney

WCB 81-02615
April 21, 1982
Order on Review

Reviewed by Board Members McCallister and Barnes.

The employer seeks Board review of Referee Braverman's order which granted claimant an increased award of compensation for an award totalling 40% loss of function of the right forearm. The employer requests that the 25% award granted by the Determination Order be reinstated and affirmed.

The sole issue before us is the extent of claimant's disability due to an injury sustained on March 14, 1980. On that date, claimant suffered a Colles fracture of the right wrist. In October, 1980 claimant's initial treating physician, Dr. Button, found "excellent consolidation of the fracture of the distal radius" with a "non-union of the fractured styloid process of the ulna." Dr. Button believed it was possible claimant would need surgery in the future, but at that time he released claimant for his regular work, hanging sheetrock.

Dr. Hazel, in October, 1980, indicated claimant saw him with "dirty, grimey, moderately calloused" hands which had obviously been used. He found good function of the wrist. Claimant was adamant that he could no longer hang sheetrock, but Dr. Hazel was not impressed with this. Installing sheetrock, he felt, was an occupation which would be difficult for most people with two perfect wrists.

On October 14, 1980 Dr. Neufeld listed claimant's limitations in range of motion. A generous reading of this report would reveal only about 15% impairment. He felt claimant could do most types of jobs, with the exception of those requiring awkward lifting (such as sheetrock work). In July, 1981 Dr. Neufeld indicated the 25% disability claimant was awarded by the January 15, 1981 Determination Order was correct.

The Referee based his increased award not only on claimant's mechanical impairment, but on his "actual loss of use or function in work, home, and play, on a repetitive, steady basis." The Referee was apparently impressed with the fact that claimant can no longer do the arduous task of sheetrock work. He also seemed impressed with claimant's complaints at the hearing and the actual physical appearance of claimant's wrist.

Based on the medical reports alone and OAR 438-65-501 to 438-65-532, we find the Determination Order award of 25% is appropriate, if not generous. Claimant's testimony does not justify a greater award. Most of the medical reports indicated that claimant had been performing vigorous work with his hands. Because he can no longer lift sheetrock does not convince us he is precluded from other heavy work.

ORDER

The Referee's order dated October 20, 1981 is reversed. The January 15, 1981 Determination Order is reinstated and affirmed.

SUSAN C. PETRIELLO, Claimant
Evohl F. Malagon, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Mildred Carmack, Defense Attorney

WCB 79-08108 & 80-02990
April 21, 1982
Order on Review

Reviewed by Board Members McCallister and Barnes.

Argonaut Insurance, carrier for Western Construction Company, has requested review of Referee Seifert's orders which found Western Construction Company responsible for claimant's low back injury.

Claimant is a heavy equipment operator. She operated a large vibrating roller used for compacting rock while employed at R.A. Hatch Company from October, 1978 until April 9, 1979. Claimant also was required to shovel cement for two days about April 6, 1979 at which time she injured her low back. She went to work for Western Construction Company operating heavy equipment, but not shoveling, from April 17, 1979 until May 29, 1979 when she quit because her back pain was too great.

On June 4, 1979 claimant filed a claim against R.A. Hatch Company for her back injury. On August 17, 1979 the carrier for R.A. Hatch Company, SAIF Corporation, denied the claim on the basis that they could not substantiate an on-the-job accident occurring on or about April 6, 1979. Claimant then operated heavy equipment for J.C. Compton Company from August, 1979 to September, 1979 and for Groves, Kiewit & Granick for three days in December, 1979. All the while claimant continued to suffer back pain.

On February 15, 1980 a claim form, unsigned by the claimant, was filed with Western Construction Company. On March 6, 1980 the carrier for Western Construction Company, Argonaut, denied the claim on the basis of untimely filing and that any back injury she may have sustained occurred prior to her employment at Western Construction Company.

We find that a compensable injury did occur on or about April 6, 1979 while claimant was shoveling cement in the employ of R.A. Hatch Company. Claimant so testified and she so reported to her chiropractor, Dr. Tracy, on June 1, 1979, to her orthopedic surgeon, Dr. Matteri, on December 20, 1979, and to the Orthopaedic Consultants on June 6, 1980.

We must further determine whether claimant's continuing back problem at subsequent employment was merely a continuation of that injury, thereby leaving the responsibility with R.A. Hatch Company, or whether an incident or incidents at the next employment at Western Construction Company contributed independently to the causation of the injury, thereby shifting the responsibility to Western Construction Company.

Comparison of claimant's symptoms, diagnoses, and treatments for the period of time immediately following the injury and the period of time during which claimant worked for Western Construction Company is difficult because of the short span of time between the two jobs. Claimant was fired by R.A. Hatch Company the next working day (April 9, 1979) after her injury (April 6, 1979). She started working for Western Construction Company only eight days after that (April 17, 1979). During this time the claimant testified to suffering back pain of the same type and location as that subsequently suffered at Western Construction Company and elsewhere.

The first medical treatment and diagnosis was either April 15 or 25, 1979. The hospital report date is illegible and testimony is conflicting as to the date.

This treatment was at an Ontario hospital emergency room where low back strain was diagnosed and bed rest, heat, pain medication and a corset were prescribed. Next, on May 14, 1979, claimant saw Dr. Bills who diagnosed trochanteric bursitis and injected claimant's hip with pain medication. Claimant then began treatment with Dr. Tracy who diagnosed subluxation of the sacrum, C1 and C2 with lumbar and cervical scoliosis. She has received treatment from Dr. Tracy at least every two weeks thereafter. Throughout this time the claimant complained of lower back pain persisting since her April 6, 1979 injury, mostly affecting the left side with occasional leg pain.

The lay testimony shows that claimant's symptoms persisted and were continuous although they varied in intensity. The lay testimony also shows that claimant complained of back problems prior to and from the inception of her work at Western Construction Company. The evidence does not show any incident or injury which occurred while claimant was employed at Western Construction Company. While it is true that sitting, driving and operation of

heavy equipment bothered claimant's back while employed at Western Construction Company (and at other employment subsequent to the April 6, 1979 injury), this activity had not bothered her until after the cement shoveling incident. This leads us to agree with Dr. Watson that these activities were not injury producing, but rather injury aggravating.

We find that claimant's continuing chronic low back problem was merely a recurrence of the first injury after a period of work with continuing symptoms indicating the original condition persisted.

At the hearing claimant requested penalties for SAIF Corporation's tardy payment of temporary total disability compensation and delayed denial. SAIF had notice of claimant's claim for back injury on June 7, 1979. The claim was a doctor's report from Dr. Tracy which indicated that claimant was unable to work at that time. However, no temporary total disability payment was made until July 2, 1979 which was ten days later than the fourteenth day after notice. See ORS 656.262(4). SAIF Corporation also did not deny the claim until August 17, 1979 which was eleven days later than the sixty days allowed by statute. ORS 656.262(5) The SAIF Corporation's unexplained inability to meet these deadlines warrants a 15% penalty of the amount that should have been paid up to July 2, 1979. Zelda M. Bahler, 33 Van Natta 478 (1981).

ORDER

The Referee's orders dated April 9, 1981 and April 23, 1981 are reversed. The denial issued by Argonaut on behalf of Western Construction dated March 6, 1980 is affirmed. The denial issued by the SAIF Corporation on behalf of R.A. Hatch dated August 17, 1979 is set aside and the claim is remanded to SAIF for processing. SAIF shall reimburse Argonaut for all claim costs incurred to date.

The SAIF Corporation shall pay claimant a penalty in the amount of 15% of the temporary total disability compensation that was due as of July 1, 1979.

Claimant's attorney is awarded \$250 as a reasonable attorney's fee for services rendered on Board review, payable by SAIF.

EUGENE C. RHODES, Claimant
Raygo Wagner, Claimant's Attorney
Scott Terrall, Defense Attorney

WCB 80-06781
April 21, 1982
Order on Review

Reviewed by Board Members McCallister and Barnes.

Claimant seeks Board review of Referee Williams' order which granted him compensation equal to 112% for 35% unscheduled disability for an injury to his right hip. Claimant contends this award is inadequate. The employer, in its brief, contends claimant is only entitled to a scheduled award and the 25% award granted by the Determination Order is sufficient.

Before a decision on claimant's extent of permanent disability can be made, it must be determined whether he is entitled to a scheduled or unscheduled award. The Referee concluded:

"In light of all of the medical reports dealing with claimant's hip condition, it seems somewhat incongruous to even comment that the hip is ordinarily considered to include the neck of the femur. Nevertheless, the aseptic necrosis in the head of the femur, certainly by any standards, is a part of the hip."

The medical evidence indicates that claimant's injury involves only the right femoral neck. Claimant's condition includes shortening of the femoral neck and aseptic necrosis. There is no proof that the acetabulum was injured in any way due to this industrial injury.

The Board has already addressed this specific issue in Chester Clark, 31 Van Natta 10 (1981). We stated:

"We begin with the elementary observation that the femur is part of the leg -- the bone extending from the knee to the pelvis. An injury to the femur would be an injury to the leg. Claimant's injury was to the femoral head, that is, the top of his leg bone where it joins the pelvis. But the top of a bone of the leg is not something other than a bone of the leg. Thus, for example, a fracture of the femur at or near the femoral head would still be a fracture of the femur and thus a leg injury." 31 Van Natta at 10.

Also see John Cameron, WCB Case No. 80-11124, 34 Van Natta 211 (March 17, 1982). Applying Clark, we conclude that claimant's condition, due to fracture of the right femoral neck, should be considered as a scheduled leg injury.

We also conclude claimant has failed to present medical evidence to show that his loss of function was any greater than the 25% awarded by the July 8, 1980 Determination Order.

ORDER

The Referee's order dated July 1, 1981 is reversed. The July 8, 1980 Determination Order is reinstated and affirmed.

BILLIE A. WHITNEY, Claimant
Jack Collier, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-01652
April 21, 1982
Order on Review

Reviewed by Board Members McCallister and Barnes.

SAIF Corporation seeks Board review of Referee Braverman's order which granted claimant additional compensation for 10% loss of use of the left forearm and 25% loss of use of the right forearm. SAIF contends the 5% awards granted by the Determination Orders should be affirmed.

Claimant sustained mild bilateral carpal tunnel syndrome while working for Willamette Poultry in October of 1978. Both wrists were operated on in late 1979. The only comprehensive medical report in the record was that of Dr. Raaf. He stated that claimant's permanent disability of the left arm was minimal and the disability of the right was mild. This assessment apparently was based substantially on claimant's complaints of pain because the objective findings were minimal in the left arm and virtually nil in the right. Claimant has complaints of pain when writing, typing, cleaning and doing normal household chores. However, by her own testimony, wearing wrist braces allows her a substantial amount of relief from pain. She is able to do almost everything she could do prior to the "injury"; she just requires rest periods after doing any prolonged or repetitive activity. After reviewing the evidence and considering the criteria in OAR 438-65-501 to 438-65-532 we conclude that the claimant was properly compensated by the awards granted by the Determination Orders.

ORDER

The Referee's order dated August 5, 1981 is reversed.

The Determination Orders of February 20, 1980 and July 17, 1981 are reinstated and affirmed.

BARBARA BEATTIE, Claimant
Allan H. Coons, Claimant's Attorney
John Svoboda, Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-05477
April 7, 1982
Order on Review

Reviewed by Board Members McCallister and Barnes.

The employer seeks Board review of Referee Wolff's order which set aside the June 2, 1980 Determination Order, reversed the carrier's denials and remanded the entire claim (including claimant's "fibrositis" and psychiatric conditions) to SAIF for acceptance and payment of compensation. He also assessed penalties against SAIF for "unreasonable closure, unreasonable processing of the claim, unreasonable refusal to reopen the claim, unreasonable resistance, delay and refusal to pay compensation, and the unreasonable delay in denying the claims." SAIF Corporation also requests review.

The four major issues are: (1) compensability of claimant's "fibrositis" condition; (2) compensability of claimant's psychiatric condition; (3) premature closure; and (4) the award of penalties and attorney fees.

We concur with the conclusions reached by the Referee on all the issues above with the exception of the penalty issue. The Referee found premature closure on May 8, 1980 and assessed a penalty of 25% of the time loss benefits payable between May 9, 1980 and March 5, 1981 (one day following the hearing). Although we find that this case was prematurely closed, we do not find it unreasonably so. Immediately prior to closure, Dr. Cornog indicated that claimant was stationary from an organic standpoint and prompt claim closure was recommended. Approximately a week later, Dr. Holland indicated claimant had no appreciable psychiatric impairment that would interfere with her being productive. Although we find claimant was not medically stationary due to her back condition at that time, we do not find the request for closure unreasonable.

Claimant contends that the denials issued on October 16, 1980 and December 30, 1980 were late. Claimant received temporary total disability compensation up through May 14, 1980. Between that date and the date of the denials, there is no evidence that claimant was entitled to time loss benefits due to the fibrositis or psychiatric conditions. We do not find the carrier was unreasonable in its failure to pay time loss. Claimant was being treated for both conditions for approximately one year prior to the denials. There is no evidence that her medical expenses were not paid during that time. In fact, both denials indicated that any further treatment and benefits were being denied. In essence, both claims were in an accepted status up to the time they were denied. We conclude, under the circumstances of this case, that penalties are not in order. That portion of the Referee's order should be reversed.

ORDER

The Referee's order dated May, 7, 1981 is modified. That portion of the order which granted claimant a penalty in the amount of 25% on all time loss payable between May 9, 1980 and March 5, 1981 is reversed. The remainder of the Referee's order is affirmed.

BARBARA BEATTIE, Claimant
Allan H. Coons, Claimant's Attorney
John Svoboda, Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-05477
April 22, 1982
Order on Reconsideration

On April 16, 1982 the Board received a letter from claimant's attorney requesting that he be granted an attorney's fee for successfully defending three of four issues. The request for Board review was made by the employer, and the Board found that assessment of a penalty was not in order. In Zelda Bahler, 33 Van Natta's 478 (1982), the Board concluded that claimant's attorney is not entitled to an attorney's fee on review pursuant to ORS 656.382(2) unless he successfully defends the entire Referee's order. Claimant's attorney, in this case, has failed to do this and is not entitled to an attorney's fee on Board review.

ORDER

Claimant's request for reconsideration is denied.

BOARD MEMBER LEWIS, DISSENTING:

I respectfully dissent from the majority's refusal to reconsider the issue of claimant's attorney's entitlement to a carrier-paid attorney's fee pursuant to ORS 656.382(2). I believe that the Zelda Bahler decision was wrongly decided and that claimant's counsel are entitled to an attorney's fee in situations such as this.

Although ultimately stated as a matter of policy, the Board's holding in Bahler appears to be based upon a conclusion that the Board's reduction or elimination of a Referee's assessment of a penalty is a reduction or disallowance of "compensation." I disagree with such an interpretation.

ORS 656.005(9) defines compensation as including all benefits provided for a compensable injury. My opinion is that the "benefits" that accrue to injured workers include disability payments, medical and other health-related services, survivor and death benefits, vocational rehabilitation and assistance.

Penalties are by nature different from the benefits provided to workers. Although a penalty imposed upon a carrier or employer may have the effect of remunerating a claimant for any hardship or inconvenience occasioned by unreasonable conduct, the primary purpose of the penalty provision is to serve as a sanction for the failure of a carrier or employer to comply with the requirements of law. The penalty provision exists in order to deter employers and their carriers from disregarding their obligations under the Act. By virtue of their basic nature, penalties cannot be viewed as compensation to the worker as that term is defined in ORS 656.005(9). See ORS 656.003. Penalties under the Workers Compensation Law are closely akin to common law exemplary, or punitive, damages which, the jury is instructed, are not related in amount to the actual harm suffered by a plaintiff; rather, the award of punitive damages is gauged by (among other factors) the nature of the defendant's conduct.

I recognize that the statute speaks in terms of "additional compensation" and not a "penalty." I am also aware of the fact that the penalty provision of ORS 656.262(9) has been characterized as "payment to claimant for whatever difficulties may have been caused by the continuing delay" as well as a sanction against the carrier. Williams v. SAIF, 31 Or App 1301, 1305 (1977). I submit, however, that had the Legislature considered this issue, a penalty awarded by a Referee would not be included within the parameters of ORS 656.382(2) except in the situation where penalties are the only issue on Board review.

If a claimant successfully defends an award of temporary or permanent disability or a finding of compensability, the claimant's attorney should be reasonably compensated for the services rendered before the Board. Requiring the claimant to prevail on every issue raised on review by the employer may result in some expedience at the Board level by reducing issues on review, as in those cases where the parties would eliminate a penalty issue by stipulation when the claimant fears reduction by the Board; however, I seriously question the wisdom or propriety of shifting or creating burdens for purposes of administrative expedience.

In Bahler, the Board reasoned that the exclusion of penalties from the definition of compensation would always guarantee a carrier-paid attorney's fee under ORS 656.382(2) "regardless of the outcome at the Board level on a penalty issue or any other issue." 33 Van Natta's at 483. I can envision no such guaranteed fee that would accrue to the claimant's attorney, other than perhaps in the situation already mentioned in which penalties are the only issue on review. In such cases, regardless of whether penalties are "compensation" or some other entity, if the claimant did not successfully defend that issue in whole or in part, no award of attorney's fee would be appropriate, claimant having failed to prevail on the issue before the Board.

The Board speculated that a chill would fall upon the employers' willingness to request review of penalty issues if the Board followed the policy of awarding a fee under ORS 656.382(2) when there is a reduction or elimination of a penalty. I fail to see any basis for this fear. I believe a more realistic concern

is the problem created for claimants by the Bahler decision: Claimants' attorneys may feel compelled to stipulate to a reduction of a penalty assessed by the Referee in order to avoid the possibility of not receiving an attorney's fee on review in spite of a successful defense of the merits of a claim (e.g., a finding of compensability or a favorable determination on extent of disability). Claimants should not be placed in this dilemma. This is clearly consistent with the principle that the Workers Compensation Act is to be construed liberally for the benefit of the workers whom it is designed to protect. Holden v. Willamette Industries, 28 Or App 613, 618 (1977). In this case, the Board's Order on Review delineated "four major issues": (1) Compensability of claimant's "fibrositis" condition; (2) compensability of claimant's psychiatric condition; (3) premature closure; and (4) an award of penalties and attorney fees. The Board upheld the Referee's decision on issues (1), (2) and (3) but eliminated the Referee's assessment of a penalty.

Claimant's attorney successfully defended three issues relating to the claimant's entitlement to workers compensation benefits, and it is my opinion that claimant's attorney should be compensated for so doing. In claimant's letter requesting the Board to award an attorney's fee on Board review, counsel indicated that he spent at least twenty hours preparing a response to the employer's seven and one-half page brief which included as an exhibit a six page opening argument previously submitted for the Referee's consideration. SAIF also submitted an appellant's brief which consisted of six pages. Claimant's respondent's brief is well-written and consists of fifteen and one-half pages. The Board's refusal to reasonably compensate claimant's attorney for the services, which is required by the Board's decision in Zelda Bahler, is an unfair and unfavorable result.

For the foregoing reasons I respectfully dissent from the majority's refusal to reconsider the Board's Order on Review and grant claimant's attorney a reasonable attorney's fee pursuant to ORS 656.382(2). On reconsideration, I would overrule that portion of the Zelda Bahler decision dealing with attorney's fees on Board review (33 Van Natta's at 482-483), and I would award claimant's attorney \$650 as a reasonable attorney's fee for successfully defending claimant's award of compensation.

GARY W. BRILL, Claimant
John Stone, Claimant's Attorney
Mildred J. Carmack, Defense Attorney

WCB 81-02570
April 7, 1982
Order on Review

Reviewed by Board Members McCallister and Lewis.

The employer seeks Board review of Referee Pferdner's order which, (1) granted claimant an award of 96° for 30% unscheduled disability, (2) granted claimant additional compensation for temporary total disability from December 12, 1980 to January 14, 1981, (3) ordered defendant to recompute claimant's temporary total disability on the June 20, 1978 injury on the basis of a five day work week rather than a four day work week, (4) allowed defendant to deduct the sum of \$2,084.88 from claimant's increased compensation for temporary total disability and permanent partial disability granted as an offset for overpayment of temporary total disability and (5) prohibited the defendant from offsetting the sum of \$1,275.79 as a result of the October 19, 1979 industrial injury.

Claimant was employed by a grocery store as a journeyman checker and on June 20, 1978 sustained a compensable industrial injury to his low back after lifting a case of canned goods.

The initial diagnosis was acute lumbar strain made by Dr. Duff who subsequently released claimant to light work on August 18, 1978. Claimant then came under the care of Dr. Johnson who performed a myelogram because of claimant's continuing complaints of left leg pain. This myelogram was normal. On November 22, 1978 Dr. Johnson declared claimant's condition medically stationary and recommended vocational rehabilitation as claimant was not to do heavy work.

On January 11, 1979 a Determination Order was entered which granted claimant an award of 16° for 5% unscheduled low back disability. By a stipulation of the parties on July 25, 1979 claimant was granted an additional 10% for a total award from the 1978 injury of 48° for 15% unscheduled disability.

Claimant then got a job in a car wash for approximately two or three months but the work exacerbated his back condition. Some time in late September, 1979 claimant returned to work for this employer in the grocery store. On October 17, 1979 claimant was lifting another case of canned goods and injured his back. This was accepted by the carrier as a separate and new injury. Dr. Johnson took claimant off work and diagnosed facet syndrome.

This 1979 industrial claim was closed by a Determination Order of February 15, 1980 and granted compensation for temporary total disability through December 26, 1979 and no award of permanent partial disability. This Determination Order was never appealed but from this Determination Order the carrier contends an overpayment occurred in the amount of \$1,275.79.

Claimant entered an approved program of vocational rehabilitation in small engine repair and completed the program on December 12, 1980.

On December 1, 1980 Dr. Cherry had examined claimant and found that claimant had episodic aggravations which were disabling and by a report of December 22, 1980 recommended that claimant be seen at the Pain Center. Subsequently, on two occasions he reiterated this request. On January 15, 1981 Dr. Johnson reported that claimant's condition remained medically stationary and his permanent partial disability was unchanged. Dr. Johnson was of the opinion that referral to the Pain Center would not be beneficial.

Claimant was seen at the Northwest Pain Center on January 29, 1981 and there arose a question of claimant's motivation for the pain center program and claimant was never actively enrolled thereafter.

On March 9, 1981 a Determination Order was issued which granted claimant compensation for temporary total disability from March 24, 1980 through December 12, 1980 for the time of claimant's participation in the vocational rehabilitation program and this was related to the 1978 industrial injury. Based on this Determination Order the carrier contends entitlement to an offset for overpayment of compensation for temporary total disability in the sum of \$2,084.88.

The Referee first ruled that claimant was a very credible witness. The claimant contends that he was hired to work five days a week. The Referee ordered the defendant to recompute the rate of compensation for temporary total disability based on a five day work week. We agree.

The Referee next ruled that the overpayment of \$1,275.79 resulting from the injury of October, 1979 could not be deducted from any increased award granted to claimant as a result of the 1978 industrial injury. We agree.

The Referee found claimant was entitled to compensation for temporary total disability additionally from December 13, 1980 to January 14, 1981. This decision of the Referee was based on the fact claimant was under the medical care of Dr. Cherry on December 12, 1980 and entitled to compensation for temporary total disability until declared medically stationary by Dr. Johnson on January 14, 1981. We disagree and reverse.

From the 1978 injury claimant was declared medically stationary and his claim was closed, by a Determination Order of January 11, 1979. Thereafter a stipulation was entered into in July, 1979 making this the last award or arrangement of compensation from the 1978 industrial injury. Thereafter, as regards the 1978 injury, claimant's condition did not worsen. Claimant's claim arising from the 1978 injury was reopened in March, 1980 for the sole purpose of his enrollment in an authorized program of vocational rehabilitation. Claimant came under the care of Dr. Cherry and received some physical therapy treatments, but Dr. Johnson found claimant's condition remained unchanged and medically stable. Therefore, claimant has not proven an aggravation or a worsening of his condition related to the 1978 industrial injury and is therefore not entitled to further compensation for temporary total disability.

On the issue of extent of disability the Referee found claimant was entitled to an additional 15% unscheduled disability award related to his 1978 industrial injury for a total award of 30%. Claimant is only 25 years of age, and most of his work experience has been in grocery store business but he also has some nursery experience. He has a tenth grade education and his GED. Claimant has been retrained in small engine repair from which he has earned very little money and no regular gainful employment since the program ended. Claimant is precluded from his regular occupation and is now limited to work with no heavy lifting and preferably light to sedentary employment. Based on the above we concur with the Referee's award.

The final issue dealt with the overpayment from the March 1981 Determination Order and defendant's contention of entitlement to an offset in the sum of \$2,084.88 against any increased benefits granted. We concur with the allowance made by the Referee to this offset; however, because of our reversal on the claimant's entitlement to additional compensation for temporary total disability, the offset must be taken from the additional award granted for permanent partial disability.

ORDER

The Referee's order dated July 21, 1981 is modified. That portion of the Referee's order granting additional compensation for temporary total disability is reversed. The remainder of his order is affirmed.

GARY W. BRILL, Claimant
John Stone, Claimant's Attorney
Mildred J. Carmack, Defense Attorney

WCB 81-02570
April 23, 1982
Order on Reconsideration

The Board issued its Order on Review in the above entitled matter on April 7, 1982 where in we affirmed the Referee on all issues with the exception that we reversed the Referee's granting of additional compensation for temporary total disability.

By a cover letter of April 13, 1982 the carrier's attorney submitted a Motion for Reconsideration on the grounds that the Board specifically found claimant's condition did not worsen after the last award or arrangement of compensation from the 1978 injury but then granted an additional award of 15% unscheduled disability. The carrier's attorney further contends that the employer should have been allowed an offset of the \$1,275.79 overpayment.

On the issue of additional permanent partial disability granted arising out of the 1978 injury, we adhere to our prior decision. Claimant's condition after the stipulation, which was the last arrangement of compensation, did not worsen. However, the claim was reopened for claimant's participation in an authorized program of vocational rehabilitation. After completion of that program the claim was closed by Determination Order. That Determination Order granted no additional award of permanent

partial disability and claimant appealed. The issue of extent of disability was raised and we felt, as did the Referee, that claimant had been inadequately compensated for his loss of wage earning capacity and was entitled to a greater award.

We also adhere to our prior decision not to allow an offset. The overpayment claimant is related to a 1979 industrial injury for which nothing additional has been granted and there is nothing to offset against. The Referee concluded, and we agree, that the employer cannot offset an overpayment on one industrial injury against an increased award in another injury. The carrier's motion is denied and our order is readopted and republished.

IT IS SO ORDERED.

WILLARD B. EVANS, Claimant
Peter McSwain, Claimant's Attorney
James Larson, Defense Attorney

WCB 80-11378
April 27, 1982
Order on Review

Reviewed by Board Members Barnes and McCallister.

The SAIF Corporation seeks Board review of Referee Baker's order which set aside its "de facto denial" of medical services, found there was "no issue in this proceeding regarding the merits of the aggravation claim" and assessed a penalty of 25% of the cost of contested medical services and any temporary total disability compensation "which may ultimately be held to have been due and payable when the aggravation claim has been either accepted or litigated on its merits."

As our summary of the Referee's order may indicate, there is some confusion in this case about the issues, most notably about whether there is any distinction between litigating a denied aggravation claim on its merits and litigating a denial of medical services. We confronted similar confusion in Mary Ann Hall, 31 Van Natta 56 (1981), in which we stated:

"The first issue is variously described in the record as a claim for medical services, ORS 656.245, and a claim for aggravation, ORS 656.273. That ambiguity in the record is explained in part by an ambiguity in the statutes. ORS 656.245 provides that injured workers shall receive 'medical services for conditions resulting from the injury for such period as the nature of the injury or the process of the recovery requires.' Standing alone, ORS 656.245 provides for on-going medical care. The aggravation statute, ORS 656.273, also refers to medical care: 'An injured worker is entitled to additional compensation, including medical services, for worsened conditions resulting from the original injury.'

"Interpreting these two statutes together, a claim for ORS 656.245 medical services is processed, procedurally, as an aggravation claim during the five year aggravation period. It does not follow, however, that a claim for ORS 656.245 medical services results in an aggravation reopening of a claim. Aggravation reopening results in payment of temporary total disability until claim closure and the possibility of an increased award of permanent disability at that time. By contrast . . . this case illustrates a situation that, although processed as an aggravation claim, cannot result in aggravation reopening, but only an order to provide requested medical services."

The same comments are substantially applicable in this case. Claimant has never submitted any medical verification of inability to work and, therefore, aggravation reopening is not in issue. See ORS 656.273(6). At most, claimant has made a claim for ORS 656.245 medical services. "A claim for ORS 656.245 medical services is processed, procedurally, as an aggravation claim during the five year aggravation period." Mary Ann Hall, supra.

Amendments adopted by the legislature in 1981 reinforce the conclusions we reached in Mary Ann Hall. ORS 656.273(2) continues to provide: "To obtain additional medical services or disability compensation, the injured worker must file a claim for aggravation . . ." (Emphasis added.) A 1981 amendment to ORS 656.245 added subsection (2) which provides: "When the time for submitting a claim under ORS 656.273 has expired, any claim for medical services referred to in this section shall be submitted to the insurer or self-insured employer." (Emphasis added.) We think this statutory language makes it even clearer that the substantive right to medical services is governed by ORS 656.245, while the applicable procedures for a medical services claim are the aggravation procedures spelled out in ORS 656.273.

It is thus possible for an aggravation claim to involve issues of entitlement to three distinct forms of relief: (1) medical services; and/or (2) temporary total disability compensation; and/or (3) increased permanent disability compensation. The Referee's statements in this case to the effect that the merits of the aggravation claim would have to be litigated in the future were thus incorrect. What was before the Referee was whether or not the aggravation claim was meritorious. Moreover, we disagree with the Referee's apparent assumption that the different forms of relief available under an aggravation claim can be the subject of successive hearing requests. We disapprove of splitting causes of action and multiplying hearing requests in this manner. For any period of time in the past for which evidence is obtainable, entitlement to all forms of relief available under an aggravation claim must be determined in a single proceeding or be barred under res judicata reasoning. See Million v. SAIF, 45 Or App 1097 (1980).

We turn to the specifics of claimant's aggravation claim in this case. Claimant sustained a compensable industrial injury to both knees on May 2, 1975. The diagnosis was internal derangement and chondromalacia. Claimant underwent corrective surgery on the right knee in January of 1977 and on the left knee in August of 1978. The last arrangement of compensation was a stipulation dated September 5, 1978 granting claimant compensation for 20% loss of function of both legs.

It is hard to identify the aggravation claim. It is possibly claimant's attorney's request for hearing filed December 18, 1980. It is possibly a report from a California physician, Dr. Friesen, dated January 20, 1981.

Regardless of what constitutes the claim, however, as previously noted, there is no evidence of entitlement to temporary total disability compensation or increased permanent disability compensation. The sole issue is entitlement to medical services.

Dr. Friesen's report is the only relevant medical evidence. It reads in full:

"The above named is presently residing at 1547 13th Street, Reedley, California 93654 and is under my professional care.

"Mr. Evans was in our office December 29, 1980 complaining of problems with his knee. He states the knee 'pops, crackles, and goes out.' Apparently patient had surgery on his knee in Oregon three years ago as the results of an industrial injury.

"We would like for Mr. Evans to be checked by an Orthopedist in Fresno, California and are requesting authorization from you for same.

"Thank you for your attention in this matter."

The Referee concluded, concerning this report:

"I find that Dr. Friesen's report constituted a valid claim for medical services and claimant was entitled to medical services in the form of an evaluation by an orthopedist selected by Dr. Friesen."

We disagree. Claimant's attorney admitted at the hearing that SAIF had not been presented with any medical bills which it had declined to pay. So the only issue is authorization for future medical services.

We assume that the authorization requested by Dr. Friesen for claimant "to be checked by an orthopedist" can be compensable medical services under ORS 656.245 based on Brooks v. D & R Timber, 55 Or App 688 (1982), which appears to hold that diagnostic surgery can be a compensable medical service. Nevertheless, there must be some evidence that "to be checked" or any other diagnostic procedure is reasonably necessary and causally related to an industrial injury. Dr. Friesen's one and only report in evidence does not in any way explain why further medical evaluation is necessary nor, most significantly, in any way establish a causal link between claimant's 1975 industrial injury and his 1981 complaints of knee problems.

ORDER

The Referee's order dated September 25, 1981 is reversed.

MELBA D. HAMPTON, Claimant	WCB 81-01908
Michael B. Dye, Claimant's Attorney	April 27, 1982
James F. Larson, Defense Attorney	Order on Review

Reviewed by Board Members McCallister and Barnes.

The SAIF Corporation seeks Board review of Referee Daron's order which remanded claimant's claim to it for acceptance and payment of compensation and granted an attorney's fee of \$1,750. SAIF contends that their denial should be affirmed, and even if it is not, that the attorney fee awarded by the Referee is excessive.

The Board affirms the conclusion reached by the Referee on the issue of compensability. However, we do agree with SAIF that the attorney fee of \$1,750 is excessive. In Clara M. Peoples, 31 Van Natta 134 (1981) we stated:

"When claimants prevail on denials of their claims, most of the Referees in most of the cases are awarding attorney fees in the range of \$800 to \$1,200. While efforts expended and results obtained can, of course, justify a larger or smaller attorney fee, nothing in the present record indicates extraordinary legal services."

See also Ada C. Del Rio, 32 Van Natta 138 (1981).

We take note of the extra attorney travel involved and the deposition of Cindy Sams in our consideration of claimant's attorney's fee. We conclude a more appropriate amount would be \$1,300.

ORDER

The Referee's order dated November 13, 1981 is modified. The attorney's fee granted by the Referee is reduced from \$1,750 to \$1,300. The remainder of the Referee's order is affirmed.

BOARD MEMBER LEWIS, DISSENTING, IN PART:

I agree with the majority's disposition of the compensability issue raised by SAIF. I disagree, however, with the majority's reduction of the Referee's award of attorney's fees. I do not believe that the award of \$1,750 is excessive in this case.

Aside from disagreeing with the majority's reduction of the award of attorney's fees, I am in further disagreement with the majority insofar as no attorney's fee on review has been awarded claimant's attorney for prevailing on the issue of compensability. ORS 656.382(2).

A carrier-paid attorney's fee, like a penalty, should not be considered compensation to a claimant as that term is used in ORS 656.382(2). A carrier-paid attorney's fee allowed claimant's attorney is not "compensation awarded to a claimant." Even if a Referee awards an attorney's fee which the Board considers to be excessive, and the Board reduces the attorney's fee for services performed at the hearing, when claimant prevails on a compensability or extent of disability issue before the Board on a request for review by the employer, ORS 656.382(2) requires that claimant's attorney be awarded a reasonable attorney's fee for legal representation on review.

In my opinion, attorney's fees, like penalties, should not be regarded as compensation to claimants. See Barbara Beattie, WCB Case No. 80-05477, 34 Van Natta's 484 (Order Denying Reconsideration, April 22, 1982), Board Member Lewis dissenting.

For the foregoing reasons, I respectfully dissent.

WARD NEIHART, Claimant
Malagon & Velure, Claimant's Attorneys
Cowling, Heysell & Pocock, Defense Attorney

WCB 81-00136
April 27, 1982
Order Denying Remand

Claimant has moved the Board to remand to the Referee for further evidence-taking pursuant to ORS 656.295(5).

Claimant's motion is denied. Robert A. Barnett, 31 VanNatta's 172(1981).

IT IS SO ORDERED.

JOHN ROBERTSON, Claimant
D. Keith Swanson, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-07423
April 27, 1982
Order on Review

Reviewed by Board Members Barnes and McCallister.

The SAIF Corporation seeks Board review of Referee Daron's order which granted claimant an additional award of 64° for 20% unscheduled disability for a total award to date of 35% unscheduled disability.

Claimant, 30 years of age at the time of the hearing, was employed as a skidder operator and suffered a compensable industrial injury on September 10, 1979 when he jumped off a machine and landed in uneven terrain. Subsequently a herniated disc at L5 was diagnosed and Dr. Tsai performed a laminotomy and discectomy on January 2, 1980.

By February, 1980 claimant's only complaints were aching on the left side and left leg. Dr. Tsai felt claimant was precluded from his logging occupation and placed work restrictions of no weight-bearing over 50 pounds and no excessive twisting or bending.

On July 3, 1980 Dr. Fax rated claimant's physical impairment as mild and also found him precluded from returning to logging.

A Determination Order of July 28, 1980 granted claimant 15% unscheduled low back disability.

The vocational rehabilitation personnel closed claimant's file for non-cooperation. It is apparent that claimant has very definite ideas about what work he will accept. He has been unwilling to accept vocational guidance. The Referee found that claimant's personal attitude alienated some efforts at job placement assistance. We agree.

The Referee concluded claimant's loss of wage earning capacity represented 35% of the maximum allowable by statute. We disagree.

Claimant is fairly young, with an eleventh grade education and has his high school equivalency certificate. Although claimant is precluded from returning to very heavy or even heavy work such as logging, he still has available to him a significant number of occupations such as light meat cutting activities. Claimant's physical impairment is rated as mild. Considering all the relevant factors and applying OAR 436-65-600 to -609 we find claimant is entitled to an award of 20% unscheduled disability.

ORDER

The Referee's order dated March 20, 1981 is modified. Claimant is granted an award of 64° for 20% unscheduled low back disability. This award is in lieu of all prior awards.

DOROTHEA ACKERSON, Claimant
Rolf Olson, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-07162
April 29, 1982
Order on Review

Reviewed by Board Members Barnes and McCallister.

SAIF Corporation seeks Board review of that portion of Referee Daron's order which granted claimant compensation equal to 256° for 80% unscheduled disability for injury to her low back. SAIF contends the 30% granted by the Determination Order is sufficient; claimant contends she is entitled to compensation for permanent total disability.

We adopt the background facts recited by the Referee.

Claimant sustained a compensable low back injury on January 24, 1980 while working as a motel maid. She has been examined by several doctors who rated her impairment anywhere from mild to moderately severe. It is apparent that claimant's condition gradually, but definitely, improved to the point that her objective physical findings are not significant. Based on a review of the medical evidence we conclude that claimant has an impairment rating of 15%.

Using the guidelines in OAR 436-65-600, et seq, we reach the following findings. Claimant's age (60 years) results in a +10; her education (6th grade) gives her a +15. Her job as a motel maid results in an SVP (specific vocational preparation) of 2 with an impact of 0. She is restricted to light or sedentary type work (+10). Her background includes work as a waitress and as a cook. These jobs are also considered when determining from what portion of the labor market claimant is precluded. Based on a GED rating of 2, an SVP rating of 6 (for her experience as a cook) and her restriction to light work, we conclude claimant has 15% of the general labor market still open to her. When combining all these factors, we find claimant would be appropriately compensated with an award equal to 144° for 45% unscheduled disability.

ORDER

The Referee's order dated September 29, 1981, is modified.

Claimant is entitled to compensation equal to 144° for 45% unscheduled disability for injury to her low back. This award is in lieu of that granted by the Referee. The attorney fee made payable out of this compensation should be adjusted accordingly.

The remainder of the Referee's order is affirmed.

EDGAR ALLEN, Claimant
Malagon & Velure, Claimant's Attorneys
Keith D. Skelton, Defense Attorney

WCB 80-07105
April 29, 1982
Order on Review

Reviewed by Board Members McCallister and Barnes.

Claimant requests Board review of Referee Mongrain's order which affirmed the July 29, 1980 Determination Order and found that claimant was not entitled to have his claim reopened, found the claimant entitled to no further award for permanent disability, including permanent total disability, ordered the employer to authorize enrollment of the claimant at the Swedish Medical Center Pain Center and to pay all incidental expenses, and refused to allow claimant an award of penalties and attorney fees.

The issues are extent of claimant's permanent disability, including permanent total disability, whether or not claimant's claim was prematurely closed and entitlement to penalties and attorney fees.

Claimant suffered a compensable injury on February 28, 1975. His claim was closed by Determination Order of January 29, 1976 which awarded temporary total disability compensation, 25% unscheduled permanent partial disability for neck disability and 25% scheduled permanent partial disability for left arm disability. A hearing was held on November 30, 1978 where claimant sought to establish his status as permanently and totally disabled. The claimant was awarded an additional 128° for a total of 288° unscheduled disability for neck, left shoulder and emotional disability. The Referee affirmed the Determination Order's award for loss of left arm. In 1980, the claim was reopened for performance of diagnostic tests, including a myelogram. A Determination Order issued July 29, 1980 which awarded claimant additional temporary total disability incurred in association with those diagnostic tests. It is that Determination Order which was the subject of claimant's present request for hearing.

Dr. Dunn, in his chart note of June 6, 1980, indicated that treatment at the Portland Pain Center would be beneficial to the claimant. His August 5, 1980 chart note, however, states that claimant had expressed no interest in treatment at the Pain Center, apparently due to information he had received about it from unspecified sources. Claimant was then referred to the Swedish Hospital Medical Center Pain Center by Dr. Dunn. Dr. Nancy Worsham performed an evaluation of the claimant on December 3, 1980 and recommended treatment at that facility.

On January 16, 1981 the employer/carrier's attorney requested further information from Dr. Worsham, concerning the potential benefits of the proposed treatment at the Pain Center. Dr. Worsham responded with a detailed letter on January 21, 1981. This response was followed by another letter from the employer/carrier's attorney to Dr. DuPen, also of the Pain Center, requesting information concerning the effect of claimant's ongoing workers compensation litigation, on the possibility of a positive response by the claimant to the proposed treatment, inquiring specifically, ". . . should attempts at litigation cease, would that have a more

positive effect?" Dr. DuPen replied in his February 6, 1981 letter that the treatment at the Pain Center would be more effective if litigation was terminated. Dr. Dunn agreed that the effectiveness of any pain treatment program is impaired by ongoing litigation. By letter of May 12, 1981 the employer/carrier's attorney proposed to the claimant's attorney that claimant's Request for Hearing be dismissed in accordance with the recommendation of Dr. DuPen, or enter into a final settlement and dismiss the litigation in exchange for provision of "any kind of curative treatment recommended." This letter was admitted as an exhibit at the hearing, only as a response to claimant's reopening request.

With regard to the issue of extent of permanent partial disability, possible permanent total disability and entitlement to Pain Center treatment, we affirm and adopt those portions of the Referee's order. We also agree with his conclusions concerning the issues of claim reopening and entitlement to penalties and attorney fees, but would add the following additional comments with regard to claimant's contentions concerning the propriety of the employer/carrier's action in conditioning acceptance of Pain Center treatment on the claimant's terminating litigation.

In Charles A. Murray, 34 Van Natta 249 (1982), we stated:

"A requested authorization for medical treatment is just that -- a requested authorization. There may be many reasons why an injured worker or his doctors might decide not to follow through on a given treatment modality. But when a carrier is asked for advance authorization, the only issues are whether the contemplated treatment is reasonably necessary and causally related to the compensable injury; the probability of the requested treatment actually being rendered is not then any concern of the worker's compensation carrier." 34 Van Natta at 249 - 50.

We find that reasoning applicable to this case. When the question of authorization for Pain Center treatment first arose, the employer/carrier should have only been concerned about the reasonableness and causal relationship of the proposed treatment. In investigating the question of reasonableness, it was appropriate for the employer/carrier to inquire whether pending litigation made the proposed treatment contraindicated. But in response Drs. DuPen and Dunn only opined that Pain Center treatment could or would be more effective if litigation were terminated, not that it would be totally ineffective. Any indication of total ineffectiveness would strongly suggest that the proposed treatment was not reasonable. That, however, is not what Drs. DuPen and Dunn said. They merely suggested a reason, in the words of Murray, "why an injured worker or his doctors might decide not to follow on a given treatment modality." When initially asked for authorization for Pain Center treatment, that was not then any reason for the employer/carrier to deny authorization.

The claimant contends that the employer/carrier's action in attempting to condition authorization of Pain Center treatment upon dismissal of his litigation, warrants imposition of penalties and attorney fees. It is conceivable to us that such action, under the proper circumstances could justify imposing penalties and attorney fees. This is not such a case however. The most that could be said about the employer/carrier's action in this case is that, "it never hurts to ask."

ORDER

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

JUAN ANFILOFIEFF, Claimant	WCB 81-06685
Paul Lipscomb, Claimant's Attorney	April 29, 1982
SAIF Corp Legal, Defense Attorney	Order on Review
Brown, Burt & Swanson, Attorneys	

Reviewed by Board Members McCallister and Barnes.

The claimant requests Board review of Referee Nichols' order which affirmed the SAIF Corporation's April 15, 1980 partial denial of claimant's left carpal tunnel syndrome, awarded claimant 45% scheduled permanent partial disability for loss of use of the left hand, that being an increase of 10% over the June 19, 1980 Determination Order, found claimant entitled to no award for unscheduled permanent partial disability for shoulder and neck pain, awarded claimant additional temporary total disability compensation benefits and assessed a 25% penalty against SAIF on such compensation, assessed a \$350 attorney fee against SAIF for its failure to provide documents to claimant's attorney within the time limits set forth in OAR 436-83-460 and allowed claimant's attorney 25% of the increased compensation granted by the order.

The claimant contends that the Referee erred in finding his left carpal tunnel syndrome to be not compensable, and in refusing to allow an award of unscheduled disability for his neck and shoulder problems. SAIF has cross-requested review on the issues of attorney's fees and penalties.

Claimant suffered a laceration injury to his left hand on January 10, 1978. Claimant was standing on a ladder nailing corrugated metal siding to the side of a bath house at his employer's home when the ladder slipped, causing him to fall and lacerate his left hand on a piece of the siding. The injury was described by Dr. John Burr in his January 10, 1978 report as "Severe lacerations, fingers left hand, index, long and ring fingers, with degloving injury and tendon laceration." Dr. Burr treated claimant's wounds and released him for work on January 4, 1979. The question of compensability of this injury was finally decided in claimant's favor by the Court of Appeals. Anfilofieff v. SAIF, 52 Or App 127 (1981).

Claimant was seen by Dr. Melgard on January 24, 1979 complaining of pain in the left shoulder radiating into the left arm, forearm and hand. Dr. Melgard indicated that carpal tunnel syndrome was doubtful, but suggested an exploration and decompression in his February 22, 1979 report. Claimant was apparently not seen by Dr. Melgard again until August 17, 1979 at which time carpal tunnel syndrome, left was conclusively diagnosed. An exploration and decompression of the left median nerve was performed by Dr. Melgard on August 21, 1979.

SAIF, by letter of January 22, 1980, posed to Dr. Melgard the question of relationship of claimant's January 10, 1978 injury to his subsequent carpal tunnel syndrome. Dr. Melgard replied on January 28, 1980 stating,

"It is hard for me to relate his problem to anything else but the injury. I think that it is irrelevant that Dr. Burr sent in that the patient had a piece of glass in his hand. He still could have injured his hand with the injury of January 10th, 1978."

This is the only evidence contained in the record concerning the relationship of claimant's laceration injury to his carpal tunnel syndrome.

The Referee found that the claimant failed to establish by a preponderance of the evidence that his carpal tunnel syndrome was related to his industrial injury. We agree with that determination.

As we stated in Robert Sanchez, 32 Van Natta 80 (1981), this Board feels that it has obtained a certain degree of expertise in the etiology of carpal tunnel syndrome. In that case we noted that carpal tunnel usually involves a pre-existing congenital narrowing of the tunnel through which the median nerve passes in the wrist, combined with other factors which narrow the tunnel further compressing or irritating the median nerve. The factors which cause this narrowing are often unknown and unknowable. Significant traumas, mainly of a crushing type can narrow the carpal tunnel.

We are unprepared to accept an unsupported, speculative and conclusory statement such as Dr. Melgard's concerning the causal relation of a laceration injury to the claimant's carpal tunnel syndrome. Even apart from the Board's expertise in this area, we would find Dr. Melgard's statement insufficient.

With regard to the claimant's contention that he has suffered unscheduled disability to his shoulder and neck as a result of the injury, we agree with the Referee that no such disability has been established. Upon examination of January 24, 1979 Dr. Olsen-Garewal found a full range of motion of the cervical spine, and a fairly full range of motion of the left shoulder. Following his carpal tunnel surgery, claimant was seen by Dr. Burr on March 27, 1980. Dr. Burr found that claimant exhibited a full range of

motion of the shoulders. Dr. Melgard's July 23, 1980 report notes that claimant complained of numbness, tingling and aching in his left arm when using a chain saw. Dr. Melgard stated that this problem is not uncommon even for people who have not had surgery or problems such as the claimant's. There is simply no objective evidence that the claimant is suffering any disability other than his left hand.

With regard to the issues raised by SAIF concerning penalties and attorney's fees, we agree with the reasoning and conclusions of the Referee.

ORDER

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

JOHN L. BEERY, Claimant
Cash R. Perrine, Claimant's Attorney
Roger R. Warren, Defense Attorney

WCB 81-04931
April 29, 1982
Order on Review

Reviewed by Board Members Barnes and McCallister.

Claimant seeks Board review of Referee Peterson's order which upheld the carrier's denial of his occupational disease claim for carpal tunnel syndrome.

It is claimant's theory that his work activities, which included occasional use of a jackhammer and a hand shovel, were the major cause of his wrist condition. The carrier argues and the Referee found that claimant's off-work activities -- skiing, basketball and motorcycle riding -- were as likely causative factors.

Claimant testified that he suffered wrist symptoms within two weeks of beginning the job that included occasional use of a jackhammer and a hand shovel. The Referee found this testimony to be credible. Comparison of possible at-work causation and possible off-work causation to determine which predominates thus comes down to a comparison of an indefinite, apparently extensive period of strenuous off-work activities, skiing, basketball and motorcycle riding and a short two-week period of work that included some activity that would have produced wrist micro-trauma. Given the limited available information upon which to make this comparison, we agree with the Referee that claimant failed to establish that work activities were the major contributing cause of his carpal tunnel syndrome. See SAIF v. Gygi, 55 Or App 570 (1982).

Prior recent Board cases are consistent with this conclusion. In Michael Fiddelke, 34 Van Natta 30 (1982), we found that claimant's off-work motorcycle riding was more likely the cause of any aggravation of his carpal tunnel condition than any at-work activities. In Robert Sanchez, 32 Van Natta 80 (1981), we found that claimant's off-work, recreational handball playing was more likely the cause of his carpal tunnel condition than any at-work activities that, as in this case, included use of a hand shovel. (Sanchez articulated a "sole issue" test which has since been rejected by the Court of Appeals in Cygi but the basis of Fiddelke and Sanchez, that various off-work activities can involve significant wrist micro-trauma and can be as likely or more likely the major cause of carpal tunnel syndrome remains valid, is here applicable and dispositive.)

Our conclusion on the merits renders moot the carrier's motion to strike claimant's brief on the basis of untimely filing.

ORDER

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

JOEL BROCK, Claimant	WCB 80-08753
Samuel J. Imperati, Claimant's Attorney	April 29, 1982
Ridgway Foley, Jr., Defense Attorney	Order on Review

Reviewed by Board Members Barnes and McCallister.

The claimant seeks Board review of Referee Williams' order as reconsidered and reinstated which affirmed the Determination Orders of September 15 and October 14, 1980 and denied claimant the relief he requested. Claimant contends premature claim closure or in the alternative that he is entitled to an award of unscheduled disability. Claimant also requests penalties and attorney fees for the employer's failure to timely provide medical reports.

We adopt the facts as recited by the Referee as our own and adopt those portions of the Referee's order that ruled claimant has failed to prove that his claim was prematurely closed. We further find that the preponderance of credible evidence does not support claimant's contention that he has suffered any loss of wage earning capacity and also adopt the relevant portion of the Referee's orders.

OAR 436-83-460 provides that insurers and self insured employees have a duty to provide a claimant who has requested a hearing with copies of all medical or vocational reports "which are then or come to be" in its possession. (Emphasis added.) Claimant contends the employer violated the continuing discovery duty in regard to Exhibits 39, 40 and 41. A chronology sets the stage for explaining the flaw in claimant's theory:

November 5, 1980: Hearing held.

November 7, 1980: Dr. Brown sends the employer a report (Ex 39).

February 5, 1981: Dr. Silver sends a letter to Dr. MacFadden, apparently with a copy to the employer (Ex. 40).

March 31, 1981: Dr. MacFadden sends a report to the employer (Ex. 41).

Since the issue is timely disclosure rather than nondisclosure, it is perplexing that the record does not clearly indicate when claimant's attorney received copies of the three reports is question.

OAR 436-83-460 provides for possible penalties for failure of an insurer or employer to comply with the discovery duty established by that rule. This is intended to advance and facilitate the hearing process. So viewed, the continuing discovery duty ("or come to be") has to have some outer temporal limit. We conclude that ordinarily the outer temporal limit of a discovery duty designed to advance the hearing process is the hearing. As the above chronology demonstrates, claimant is here complaining that medical reports that were not generated until two days to five months after the hearing were not disclosed timely. Under the circumstances of this case, we conclude there was no violation of OAR 436-83-460.

In concluding that claimant has not proven premature closure or entitlement of an award for unscheduled disability, we have considered Exhibits 39-41. Given considerable confusion in the record about whether the Referee ever admitted these exhibits, it may have been error for us to do so. But the error, if any, cannot possibly have prejudiced claimant because those exhibits are not adverse to his position.

ORDER

The Referee's order dated March 13, 1981 and July 10, 1981 are affirmed.

MELVIN R. CASTOR, Claimant
Nick Chaivoe, Claimant's Attorney
Daryll Klein, Defense Attorney

WCB 79-09160
April 29, 1982
Order on Review

Reviewed by the Board en banc.

Claimant requests Board review of Referee Mulder's order which awarded him 15% unscheduled low back disability in addition to the 35% awarded by the Determination Orders issued October 29, 1974, November 2, 1978 and October 3, 1980.

The sole issue on review is the extent of claimant's unscheduled permanent low back disability.

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

ORDER

The Referee's order dated June 8, 1981 is affirmed.

Board Member McCallister, dissenting:

I do not agree with the opinion of the majority. I would reinstate the Determination Orders. The Referee questioned the claimant's credibility. He found "this case has some major inconsistencies" (emphasis added) and concluded "...that claimant's credibility was significantly eroded..." (emphasis added). After review of the record, I agree with the Referee's conclusion on credibility. Considering the finding on credibility, claimant's disability should be evaluated on the objective medical evidence. I find no objective evidence in the record after issuance of the October 3, 1980 Determination Order which persuades me that the Evaluation Division's award should be disturbed. Therefore, I would affirm the Determination Order which provided claimant with an unscheduled permanent partial disability award totalling 35%.

EFREN CHAVEZ, Claimant
Bruce Bottini, Claimant's Attorney
Ridway Foley, Defense Attorney

WCB 81-00817
April 29, 1982
Order on Review

Reviewed by Board Members McCallister and Barnes.

The employer seeks Board review of Referee Mannix's order which granted claimant compensation for permanent total disability and determined claimant was medically stationary on November 17, 1980. The employer contends the award is excessive and that claimant was actually medically stationary on August 27, 1980.

The Referee gave a thorough recitation of the facts at the hearing and we adopt that recitation as our own. We agree with the Referee's rationale regarding the date claimant became medically stationary.

We do not find that claimant has proven entitlement to permanent total disability. Claimant was born and educated in Mexico. His education is scanty and contributes a great deal to his loss of wage earning capacity. Not only does he know very little of the English language, he has a limited ability to read and write Spanish, his primary language. Claimant's work background includes work in agriculture and other heavy physical labor. There is no dispute that he is precluded from heavy work in the future.

There is limited evidence in the record regarding claimant's physical impairment. He had a previous back injury in 1975 which resulted in an award of 96° for 30% unscheduled disability. The medical consensus at that time was that claimant's disability was in the mild range or about 10% of the whole man. After the March 12, 1979 injury, which is the basis of this proceeding, claimant underwent surgery. He was advised to avoid repetitive bending or lifting over 25 pounds. Dr. Miller, in August, 1980, indicated that half of claimant's residual impairment was due to the 1975 injury and the other half was due to the 1979 injury. The objective findings with respect to claimant's range of motion reveals approximately 10% impairment. Allowing some percentage for subjective complaints of pain, we conclude that claimant's physical impairment is 20%.

The employer has made much of claimant's lack of motivation. All of claimant's doctors suggest that he be retrained. Claimant's age (31) makes this recommendation feasible despite his language barrier and minimal education. Claimant spent some time with Mr. LaMotte, a vocational counselor. Claimant was not given any of the testing normally administered to injured workers. Mr. LaMotte contacted only one employer in claimant's behalf. Although claimant was apparently cooperative, we find that efforts to return him to gainful employment were minimal. Claimant's past work record gives evidence of motivation, but his own efforts to become re-employed since he last worked have been unimpressive.

In arriving at an appropriate award for claimant we look to the guidelines in OAR 436-65-600, et. seq. Claimant's lack of education and language disability are serious obstacles to re-employment and we allowed a substantial amount for that. Considering claimant's physical impairment and the various social/vocational factors involved, we conclude a more appropriate award would be 176° for 55% unscheduled disability.

ORDER

The Referee's order dated June 30, 1981 is modified. Claimant is hereby granted compensation equal to 176° for 55% unscheduled disability for an injury sustained on March 12, 1979. This award is in lieu of all other awards claimant has been granted for this injury. The claimant's attorney fee should be adjusted accordingly.

That portion of the Referee's order which affirmed the January 16, 1981 Determination Order in regard to the award of temporary total disability is affirmed.

CLARICE G. DORN, Claimant
Robert Udziela, Claimant's Attorney
David Horne, Defense Attorney

WCB 80-08734
April 29, 1982
Order on Review

Reviewed by Board Members Barnes and McCallister.

Claimant requests review, and the carrier cross-requests review, of Referee Mulder's order which directed the carrier to accept the claimant's psychological claim. The claimant contends the Referee should have awarded temporary total disability and permanent partial disability. The employer contends the denial of the psychological claim was correct and on that issue the Referee should be reversed, but in all other respects the Referee's order should be affirmed.

During 1976 and possibly before, while employed as an assembler of small electronic components, claimant gradually developed discomfort and pain in her right hand, wrist, arm and shoulder. Claimant's job required repetitive use of small tools such as wire cutters and screwdrivers. The symptoms were progressive and in March, 1976 became so bad she sought medical attention. She saw Dr. Hopkins, orthopedist, who diagnosed a right "shoulder-arm syndrome." After several months off work claimant returned to a modified job which required less repetitive use of the affected arm and shoulder. Over the ensuing months, the symptoms waxed and waned, sometimes less intense, sometimes more. Consequently, in search of a cure (or even a cause) she was examined/treated by various physicians who advanced possible causes of the continuing symptoms. None had a cure. In July, 1978 treatment was taken over by Dr. Grewe, neurological surgeon.

Dr. Grewe's working diagnosis was possible thoracic outlet syndrome, possible cervical nerve root compression, possible shoulder-arm-hand syndrome, secondary to chronic strain, post operative status three lumbar spinal fusions and obesity.

Dr. Grewe treated claimant throughout 1978 and 1979 but did not, except on a "suspected" basis, establish a firm diagnosis. Claimant's problem continued. At various times during the course of treatment the claimant requested Dr. Grewe to recommend that her employer provide a reduced work schedule for her. Dr. Grewe did so until finally claimant's work week had been reduced to three days. Also, over this period of time, Dr. Grewe continued to flirt with the diagnosis "thoracic outlet syndrome" as the most likely cause of claimant's continued complaints. He suggested surgery. The claimant's reaction was disinterest in surgery unless her symptoms became worse. In October, 1978 Dr. Grewe performed a myelogram; it was negative. Claimant had post myelogram headaches and concurrently her shoulder/arm symptoms continued as before. Because of the headaches claimant stayed off work about a month. All during this time Dr. Grewe had encouraged the claimant to lose weight.

On July 16, 1979 Dr. Grewe reported claimant to be medically stationary as of March 8, 1979, the date he had last examined her. Thereafter a Determination Order issued August 10, 1979 which awarded temporary total disability, temporary partial disability for the period claimant was on a three-day work week and 20% unscheduled disability. After claim determination, Dr. Grewe submitted various reports which tend to indicate maintenance of the status quo, i.e., continuation of claimant's pain and discomfort without any firm diagnosis of the cause. Then in December, 1979 Dr. Grewe recommended that claimant be placed on a leave of absence "for the next several months." In April, 1980 Dr. Grewe submitted a medical progress report wherein he indicated claimant's condition was not medically stationary nor was she released for work. In June, 1980 Dr. Grewe submitted a comprehensive report the gist of which is that claimant's condition had worsened.

Taking all of the evidence as a whole we conclude that claimant's condition worsened in December, 1979. She was not medically stationary and was unable to work. Therefore, she is entitled to temporary total disability. In making this finding, we have considered the later opinions of Dr. Grewe and Orthopaedic Consultants. We are more persuaded by Dr. Grewe's opinions closer in time to the events and believe Orthopaedic Consultants' report of September, 1980 means claimant was medically stationary on the date of their examination.

The next question is when did claimant's condition become medically stationary after the December worsening. We find she became medically stationary June 9, 1980. Even though in his June 9, 1980 report Dr. Grewe does not use the "magic words," his report does support the inference that claimant's condition had again become medically stationary.

Was the carrier's failure to pay temporary total disability unreasonable? We think not. Just because we have inferred claimant's condition had worsened and that her injury-related condition caused the time loss does not mean a contrary belief at the time the events occurred was unreasonable.

To what extent, if any, is the claimant's obesity, weight reduction program (costs) and any psychological problems causally linked to the compensable injury? Taking the last first, we find claimant had failed to prove any psychological condition is injury related. In this regard, we are persuaded by the opinion of Dr. Quan, psychiatrist. His is the only psychiatric opinion in the record.

The weight reduction program was recommended because claimant's obesity was thought to be contributing to her continued symptoms as a complicating factor retarding recovery. The obesity is not related to the injury and is not compensable -- no one has claimed a relationship. We believe the weight of evidence indicates claimant's weight problem is volitional and/or attitudinal. We find the employer has no legal responsibility to provide any weight reduction assistance to claimant.

The last question is extent of claimant's permanent disability. Since we have found claimant became medically stationary on June 9, 1980, her permanent disability should be determined. Considering all the factors of disability and applying those factors to OAR 436-65-600, et. seq., we find that claimant's permanent disability does not exceed the 20% unscheduled disability award in the August 10, 1979 Determination Order.

In sum, our findings are: (1) Claimant's condition worsened in December, 1979 and became medically stationary in June, 1980; (2) there is no injury-related psychological condition; (3) the employer is not responsible for any treatment of claimant's obesity or any weight loss or weight control program(s); (4) penalties and attorney fees will not be assessed against the carrier; and (5) claimant has not proven entitlement to an increased award of permanent partial disability.

ORDER

The Referee's orders of April 16, 1981 and May 6, 1981 (erroneously dated May 6, 1979) are reversed.

The employer's partial denial of psychological treatment alleged to have been necessitated by claimant's industrial injury is reinstated and affirmed.

Claimant is awarded temporary total disability from December 19, 1979 to June 8, 1980. Claimant's attorney is allowed 25% of this increased compensation as and for a reasonable attorney's fee, not to exceed \$750.

All other relief claimant seeks is denied.

DANA L. FOLMSBEE, Claimant
Catherine Riffe, Claimant's Attorney
Katherine O'Neil, Defense Attorney

WCB 80-06123 & 80-06259
April 29, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

Both the claimant and the employer seek Board review of Referee James' order which affirmed the Determination Orders dated March 14, 1980 and June 12, 1980 (as modified by a Determination Order on Reconsideration dated July 1, 1980) and set aside the employer's denial of claimant's subsequent aggravation claim, ordering reopening effective March 30, 1981.

Although the only denial in the record appears to deny only aggravation reopening, the employer seems to be arguing a back-up denial position, i.e., that the separate claims for injuries sustained on September 19, 1979 and February 19, 1980 originally accepted and processed to closure by Determination Orders were not compensable in the first instance.

Claimant argues that the claim should be reopened effective December 23, 1980 and that penalties and attorney fees should be assessed. Given the narrow margin of claimant's victory, the request for penalties is especially not well founded.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated June 29, 1981 is affirmed. Claimant's attorney is awarded \$500 for services rendered on this Board review, payable by the employer.

ALFRED FOWLER, Claimant
Gerald Doblle, Claimant's Attorney
Joseph Robertson, Defense Attorney

WCB 80-08626
April 29, 1982
Order on Review

Reviewed by Board Members Barnes and McCallister.

The claimant seeks Board review of Referee Howell's order which affirmed the employer/carrier's denial of claimant's occupational disease claim. Claimant also requests penalties and attorney fees for the employer's unreasonable denial.

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

The Referee relied upon and followed the Board's holding in Robert Sanchez, 32 Van Natta 80 (1981) for the proposition that the claimant must prove his at work activities were the sole cause of his back condition. However, subsequent to the Referee's decision the Sanchez approach was rejected by the Court of Appeals in SAIF v. Gygi, 55 Or App 570 (1981). In Gygi the court held the claimant must establish that on job activities were the major contributing cause in order for an occupational disease claim to be compensable.

After de novo review of the evidence and considering that evidence under the Gygi rule, we affirm the Referee's conclusion on compensability. The claimant has failed to prove by a preponderance of the evidence that his at work activities were the major contributing cause of his back condition.

ORDER

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

MARVIN K. GIBBS, Claimant
Brian L. Welch, Claimant's Attorney
Marshall Cheney, Defense Attorney

WCB 80-01789
April 29, 1982
Order on Remand

On review of the Board's order dated February 11, 1981, the Court of Appeals reversed the Board's order and remanded this claim with instructions to enter an award in accordance with the court's order.

Now, therefore, the above noted Board Order is vacated, and claimant is awarded 52.5% permanent partial scheduled disability for 35% loss of his left leg.

Claimant's attorney is allowed as and for a reasonable attorney's fee, 25% of the increased compensation awarded by the Court of Appeals for services rendered before the court. OAR 438-47-045(1).

In connection with the claimant's petition for attorney fees, the Board notes that counsel's affidavit and time record contain references to time expended in representing claimant before the Board. The Board has not considered this time as part of its allowance of an attorney's fee for services rendered before the Court of Appeals. Since the Board reduced the Referee's award of compensation and reinstated the award granted by the Determination Order, counsel has no entitlement to an attorney's fee on Board review. Furthermore, the only authority delegated to the Board pursuant to Morris v. Denny's, 53 Or App 863 (1981), is to allow an attorney's fee for services rendered before the Court of Appeals when the Court increases an award of compensation granted by the Board. OAR 438-47-045(1).

IT IS SO ORDERED.

RUSSELL HILDEBRANDT, Claimant
Charles Paulson, Claimant's Attorney
R. Kenney Roberts, Defense Attorney

WCB 81-00100
April 29, 1982
Order on Review

Reviewed by Board Members McCallister and Barnes.

Claimant and the employer seek Board review of Referee Pferdner's order which granted claimant compensation equal to 256% for 80% unscheduled low back disability, reopened claimant's claim for aggravation and prohibited the carrier from recouping any portion of an alleged overpayment out of the increased benefits. Claimant contends he is permanently and totally disabled. The employer asks that their denial of aggravation be affirmed and that they be allowed to offset the amount of their overpayment from the increased award. They also contend that the Referee's award of compensation is excessive.

The Board adopts the facts as recited in the Referee's order.

Claimant sustained a compensable low back injury on October 20, 1976. He had been granted compensation totalling 160° for 50% unscheduled disability. The last closure was by Determination Order on December 10, 1980 which granted additional temporary total disability compensation but no additional permanent partial disability compensation. Based on claimant's impairment, social-vocational factors and lack of motivation, the Referee granted claimant an award for 80% unscheduled disability. We conclude that this award is appropriate.

On August 28, 1980 claimant was examined by the Orthopaedic Consultants who determined he was stationary and actually had little change in his condition since their last examination in September, 1978. Based upon this report claimant's claim was closed, and properly so, by the December 10, 1980 Determination Order. Claimant then saw Dr. Stack, his treating physician, on December 19, 1980 with complaints of increased back pain. In a report of January 12, 1981 Dr. Stack advised the carrier that claimant was still temporarily and totally disabled based primarily on his subjective complaints. The doctor felt claimant had not changed much since the initial injury.

As we view this claim, claimant is a severely disabled individual. He has not worked for several years and apparently has no intention of doing so. Claimant's claim was properly closed in December, 1980. There is no evidence of a worsened condition other than increased complaints of pain. These complaints are consistent with those to be expected from a person who has been found to be 80% permanently disabled. The fact that Dr. Stack states claimant is temporarily and totally disabled is not persuasive to us as proof of a worsened condition. There is no evidence of objective change in claimant's condition. There is no dispute that claimant is precluded from a large segment of the job market and that, as far as he is concerned, he is now and has always been totally disabled. This is not justification to reopen his claim. The carrier's denial of April 28, 1981, insofar as it denies reopening for temporary total disability, is affirmed. Claimant is, however, entitled to continuing medical care and treatment under ORS 656.245.

With respect to the carrier's request for an offset against the increased award of compensation, we agree with the Referee. The carrier formally raised the issue in writing on August 19, 1981 and again in the opening statement at the hearing. It then failed to present even one scintilla of evidence in support of its contention. We uphold the Referee's statement that the carrier ". . . is hereby prohibited from endeavoring to recapture any portion of any alleged overpayment out of any increased benefits due claimant pursuant to the terms of this Order."

ORDER

The Referee's order dated October 23, 1981 is modified. The carrier's denial of aggravation dated April 28, 1981 is affirmed. Claimant is entitled to continuing medical benefits under ORS 656.245. The \$400 attorney's fee granted by the Referee for prevailing on the aggravation claim is vacated. The remainder of the Referee's order is affirmed.

RUSSELL HILDEBRANDT, Claimant
Charles Paulson, Claimant's Attorney
R. Kenney Roberts, Defense Attorney

WCB 81-00100
May 21, 1982
Order of Abatement

The Board issued its Order on Review in the above entitled case on April 29, 1982. The employer has requested we reconsider our order. To allow us time to give this case proper consideration, we hereby abate our April 29, 1982 Order on Review.

Claimant's attorney is directed to respond to the employer's motion within 15 days of the date of this order.

IT IS SO ORDERED.

WILLIAM C. LEWIS, Claimant
Steven L. Maurer, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-06783
April 29, 1982
Order on Review

Reviewed by Board Members Barnes and McCallister.

The claimant seeks Board review of Referee Mongrain's order which granted claimant 47° for unscheduled right hip disability in lieu of the awards granted by the Determination Order. Claimant contends that the award is inadequate to compensate him for his loss of wage earning capacity. SAIF cross requests review contending that claimant is not entitled to any award as claimant did not carry his burden of proof under Weller v. Union Carbide Corporation, 288 Or 27 (1979).

The nature and extent of claimant's right leg, hip and low back disability is not seriously in dispute; rather, the main problem is whether claimant's award should be scheduled or unscheduled. The Determination Order granted claimant an award of 15° for 10% scheduled loss of the right leg and 32° for 10% unscheduled low back disability. The Referee concluded that all of claimant's permanent disability was in the unscheduled area. We agree.

The Referee added the scheduled degrees and unscheduled degrees awarded by the Determination Order, concluded that claimant had already received 47°, and ordered that claimant be awarded 47° unscheduled. We can think of little to recommend this methodology, especially when the Referee also stated claimant was entitled to an award of 15% unscheduled permanent partial disability which is 48°, not 47°.

We agree that claimant is entitled to an award of 15% unscheduled permanent partial disability for injury primarily to his hip, secondarily to his low back.

On SAIF's cross request for review, we conclude that Weller is not applicable. In the case of Lorena Iles, 30 Van Natta 666 (1981), SAIF contended, as it does here, that claimant had not proven that her underlying condition had worsened and therefore it was not compensable. The Board held that Weller did not apply because claimant's underlying condition was asymptomatic prior to the industrial accident. The same holds true in this case. Also see Rebecca Hackett, WCB Case No. 80-04498, 34 Van Natta's 460 (April 14, 1982).

ORDER

The Referee's order dated September 29, 1981 is modified.

Claimant is hereby granted an award of 48° for 15% unscheduled right hip and low back disability. This award is in lieu of all prior awards. Claimant's attorney is allowed 25% of the increased compensation granted by this order.

VESIA LOVING, Claimant
Michael D. Royce, Claimant's Attorney
Ronald W. Atwood, Defense Attorney

WCB 80-08433
April 29, 1982
Order on Reconsideration

The Board issued its Order on Review in this case on January 21, 1982. On February 4, 1982 we received a Motion for Reconsideration. We abated our Order on Review in order to allow sufficient time to consider the motion.

Three issues are raised on this motion. First, claimant contends the Board did not address the issues raised. The issues on review were the same as those presented at the hearing. The Referee's order was found to have adequately and correctly addressed all issues and the Board affirmed and adopted that order as our own. Second, the September 3, 1981, post-hearing report of Dr. Specht could not be admitted under ORS 656.295(5) and Robert A. Barnett, 31 Van Natta 172 (1981). Lastly, amicus curiae do not have a right to service of an Order on Review in a case in which they have been allowed to file a brief. However, as a matter of courtesy, the Board should have sent a copy.

After due consideration of this matter the Board adheres to its original Order on Review.

IT IS SO ORDERED.

RICHARD R. MILLER, Claimant
Gary Allen, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-06585
April 29, 1982
Order on Review

Reviewed by Board Members McCallister and Barnes.

Claimant seeks Board review of Referee Shebley's order which upheld the SAIF Corporation's denial of his aggravation claim.

Because of a November, 1979 compensable injury, claimant had back surgery at the L5-S1 level in January, 1980. The present aggravation claim arises from a June, 1981 myelogram which revealed a disc defect at the L4-5 level.

As the Referee correctly noted, Dr. Shaw suggested four possible causes of claimant's L4-5 problem. However, we see this case as presenting a much closer question than the Referee may have because we believe that three of the possible causes suggested by Dr. Shaw -- various types of complications from claimant's January, 1980 surgery -- would make the present aggravation claim compensable.

The burden of proof question thus becomes whether claimant has sufficiently excluded the fourth and only noncompensable possible explanation -- a new rupture of the disc at L4-5 that occurred after the January, 1980 surgery for some reason unrelated to that surgery or any work activity. As we read them, Dr. Shaw's earlier reports imply he found the new rupture theory most likely; e.g., "The absence of muscle atrophy in his left leg . . . would also [suggest] a more recent lesion of this particular [L4-5] nerve root."

Dr. Shaw's later reports attempt to exclude the new noncompensable disc herniation theory by emphasizing that there is no history that claimant had a new "injury" anytime between the January, 1980 surgery and the June, 1981 myelogram that revealed the L4-5 defect. Claimant also testified that he suffered no "injury" during this interval. The Referee found that claimant suffered no "injury" during this interval. Claimant relies on this evidence for the proposition that he has excluded the new "injury" possibility and therefore established compensability.

The flaw, as we see it, is that neither Dr. Shaw, nor the claimant nor the Referee ever defined what was meant by new "injury." The Court of Appeals has twice recently ruled that the act of driving a bus or a van without any accident or other identifiable trauma can cause a disc herniation. Valtinson v. SAIF, 56 Or App 184 (1982); Hamel v. SAIF, 54 Or App 503 (1981). In Hamel the Court quoted from a doctor's report:

" . . . ruptured discs are known to occur in people who have 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." 54 Or App at 506.

and concluded "relatively minor activity can trigger the herniation of a vertebral disc." 54 Or App at 508. Indeed, one of the possible causes of disc herniation suggested by Dr. Shaw in this case is coughing from a respiratory infection claimant suffered following his January, 1980 surgery.

Dr. Shaw, claimant and the Referee not having defined "injury," we assume they were using the term in the ordinary sense of an identifiable trauma. Vertebral discs can herniate without identifiable trauma, as the Court of Appeals concluded happened in Valtinson and Hamel. For this reason, claimant's reliance on the lack of any "injury" between January, 1980 and June, 1981 means little or nothing. We therefore agree with the Referee's conclusion that claimant has not established the compensability of his L4-5 problem.

ORDER

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

EARNEST MURRILL, Claimant
Steven Yates, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-02505 & 80-02506
April 29, 1982
Order on Review

Reviewed by Board Members Barnes and McCallister.

The SAIF Corporation seeks Board review of Referee Baker's order which remanded claimant's aggravation claims to it for acceptance and payment of compensation to which claimant is entitled. SAIF contends claimant has failed to prove a compensable aggravation with respect to either of his shoulders.

Claimant sustained a compensable injury to his right shoulder on July 29, 1976. Claimant sustained a compensable injury to his left shoulder on October 29, 1976. Claimant's present burden is to prove a worsening of the condition of his shoulders since the last arrangement of compensation. We cannot tell from the record when the last arrangement of compensation was made for claimant's right shoulder; that claim was accepted in 1976 as nondisabling; it is likely the last arrangement of compensation was at about the same time. The last arrangement of compensation for claimant's left shoulder condition was on July 25, 1979; he has received awards totalling 20% unscheduled disability for the left shoulder injury.

We conclude claimant has failed to prove an aggravation claim for either shoulder. Drs. King and Anderson, who saw claimant at SAIF's request, failed to find any evidence of a worsened condition. Dr. Wilson, who saw claimant only on May 15 and June 5, 1980, found his shoulder conditions were worsened. However, he only gave claimant an injection on May 15 and failed to see claimant again after June 5. In his deposition testimony, Dr. Wilson said he generally agreed with the statements of both Dr. King and Dr. Anderson. He also indicated in a report of March 5, 1981 that he desired claimant receive treatment, that it was not necessary to reopen his claim for this treatment, and that he had no knowledge of claimant's situation at that time since he had not seen claimant after June 5, 1980.

We find claimant has shown, at best, some worsening of his symptomatology which can be handled under ORS 656.245. He has failed to show any real change in his condition. There is also no evidence to indicate he is unable to perform gainful employment due to his shoulder conditions. We conclude that claimant has failed to show an aggravation of either his right or left shoulder conditions.

ORDER

The Referee's order dated August 25, 1981, is reversed. The denials dated July 17, 1980 are reinstated and affirmed.

ROBERT E. NIEMI, Claimant	WCB 80-11652
Allan H. Coons, Claimant's Attorney	April 29, 1982
Ridgway K. Foley, Defense Attorney	Order on Review

Reviewed by Board Members Barnes and McCallister.

Claimant and the employer seek Board review of Referee Foster's order which granted claimant compensation equal to 52.5° for 35% loss of use of the left forearm. Claimant contends that this award is inadequate; the employer contends that even the award of 25% granted by the Determination Order is excessive.

The Evaluation Division, using the guidelines set forth in OAR 436-65-520, arrived at an 18% impairment rating with an additional 5% for weakness. The Referee agreed with the impairment figure, but granted 20% for claimant's weakness and/or disabling pain.

We conclude that there can be little dispute about the impairment rating. Dr. Lundsgaard's report of May 5, 1981 lists several range of motion limitations which we compute to be 19%. This is extremely close to the figure arrived at by the Evaluation Division. The difference comes in the figure granted for factors such as sensory loss, loss of strength, pain, atrophy, etc. Claimant testified to pain after significant activity. A substantial amount of his day is actually pain-free. Claimant's arm aches at times in cold weather, but if he warms it up the pain is relieved. Claimant is not significantly restricted unless he lifts too heavy an object. Almost any pain that is caused by an activity is relieved shortly after discontinuing that activity.

We conclude that the Determination Order award of 37.5° for 25% loss of the left forearm was the most accurate award to compensate claimant for his loss of function.

ORDER

The Referee's order dated September 2, 1981 is reversed.

The December 16, 1980 Determination Order is reinstated and affirmed.

TIMOTHY B. PRUETT, Claimant
Gary Rossi, Claimant's Attorney
Paul Roess, Defense Attorney

WCB 79-08459
April 29, 1982
Order on Review

Reviewed by Board Members McCallister and Barnes.

The claimant requests Board review of Referee Seifert's order which found that claimant's injury was covered by the Inmate Injury Fund ORS Chapter 655 rather than covered by the Workers' Compensation Law pursuant to ORS Chapter 656. That order approved a denial of Chapter 656 benefits issued by the SAIF Corporation, dated November 23, 1979 of Chapter 656 benefits.

On August 10, 1978 claimant, a 24 year old prison inmate enrolled in a work release program, suffered injuries when a State van he was driving was rear ended by a Coos Bay police car. A claim was filed on August 14, 1978 and, on December 13, 1978, the SAIF Corporation accepted the claim pursuant to ORS 655.505 to 655.550, i.e., the Inmate Injury Fund. Since July 1, 1979 the Department of Justice had processed the claim because on that date that duty was transferred from the SAIF Corporation to the Department of Justice. Then, by letter dated November 23, 1979, the SAIF Corporation in its capacity as the workers compensation carrier for State employes denied the claim for the August 10, 1978 injury for the reason that the claimant was not an employee of the State Corrections Division at the time of the injury. On August 15, 1980 the Department of Justice closed the claimant's Inmate Injury Fund claim with no award or other benefits.

Coverage of claimant's compensable injury depends on his employment status at the time of his injuries. Depending on his employment status, an inmate injured on the job may receive benefits under either Chapter 655 or Chapter 656. Chapter 655 allows no benefits to accrue to the inmate until he is released from confinement. Benefits are based on his medical condition at the time of his release. Chapter 656, however, allows payment of benefits during the period of confinement based on the inmate's current condition.

Chapter 655 coverage is for inmates who are engaged in "authorized employment" which includes inmate industries, ORS 421.305 - ORS 421.340, forest and work camps, ORS 421.450 - ORS 421.480 and such labor which the institution may lawfully require the inmate to perform, ORS 421.405 - ORS 421.420. This latter group includes janitors and gardeners for the institution, chauffeurs or drivers of prison official's vehicles used in the discharge of official business, processing of crops for the institution, clearing of land, and emergency fire fighting.

We agree that the institution probably could have lawfully required the claimant to drive the van that transported prisoners to their work release jobs. See ORS 421.405(1)(b). However, the evidence does not show that is what occurred.

We find that claimant was an employe of the State, filling a regular budgeted State job at the time of his injuries.

Claimant was enrolled in the Work Release Program in February, 1978. He was participating in that program before and after he held the van driver job. Claimant obtained employment with a building contractor until July 14, 1978 at which time he began work as a van driver for the Corrections Division of the State of Oregon. The van driver position was a budgeted State Civil Service job that could be held by any qualified person, including an inmate in a work release program.

Gilbert Pickett, manager of the North Bend Work Release Center, hired the claimant for the van driver position. He had exercised the authority to hire the van driver in the past and possessed apparent authority to hire the claimant for the position. Mr. Pickett testified that he in fact did hire the claimant through the Work Release Program at the regular salary of \$803 per month, with all accompanying benefits.

The claimant worked for over a month under the impression that he was a regular State employe receiving a salary of \$803 per month. On August 14, 1978 a claim form was signed by Gilbert Pickett and approved by Sidney Coleman in the central office that shows a box checked indicating that the claimant was injured while in the course of regular State employment in the Work Release Program. The boxes are not checked by the categories of "authorized employment" that would fall under Chapter 655 coverage.

About the first week of September, 1978 the claimant was told by Mr. Pickett that he could only continue to hold the van driver position on the basis of inmate labor for the institution, which meant that he would only be paid \$3 per day or in lieu of that, they would waive his \$4.50 per day maintenance fee. The claimant was freely allowed to leave the van driver position upon hearing this information and did so, which would not have been the case if it were a required institution driver position.

The fact that Mr. Pickett was reprimanded for hiring the claimant while a State hiring freeze was on, shows that his superiors were aware that the claimant was hired as a regular State Civil Service employe. The reprimand would not have occurred had the claimant only been working as an institution driver at \$3 per day.

The fact that Mr. Pickett did not have the actual authority to hire the claimant because of the State hiring freeze has no bearing on our decision. Mr. Pickett had the apparent authority to hire a person for the position by virtue of his job as Manager of the Work Release Center and his past practice of hiring for the van driver position. The workers compensation system does not allow an employer to avoid payment of benefits based on the defense that "they didn't really mean to hire that worker after all."

SAIF puts forth an additional argument, saying that ORS 144.490 prevents a finding that the State was acting as a regular employer of the claimant at the time of his injury. ORS 144.410 - ORS 144.525 pertain to the administration of the Work Release Program. ORS 144.490(1) states, in pertinent part, that "A person enrolled in a work release program is not an agent, employe, or servant of a penal or correction institution, the [Corrections Division] or this state: (a) while working in employment under the program . . ."

We interpret this statute to be designed to protect the State of Oregon from being liable as an employer when an inmate actually works for another employer. It does not address the situation where the State is actually the employer. Otherwise, an inmate hurt on the job while employed as a regular State employe through the Work Release Program would have no remedy under Chapter 656. Nor would he be eligible for benefits under Chapter 655 because he was not employed in one of the specific enumerated "authorized employments." We do not believe that the Legislature intended that the claimant be left without a remedy for an injury occurring on the job.

We agree with the claimant that since ORS 144.480 specifically provides workers' compensation benefits (Chapter 656) for those hurt on the job while participating in the Work Release Program, the Legislature intended coverage for all work release inmates, including those employed by the State of Oregon as regular employes.

ORDER

The Referee's order dated May 20, 1981 is reversed. The SAIF Corporation's denial dated November 23, 1979 is set aside and it is ordered that claimant's claim be accepted under Chapter 656 and that all benefits to which he is entitled be provided to the claimant.

The claimant's attorney is awarded \$1,000 for his services at hearing and \$600 for his services on Board review, payable by the SAIF Corporation in addition to claimant's compensation.

WILLIAM C. SCHNEIDER, Claimant
Charles Paulson, Claimant's Attorney
Ronald Atwood, Defense Attorney

WCB 80-10677
April 29, 1982
Order on Review

Reviewed by Board Members McCallister and Barnes.

Claimant seeks Board review of Referee Pferdner's order which upheld the employer's denial of his claim for compensation. The issues are: (1) Whether this current claim is barred by the doctrine of res judicata; and (2) if not, is it otherwise compensable.

Claimant's work as a pharmacist involved long periods of standing on hard floors. He first sought medical attention in 1976 for pain in the heels of his feet. Claimant became convinced this painful condition was work related and filed a claim for compensation in 1978. The claim was denied. Claimant requested a hearing. Prior to hearing, claimant was referred to a rheumatologist, Dr. Rosenbaum, who diagnosed claimant's condition as rheumatoid arthritis and apparently stated to claimant or claimant's attorney that the condition was not caused or aggravated by work activity. Based on the adverse information from Dr. Rosenbaum, claimant's attorney advised claimant to agree to dismissal with prejudice of his pending hearing request. Claimant agreed.

Claimant continued to work as a pharmacist until 1980 when it became apparent to him that the diagnosis of rheumatoid arthritis had to be incorrect. Claimant filed a new claim and sought further medical advice. In August of 1980 Dr. Post diagnosed claimant's condition as bilateral plantar fasciitis.

The first issue is whether claimant's 1980 claim is barred because of the dismissal in 1978 of his earlier claim. We conclude it is not. Ordinarily a claimant must "exhaust all alternative grounds or theories for recovery in one action." Dean v. Exotic Veneers, Inc., 271 Or 188, 194 (1975); see also Million v. SAIF, 45 Or App 1097 (1980). But this is not a case where the claimant was unsuccessful with one theory of recovery and merely now seeks to try another theory of recovery. Rather we find that claimant could not reasonably have been expected to pursue recovery for bilateral plantar fasciitis when he had been told by and had reasonably relied upon the advice of an expert to the effect that he had rheumatoid arthritis. The duty to exhaust all alternative theories in one proceeding does not go so far as to require a claimant to perjure himself by seeking compensation for a condition that he does not then believe exists.

Moreover, different time periods are involved in the different claims. Claimant allegedly suffered additional injury during the two years he continued to work following the dismissal of his first claim in 1978. A claim for additional injury or exposure after the prior dismissal is not barred by res judicata.

The second issue is the compensability of the current claim on the merits. Despite inability to find any evidence of arthritis upon examination in 1980, Dr. Rosenbaum adheres to his original diagnosis, asserting that this is just a rare instance of arthritis going into remission. On the other hand, Drs. Post, Phillips and Pierce all generally agree that claimant's condition is bilateral plantar fasciitis. We are not persuaded by Dr. Rosenbaum's diagnosis.

The reports of Drs. Phillips and Pierce recite claimant's history of pain in his heels while working but do not, as we interpret those reports, express any medical opinion on the cause of claimant's fasciitis. The most comprehensive explanation of possible causation is in Dr. Post's report of July 12, 1981:

"The presence of bilateral heel pain, with or without discrete plantar fasciitis, is a weightbearing problem whether it occurs in a sedentary person, a running athlete, or in a workman who is subjected to prolonged standing. We see it in children, housewives, runners, etc., but it is certainly not uncommon for a patient who presents with this problem to comment upon some specific activity that tends to produce it. Standing on hard floors, prolonged walking or standing, repetitive impact while running, or single episodes of acute trauma such as stepping barefoot on a rock are typical presenting histories.

"In short, it certainly is possible that the prolonged standing of this pharmacist has at least contributed to and possibly produced a chronic plantar fasciitis, although it must be said that this condition can occur spontaneously in people subjected only to ordinary walking and standing and even in those who do relatively little of those activities."

Dr. Post appears to be saying that claimant's standing at work and "ordinary walking" are both possible causes and neither can be documented to be more probable. This is insufficient to establish that work activity is the major contributing cause of claimant's fasciitis. See SAIF v. Gygi, 55 Or App 570 (1982).

This case is akin to Ilene Steyenson, 34 Van Natta 192 (1982), and Norman L. Hickman, 32 Van Natta 123 (1981). In Steyenson, the claim was that prolonged sitting at work caused thrombophlebitis in claimant's leg. In Hickman the claim was that prolonged talking at work caused a vocal cord ulcer. Both claims were rejected. Sitting, talking and, as in this case, weightbearing on the legs and feet are ubiquitous parts of daily living. This is not to say that claims based on such activities cannot be compensable; however, it would be exceptional that it could be proven that such claims were caused by circumstances to which a claimant was not ordinarily exposed except in actual employment.

ORDER

The Referee's order dated July 31, 1981 is affirmed.

GARY L. SMITH, Claimant
Paul Gunderson, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Paul Mackey, Attorney
Richard Lang, Attorney

WCB 80-09815
April 29, 1982
Order on Review

Reviewed by Board Members Barnes and McCallister.

Multnomah County has requested Board review of Referee Gemmell's order which: (1) affirmed the November 4, 1980 denial issued by the SAIF Corporation as insurer for the State of Oregon; (2) set aside the August 29, 1980 denial issued by Scott Wetzel for Multnomah County, which is self-insured; (3) awarded claimant 20% unscheduled permanent partial disability, that being an increase of 10% over the December 22, 1980 Determination Order; (4) allowed claimant's attorney a fee of \$2,000 for services in overcoming the denial, and an additional fee of 25% of the increased unscheduled permanent partial disability compensation granted by the order; and (5) refused to award penalties for unreasonable denial of the claim.

Each party to this appeal has raised several issues for consideration by the Board. The prime issue is raised by Multnomah County (County) which contends that the claimant is an employee of the State of Oregon (State), for the purposes of workers' compensation, rather than the County. Additional issues concern compensability, extent of disability, entitlement to penalties, propriety of the Referee's award of \$2,000 in attorney fees and reimbursement of the County by the State for compensation payments made to the claimant.

The factual background of this case developed in conjunction with the facts giving rise to Multnomah County v. Hunter, 54 Or App 718 (1981). Claimant alleges that he sustained a compensable low back injury on June 20, 1980 while lifting a box of copy machine paper weighing between seventy and one hundred pounds. Claimant was employed as an Office Assistant II for the Court Administrator's Office of the Multnomah County Circuit Court. Dr. Marble examined claimant on July 9, 1980 and noted that claimant suffered a previous back injury in 1978. Dr. Marble found residuals of a previous L4-5 disc injury and degenerative disc disease, L2-3. Claimant's condition was found to be stationary as of November 19, 1980.

Claimant's 1980 injury claim was initially accepted by the County as a disabling injury and compensation paid. Subsequently, on August 29, 1980 Scott Wetzel Services issued a denial of the claim on behalf of the County. The reason for the denial was given as "...your employment at the Circuit Court as an office assistant 2 is clearly indicative of the definition of a State employee and not that of a Multnomah County employee." The denial letter stated that benefits would continue to be paid and that an order from the Workers Compensation Department under the provisions of ORS 656.307(1) was being requested. Scott Wetzel filed a claim with SAIF on claimant's behalf on September 11, 1980. SAIF issued a denial of the claim on November 4, 1980 for the stated reason that claimant was not a subject worker of the State, and because the claim was not timely filed. Following SAIF's denial, the Com-

pliance Division of the Workers Compensation Department indicated that it was unable to designate a paying agent under ORS 656.307 since SAIF was contending that the claim was not timely filed. The claim was nevertheless processed to closure and a Determination Order issued on December 22, 1980 allowed claimant temporary total disability benefits and 10% unscheduled permanent partial disability for the low back.

I

In Hunter, the issue before the court was whether the State of Oregon or Multnomah County was the employer for Worker's Compensation Act purposes of two court reporters employed by the Multnomah County Circuit Court. The Referee had determined that the State was the responsible party. The Board reversed, holding that the County was the responsible entity, Gary Hunter and Michael Leroy, 30 Van Natta 362, 561 (1981). The Court of Appeals applied the control test of Harris v. SAIF, 191 Or 254 (1951), and found that the State's right to control the court reporters to be undisputed. The court reporters were subject to qualifications established by the Supreme Court, State judges were authorized to direct and control their work, and the State benefited most directly from their services. The Court found the most persuasive factor to be contained in ORS 8.310(4), which stated that court reporters were only deemed county employees for the purposes of certain retirement plans. The State was, therefore, found responsible even though the County paid the reporters salaries, fringe benefits, provided a work place, work supplies and withheld a portion of their salary for workers compensation benefits.

We basically agree with SAIF, that the facts of this case are somewhat weaker than those in Hunter from the standpoint of control. The court reporters in Hunter were directly subject to the control of the Circuit Judge. The line of control from a Circuit Judge to an Office Assistant II travels down several rungs in the ladder of authority before finally reaching the claimant. It is also clear that Hunter was a case basically decided on its particular factual posture, and as such fairly narrow in application. Nevertheless, we find it to be the controlling law under this set of facts.

The Referee found that from a control standpoint, the claimant was an employee of the State, but felt constrained to hold the County responsible due to the Board's decision in Hunter and Leroy. We agree with the Referee that there are no facts of such significance to distinguish this case from Hunter. The claimant in this case is in a composite employment situation. From a monetary standpoint, he is without a doubt a County employee. The County actually pays his salary and fringe benefits. The Circuit Court determines its own budgetary needs, but the Board of County Commissioners has final approval power over that budget. The County budgeted a sum of money for anticipated workers compensation needs, based on payroll projections, which included the claimant's salary. The County provided the claimant's workplace, supplies and access to the County Motor Pool. If claimant used his own vehicle, he would be reimbursed by the County.

Turning to the control aspect, it is equally clear that the claimant is a State employee from this vantage point. The claimant was hired by an administrative assistant in the Circuit Court Administrator's Office. The Court Administrator is hired by the Circuit Judges and is answerable to them. ORS 8.070 provides that "The administrator holds office at the pleasure of a majority of the judges of the circuit court and shall perform functions prescribed by court rule adopted by the judge...." ORS 205.110 requires that the Court Administrator conform to the direction of the court. The Court Administrator controls the hiring and firing of all circuit court employees, including the claimant. The claimant is accountable to the Court Administrator from a disciplinary standpoint. If claimant had a grievance, it was handled under a written plan within the structure under the Court Administrator, appealable ultimately to the Presiding Judge. The County exercised no control over the details of the claimant's work. As the Referee noted, the Circuit Court has its own classification, performance and evaluation plan for court employees, as well as personnel rules and policy administered by the Court Administrator. As the Court did in Hunter, we find persuasive the statute dealing with court employees retirement plans, ORS 3.280(3), which states, "For purposes of retirement benefits, personnel employed by the court may be considered county employees." (Emphasis added.) By implication, court employees are otherwise considered State employees.

As stated in Harris and Hunter, as between control and payment of wages, control is the decisive factor for determining employment. Harris, 191 Or at 271, Hunter, 54 Or App at 722. Therefore, we find that for purposes of the Worker's Compensation Act, that the claimant is an employee of the State of Oregon.

II

Since we have found the State to be the responsible employer, it is unnecessary to consider the additional issues raised by the County concerning compensability and extent of disability. SAIF, however, also raises the issue of compensability, by attacking the claimant's credibility. The Referee, however, specifically found the claimant to be a credible witness. We find no basis in the record to disturb that finding.

The overall tenor of Dr. Marble's findings is that the claimant had evidence of a previous back injury and degenerative changes that occurred over the years prior to the 1980 industrial injury. Dr. Marble rated claimant's loss of function to his back from all causes to be 20%. He further found that 50% of that was due to claimant's "new injury" of 1980, and the other 50% to be due to all other causes. Although the medical record is somewhat confusing and poorly developed, we accept Dr. Marble's statements and agree with the Referee's findings concerning compensability and extent of disability.

III

Claimant's attorney presents a rather novel argument that penalties are warranted in this case due to ". . .aggravation and worry arising from the denial by both insurers of his claim." We are aware of no authority, and none is cited to us in support of this proposition. In any case, we find it somewhat difficult to

conceive of claimant having suffered particular mental anguish over the denials in view of the fact that the County continued to pay him compensation until closure pursuant to ORS 656.268, despite having denied the claim. As the Referee noted, there can be no contention of unreasonableness under such circumstances, and the County was in fact commendably reasonable in processing this claim by doing more than was required by law.

With regard to the attorney fee issue, both SAIF and the County take issue with the Referee's allowance of a \$2,000 attorney fee, each contending it to be excessive. We agree with SAIF that nothing in the record justifies such a fee. Although claimant's attorney did defend against SAIF's denial of compensability, the major issue was responsibility. Claimant's attorney solicited no medical reports, and did not appear on the claimant's behalf at the taking of Judge Crookham's deposition. There was also no unreasonable conduct on the part of either SAIF or the County.

Under the standards recited in Clara M. Peoples, 31 Van Natta 134 (1981), we do not find on the basis of this record that the efforts expended or the results obtained in this case warrant a fee of \$2,000. In fact, the only defense of the award offered by

claimant's attorney was that the County "could have" terminated claimant's compensation following its denial, and that the presence of counsel assured continued payment of temporary total disability compensation. In point of fact, the County had no obligation to continue compensation payments following its denial, and claimant's counsel's "actions" had nothing to do with the County's decision to continue making such payments. Claimant's attorney also defends the award on the grounds that the case involved ". . . large numbers and size of documents . . ." We do not consider the size and number of documents in this case to be particularly out of the ordinary, and in any event do not consider this adequate justification for an out-of-the-ordinary attorney fee award. Accordingly, we reduce the Referee's attorney fee award to \$1,000 for the denial portion of this case.

IV

The final issue concerns reimbursement of the County by SAIF should the State be found to be the responsible employer. SAIF contends that the Board is without authority to order a monetary adjustment between the parties. In Marvin DeVoe, 34 Van Natta's 141 (1982), we held that the Referees and the Board have the authority to order necessary adjustments and reimbursement upon determination of the responsible insurer. The responsibility for this compensable claim has been found to be SAIF's and SAIF shall, therefore, reimburse the County for benefits paid to the claimant in relation to this claim.

ORDER

That portion of the Referee's order dated June 9, 1981 which approved the November 4, 1981 denial issued by SAIF, and disapproved the denial issued by Scott Wetzel on behalf of Multnomah County, thereby finding this claim to be the responsibility of Multnomah County, is reversed.

The August 29, 1980 denial issued by Scott Wetzel is approved and the SAIF Corporation's November 4, 1981 denial is disapproved. This claim is remanded to SAIF for continued processing and payment of any compensation as required by law.

That portion of the Referee's order allowing claimant's attorney a fee of \$2,000 for the denial portion of this case is modified. In lieu thereof, claimant's attorney is allowed a reasonable fee of \$1,000 for the denial portion of this case.

The SAIF Corporation is ordered to reimburse Multnomah County for workers compensation benefits paid to or on behalf of the claimant in relation to his injury of June 20, 1980.

The balance of the Referee's order is affirmed.

ALLEN H. SPARKS, Claimant
Don Swink, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-00286
April 29, 1982
Order on Review

Reviewed by Board Members Barnes and McCallister.

The claimant requests Board review of Referee Leahy's order which upheld the carrier's denial of right ankle and left hip conditions.

On March 19, 1976 the claimant fell off a ladder. The fact that a fracture of the right wrist occurred at the time of the fall is not disputed. The carrier accepted the wrist claim. The question is whether any other injuries arose from that fall from the ladder or as a consequence of that fall.

The claimant contends he injured his right foot (ankle) in the March, 1976 accident. He also claims a painful left hip as a consequence of removal of a small piece of bone from his left pelvis which was used in bone fusion surgery to repair the compensable right wrist fracture.

We affirm and adopt those portions of the Referee's order regarding claimant's right ankle claim with emphasis on the fact that claimant's treating doctor failed to record or suggest any right ankle injury in the March, 1976 fall until October, 1980, more than four-and-one-half years later. We affirm and adopt those portions of the Referee's order regarding claimant's pelvic claim with the additional observations that: (1) there is no question in our minds that impairment caused by bone graft donor surgery in this case would be compensable; but (2) we find Dr. Norton's analysis more persuasive - that there is no impairment at the donor site; which (3) necessarily means we reject claimant's testimony about his hip problem as grossly exaggerated.

ORDER

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

JAMES A. THAYER, Claimant
Allen Murphy, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-01089
April 29, 1982
Order on Review

Reviewed by Board Members Barnes and McCallister.

The SAIF Corporation seeks Board review of Referee Williams' order which granted claimant compensation equal to 82.5% for 55% loss of use of his right leg. SAIF contends the award is excessive.

Claimant sustained a compensable injury to his right leg on September 4, 1979. He had previously suffered a non-industrial right leg injury which resulted in his right leg being shorter than his left leg. The non-industrial injury resulted in right leg permanent impairment equal to 21%.

In his order, the Referee recites that he applied the guidelines set out in OAR 436-65-500, et. seq. Our application of those same guidelines produces a substantially different result. Based on Dr. Noall's reports, we find the following:

(1) Claimant has 2% loss of plantar flexation of the right foot.

(2) He has 4% loss of dorsiflexion of the right foot.

(3) He has 32% impairment of the right leg, with 21% being due to the prior non-industrial injury. This leaves claimant with 11% right leg impairment due to this industrial injury.

(4) Based on claimant's testimony and using the guidelines, we find 10% additional impairment because of the subjective complaints of pain.

(5) Claimant additionally complains of instability in his right knee. This was not considered by the Evaluation Division because it was not in any of the medical reports before the Determination Order was issued. We conclude that claimant's right knee instability is part of his total impairment, albeit a very minimal part. He testified his leg had given way on him only twice and said he "figured that this is something that will work itself out." We rate this portion of claimant's impairment at 5%.

Combining all of these factors, we conclude that claimant is entitled to compensation for 30% loss of function of the right leg.

ORDER

The Referee's order dated August 21, 1981 is modified. Claimant is entitled to compensation equal to 45% for 30% loss of function of his right leg. This award is in lieu of all prior awards. Claimant's attorney's fee is adjusted accordingly.

MARY R. VEGA, Claimant
Rolf Olson, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-06921
April 29, 1982
Order Denying Remand

SAIF requested review of the Referee's order of January 14, 1982. Claimant thereafter moved the Board to remand the claim to the Referee pursuant to ORS 656.295(5).

After the Referee issued his order and prior to SAIF's request for review, claimant had requested the Referee to reconsider his order. Claimant's request for remand appears to be a request to have the claim remanded to the Referee in order to allow the Referee to reconsider his order; however, in support of her request for remand, claimant has submitted two additional medical documents which were generated subsequent to the Referee's order.

If claimant's request for remand is a request for remand for additional evidence-taking, it does not meet the standards required by Robert A. Barnett, 31 Van Natta 172 (1981), in that claimant fails to state why this allegedly material evidence could not be obtained with due diligence prior to the hearing, and the Board is unable to determine from claimant's request for remand that this evidence was not in fact obtainable prior to the hearing.

Claimant contends that when the Referee found her aggravation claim to be compensable, the claim should have been remanded to SAIF for the payment of compensation, and that benefits should have been paid continuously from the date of the aggravation of claimant's condition. Instead, the Referee ordered that temporary disability benefits be paid for two specific periods of time. The claimant apparently assigns this as error and further contends that the Board should remand the claim to the Referee in order to allow the Referee to consider or reconsider claimant's position on this issue in light of the documents submitted together with claimant's request for remand.

We conclude that any evidence in support of claimant's entitlement to compensation during the period in question could have and should have been a part of the record before the Referee; therefore, the Board will consider the issue of claimant's entitlement to compensation during this period of time on the basis of the record made before the Referee as one of the issues on review.

ORDER

Claimant's motion for remand is denied.

ROBERT W. ADAMS, Claimant
Maurice Engelgau, Claimant's Attorney
Paul Roess, Defense Attorney

WCB 80-08402
April 30, 1982
Order on Review

Reviewed by Board Members McCallister and Barnes.

Claimant requests Board review of Referee Howell's order which awarded him 40% unscheduled permanent partial disability.

The issues on review are whether claimant is entitled to temporary total disability from July 14, 1980 through December 12, 1980 and extent of permanent disability.

Claimant was 59 years old at time of hearing. On November 21, 1979 he was injured when the truck he was driving went over an embankment. He was "thrown around" in the cab of the truck receiving multiple bruises resulting in widespread but undefined painful areas, mostly in the rib cage and back. He worked a few days after the accident until the discomfort caused him to go to Dr. Samuels on November 27, 1979. Dr. Samuels diagnosed lumbar strain and lumbar spondylosis, post traumatic aggravation and a "rule out" diagnosis of lumbar intervertebral disc syndrome.

Claimant continued to receive treatment from Dr. Samuels but was concurrently under the treatment of Dr. Adams. Claimant continued to have symptoms which were variously attributed to costochondritis, musculoskeletal strain, cervical brachial neurovascular compression syndrome (probably aggravated by claimant's low back condition), cervicodorsolumbar spondylosis and hand paresthesias.

Drs. Wilson, Holm and Embick examined claimant July 14, 1980 and found him medically stationary with mild residual permanent impairment. They felt he could return to truck driving with limitations on heavy lifting and repetitive bending. Dr. Adams concurred with the consultants' opinion. A Determination Order was mailed September 9, 1980 which awarded time loss from March 8, 1980 through July 14, 1980 less time worked and 32° for 10% unscheduled disability for injury to the low/mid/upper back and neck. Claimant requested a hearing on the Determination Order.

At the hearing claimant contended that the treating physician, Dr. Samuels, had not found claimant medically stationary and that the treating physician's opinion should be given greater weight than others who have merely examined or provided consultative type care. The Referee did not accept this argument, instead finding the opinions of Orthopaedic Consultants and Dr. Adams more persuasive. We agree.

After the Determination Order was issued in September, 1980 Dr. Samuels continued to treat claimant and continued to report him not medically stationary and unable to return to any work. In March, 1981 Dr. Wilson (not the same Dr. Wilson on the Orthopaedic Consultants panel) examined claimant. He expressed the following opinions:

"I would feel that Mr. Adams' condition is probably stationary.

"He has a chronic problem with nearly total spine pain which limits his activities.

"He certainly is capable of light work with limitations on heavy lifting and repetitive bending.

"I do not feel Mr. Adams can return to his previous job as a truck driver."

In April, 1981 Dr. Wilson clarified his opinion:

"It is my opinion that Mr. Adams' present situation, as far as impairment is concerned in his cervical and lumbar spine, is in the moderately severe category, and a portion of this is due to his injury by aggravation and a portion of it is due to progression of degenerative and osteoarthritic changes present."

A second Determination Order was mailed May 18, 1981 prior to the hearing which awarded additional temporary total disability from December 12, 1980 through April 21, 1981 and an additional 48° for 15% unscheduled disability for the low back, neck and upper back. The total award for permanent partial disability thus became 25%.

The claimant, at the hearing, testified to pain and "tightening up" of back muscles, headaches and lack of stamina. He also testified he continues to treat with Dr. Samuels on a regular basis. He does not believe he could handle any truck driving job

nor work in the woods, the only jobs he believes he is qualified for by experience and training. In the year prior to the hearing, he had made no effort to seek work because "he couldn't handle it." He testified that he had no plans to look for work of any kind.

The Referee found claimant had failed to prove he is permanently and totally disabled. We agree.

The Referee, after weighing all the factors of disability concluded that a 40% loss of earning capacity had been proven. We disagree.

Although Dr. Wilson did not "rate" claimant's injury-related impairment, he did say the claimant's overall impairment was "moderately severe," and that some was due to the injury and some due to the pre-existing condition. The Referee found that "more than half" of claimant's back impairment was due to the injury. We agree and find a major share of the impairment is injury related. A "moderately severe" impairment is in the range 60% to 80% of the whole man; we believe the "major share" of this impairment to be 70%.

Turning to the social/vocational factors identified in OAR 436-65-600, et. seq., we find as follows: age =+10; education =0; work experience, moderate-heavy (truck driver, heavy) =+3, SVP 4; adaptability, could do heavy, now can do light =+10; mental capacity, unremarkable =0; emotional =0; and labor market, truck driver, heavy =SVP 4, GED 2, =15% or +1. There are no negative findings.

When our impairment and social/vocational findings are combined in accordance with the relevant rules, the result is 75% permanent partial disability.

ORDER

The Referee's order dated June 24, 1981 is modified. Claimant is awarded 240° for 75% unscheduled permanent partial disability for all injuries sustained in the accident of November 12, 1979. This award is in lieu of all previous awards.

Claimant's attorney is awarded 25% of the increased compensation granted by this order over that granted by the Referee's order, not to exceed the sum of \$1,200 and payable out of the increased compensation.

NORMAN Z. ANLAUF, Claimant
Evohl Malagon, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 78-00431
April 30, 1982
Order on Remand

On May 11, 1981 the Court of Appeals issued an Order reversing the Board's Order on Review (entered September 17, 1980; Reconsideration denied October 13, 1980) and remanding this case for further proceedings. The court issued its Judgment and Mandate on July 9, 1981.

The issue on remand is the reasonableness of an attorney's fee awarded claimant's attorneys by the Referee. Claimant had prevailed at hearing and SAIF was ordered to accept a denied aggravation claim. Based upon counsel's affidavits, the Referee awarded a fee of \$5,500.00 to be paid by SAIF. SAIF requested review by the Board, contending that the fee was excessive, but the Board found it was without jurisdiction to review the case in view of ORS 656.388 (2). On appeal, the Court of Appeals held that Circuit Court review is an alternative procedure available pursuant to ORS 656.386 (1), but that SAIF had a right to request review of the Referee's order (ORS 656.295), and the Board had jurisdiction to consider the issue. 52 Or App 115 (1981).

Counsel's affidavits reflect that a total of 76 hours was expended by the two attorneys who represented claimant on his aggravation claim. Counsel requested a fee of \$7,040.00. The Referee, in awarding an attorney's fee, discounted from the total amount claimed by counsel that amount of the billing accountable to travel time, as well as several hours spent on the claim prior to the filing of the aggravation application. Based on the hourly rates claimed by each of the two lawyers that worked on the claim -- \$100.00 and \$65.00 per hour respectively -- the Referee awarded a fee of \$5,500.00, expressly finding that counsel performed extraordinary services which entitled them to a fee in excess of the maximum provided by OAR Chapter 438, Division 47.

After reviewing the record that was developed in the course of these proceedings, particularly the affidavits of claimant's counsel, which state a general accounting of their time, the Board concludes that the fee awarded by the Referee is excessive.

"In a proceeding before a referee, the referee shall allow a reasonable fee, not to exceed \$3,000, to be paid by the State Accident Insurance Fund or the direct responsibility employer . . . [w]hen a claim previously denied is ordered accepted by the referee, whether the proceeding is on a claim of aggravation or on the original claim of injury" OAR 438-47-020(1)(a).

This rule was amended effective February 1, 1979 to increase the maximum fee from \$2,000 to \$3,000. At the time of the hearing in this case, December 5, 1978, the maximum fee for prevailing on a denied claim was \$2,000.

OAR 438-47-010(2) allows for an award of an attorney's fee in excess of the maximum allowable by the remaining rules when counsel renders "extraordinary services" documented in a sworn statement such as that submitted by counsel herein. This rule, like OAR 438-47-020, was amended effective February 1, 1979. Prior to this amendment, the standard for a fee in excess of the maximum was not "extraordinary services"; instead, such a fee was to be allowed "in exceptional circumstances". We do not deem the difference in wording to be of any great significance for purposes of this decision.

We do regard 76 hours spent on a not unusual aggravation claim to be extraordinary service and an exceptional circumstance. It is our belief that a fee in excess of the maximum is justifiable, but not to the extent allowed by the Referee. It is of no relevance to the Board that counsel for SAIF spent approximately 16.1 hours in defending, compared to the 76 hours spent by claimant's counsel in presenting their client's case. It is of no significance that claimant's counsel feel aggrieved by SAIF's vigorous defense, which they have variously characterized as unreasonable, unlawful and "skillful obfuscation". The attorney's fee to which claimant's attorneys are entitled for overturning SAIF's denial should be based upon efforts expended and results obtained. OAR 438-47-010(2). The nature of the carrier's conduct, including zealously defending their client's interests, is not a part of the formula.

In evaluating efforts expended by claimant's counsel the Board is not limiting its consideration to the facts recited in counsel's affidavits. The Board also takes notice of the fee usually awarded and the time generally expended in similar cases by attorneys whose skills and competence approximate counsel's. The Board is aware of the fact that the time spent by an attorney in appearing at a hearing or deposition does not necessarily reflect the total sum of hours expended in effectively representing a claimant. The time spent by an attorney in

interviewing his client and other witnesses, as well as marshaling the evidence and preparing the case for an orderly, efficient presentation at the hearing, is not always reflected in the length of the hearing transcript or the length of a deposition. In fact, the more orderly a presentation is, the shorter a transcript may well be. Preparation time must be considered, in addition to the time and effort expended in making the presentation, when evaluating the amount of a reasonable attorney's fee.

Another consideration is the contingent nature of attorney fees in workers compensation proceedings. The Board believes that many settlements and some Referee orders result in attorney fees that, being a standard percentage of increased compensation, work out to be remuneration for the attorney at the rate of at least several hundred dollars per billable hour. This is defended as inherent in a contingent fee system - high per-hour fees in successful cases are necessary because of no attorney fees in unsuccessful cases. This means that claimants' attorneys should be willing to take the bitter with the sweet; not having complained, in our experience, when the contingent fee system produces very generous remuneration, a claimant's attorney does not really have any equitable standing to protest when the contingent fee system produces less generous remuneration.

Based upon the foregoing, the Board concludes that in addition to the \$2,000.00 maximum fee allowed by the rule in effect at the time of this hearing, claimant's attorneys should be awarded an additional fee of \$1,500.00.

Claimant's attorney argued as a preliminary matter that the proper review procedure in this case is not pursuant to ORS 656.295, but rather ORS 656.704, inasmuch as counsel's remuneration is in issue and not claimant's compensation. The Board's reading of the Court of Appeals' decision remanding this case for determination of the attorney's fee issue is that the Board has the jurisdiction, the authority and the duty to review such issues pursuant to ORS 656.295:

"Nothing in the language of ORS 656.386(1) or the statute's legislative history indicate that the legislature intended to remove the right of a party in such cases to petition the Board for review pursuant to ORS 656.295." 52 Or App at 119.

ORDER

The Referee's Order Awarding Attorney's Fees, dated January 4, 1980, is modified. Claimant's attorneys are awarded \$3,500.00 as a reasonable attorney's fee, in lieu of the award granted by the order of the Referee.

CATHERINE BAILEY, Claimant
Kenneth Peterson, Jr., Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 77-07554
April 30, 1982
Order Denying Motion to Remand

Claimant requested review of Referee Gemmell's order which upheld the SAIF Corporation's denial of responsibility for claimant's lung condition. Claimant thereafter moved the Board for an order remanding the claim to the Referee for further evidence taking, pursuant to ORS 656.295(5). In support of the motion, claimant submitted statements from medical and health professionals indicating that claimant's work exposure may have been responsible for her respiratory condition. It is apparent from the tone of claimant's motion that if this matter was remanded to the Referee for additional evidence, claimant would submit further additional evidence to supplement the record, not merely those documents appended to claimant's motion for remand.

The gist of claimant's reasoning as to why a remand is appropriate in this case is that claimant, by her own choosing, was unrepresented at the hearing, and due to this fact, the medical evidence in support of claimant's occupational disease claim was "improperly, incompletely or otherwise insufficiently developed" at the hearing. ORS 656.295(5).

Claimant admits that her request for a remand does not meet the requirements of the Board's decision in Robert Barnett, 31 Van Natta 172 (1981). At the Board's request, the parties submitted arguments on the issue of whether qualification under Barnett should be the exclusive grounds for remand, or whether there should be an additional basis for remand in order to avoid manifest injustice. It is claimant's contention that a failure to grant claimant's request for remand in this case will result in a miscarriage of justice. We disagree.

It is apparent that the evidence claimant now submits and which claimant would produce on remand was obtainable in the exercise of due diligence prior to the hearing. Accordingly, as claimant concedes, it cannot be shown that this "material evidence was not obtainable with due diligence before the hearing." Barnett, supra, at 173. This Board, including the Hearings Division, processes thousands of cases per year. An individual claimant who decides to proceed to hearing without representation by counsel may be at a disadvantage; however, no injustice results when, after being clearly and repeatedly advised of the right to representation as well as the right to postponement in order to obtain counsel, a claimant freely and knowingly elects to waive the right to representation and proceed with a hearing.

The Referee clearly informed claimant that she had a right to obtain counsel prior to proceeding and that the proceedings could be postponed in order to give claimant an opportunity to obtain counsel. The record also reflects that claimant had previously been represented by counsel, who, for whatever reason, withdrew earlier in the proceedings. The Hearings Division had made numer-

ous attempts to communicate with claimant, advising her of her right to retain substitute counsel. Claimant chose to proceed in her own behalf. We do not regard a claimant who elects to proceed in his or her own behalf at a hearing to be entitled to any consideration different from that accorded a claimant who has the benefit of counsel at a hearing.

ORDER

Claimant's motion for remand is denied.

Claimant has not as of yet addressed the merits of her request for review. Accordingly, claimant is allowed 20 days from the date of this order to file a brief addressed to the merits of her claim. SAIF is allowed 10 days thereafter to submit any additional argument in response to issues raised in appellant's brief.

STEVEN E. BALLWEBER, Claimant	WCB 80-05310
James Francesconi, Claimant's Attorney	April 30, 1982
E. Kimbark MacColl, Jr., Defense Attorney	Order on Review

Reviewed by Board Members Barnes and McCallister.

The employer seeks Board review of that portion of Referee Braverman's order which granted claimant compensation for 20% loss of use of the right forearm. The employer contends this award is excessive. Claimant cross-appeals.

Claimant filed a claim on February 12, 1979 for a right forearm condition diagnosed as "tenosynovitis." At that time he was pulling lumber on the gang chain for Willamette Industries. Surgery for decompression of the right median nerve was performed on March 22, 1979. On January 9, 1980 a second surgery was done. Claimant's treating physician, Dr. Fry, indicated claimant would require retraining since it appeared he was unable to perform any of the jobs available in the Lebanon mill. He felt claimant could perform any type of work except that requiring repetitive movements of the right hand and wrist. On June 10, 1980 a Determination Order was issued, granting claimant 7.5° for 5% loss of the right forearm.

Claimant began a vocational rehabilitation program on August 4, 1980 training to be a backhoe operator. He successfully completed the program and began work with Cordell Corporation on February 19, 1981. The job involved heavy equipment operation, flagman and other miscellaneous duties. Although claimant was satisfied with the work and the salary, he eventually quit his job with Cordell because he was not getting in enough hours to justify the long trip to and from work.

The medical evidence in the record does not give any indication of the extent of claimant's physical impairment. Various medical reports state that claimant can do any type of work he desires; however, based on his past history, repetitive work such as the gang chain would tend to cause a flare-up of his tenosynovitis. The testimony at the hearing shows that there is very little that claimant cannot do. The variety of duties at Cordell were handled

without complaint. These duties included operating the backhoe, cutting and measuring pipe, flagman, working with a shovel and compactor and breaking up pavement with a 90-pound jackhammer for approximately 15 minutes at a time. Claimant also indicated that one of his hobbies is working on cars, which he apparently can do with no problems.

Claimant contends he is precluded from certain jobs at the mill. We do not dispute this. However, the relevant test is his permanent loss of use or function of the right forearm. Except for possible flare-ups of his condition when performing repetitive work, claimant gives evidence of having remarkably good function with his right forearm. We conclude the Referee's award is excessive and the 5% award granted by the Determination Order is more in line with claimant's actual disability.

ORDER

The Referee's order dated July 20, 1981 is modified.

The permanent partial disability award for 5% loss of the right forearm granted by the June 10, 1980 Determination Order is affirmed. The attorney fee equal to 25% of the increased compensation granted by the Referee is deleted.

The remainder of the Referee's order is affirmed.

ROBERT O. BARRETT, Claimant	WCB 79-09096
Richard Kropp, Claimant's Attorney	April 30, 1982
Brian Pocock, Defense Attorney	Order on Review

Reviewed by Board Members Barnes and McCallister.

The employer seeks Board review of Referee Foster's order which set aside its denial of claimant's aggravation claim.

Claimant's original claim for his May 9, 1973 injury was first closed by Determination Order dated December 19, 1973. Under then-existing law, claimant's aggravation rights lasted for five years, i.e., until December 19, 1978. Former ORS 656.271(2). On the eve of the expiration of claimant's aggravation rights, specifically on December 14, 1978, he sent a letter to the carrier that reads in full:

"Further problems have come up in regard to my injury of May 9, 1973. I am going to see my doctor to be referred to a specialist for up-to-date evaluation.

I request this claim be reopened according to the aggravation rights granted by the Workers Compensation Board."

The law in effect at the time of claimant's 1973 injury provides: "The claim for aggravation must be supported by a written opinion from a physician that there are reasonable grounds for a claim." Former ORS 656.271(1). No such written physician's statement was submitted before claimant's aggravation rights expired in December of 1978.

We recently ruled that if an aggravation claim is perfected within the applicable limitation period, then there is jurisdiction to request a hearing on a denial after the end of the limitation period. Wilma Kim Buhman, 34 Van Natta 252 (1982). But in this case, the law in effect at the time of claimant's injury required a doctor's opinion as essential for perfecting an aggravation claim and under this standard claimant did not perfect an aggravation claim within the five year limitation period. There being no claim, there was nothing to deny and no jurisdiction to hold a hearing on the denial. See Wetzel v. Goodwin Brothers, 50 Or App 101 (1981), and cases cited therein.

Claimant is entitled to request that the Board grant own motion relief pursuant to ORS 656.278, relying on the record generated in this proceeding and any additional material claimant wishes to submit. However, if there is an appeal from this order, claimant should be aware that it is Board policy not to entertain a request for own motion relief while there is pending litigation on a claim at any level.

ORDER

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

Claimant is entitled to request that the Board grant own motion relief pursuant to ORS 656.278, relying on the record generated in this proceeding and any additional material claimant wishes to submit.

GREGORY C. BIENERT, Claimant
Samuel Imperati, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-08546
April 30, 1982
Order on Review

Reviewed by Board Members Barnes and McCallister.

The SAIF Corporation requests Board review of Referee Leahy's order which apparently granted claimant 96% for 30% unscheduled permanent partial disability for injury to his low back. The September 12, 1980 Determination Order had allowed claimant compensation for temporary total disability only. The only issue for review is the extent of claimant's disability, with SAIF contending the Referee's award is excessive.

Claimant, a hair design instructor, suffered a compensable injury on May 16, 1979 when he fell from a small stage and struck his back against some furniture. The claim was eventually found to be compensable at the March 20, 1980 hearing. On May 25, 1979 Dr. Grossenbacher diagnosed a herniated disc, L5 left. A conserva-

tive regimen was suggested. Claimant was examined by Dr. Reimer on November 1, 1979. Dr. Reimer found no physical impairment, and his impression was chronic low back pain by history with some limited motion on examination. On July 23, 1980 a myelogram was performed by Dr. Smith which revealed a small defect at L5-S1, left. Conservative therapy was suggested with possible elective surgery. To date, no surgery has been performed.

Claimant is 33 years old and has a high school education. He attended hair design school for approximately 13 months, and has worked in this profession for about 12 to 13 years. In his August 1, 1980 report, Dr. Grossenbacher indicated that claimant was orthopedically stable and advised that the claimant could return to his previous occupation on a modified basis, although he indicated that there was a mild-minimal permanent partial disability based on the claimant's pain syndrome.

Claimant returned to work, but was seen by Dr. Smith on September 3, and October 15, 1980, complaining of pain after working more than two or three hours. Claimant continued to see Dr. Smith with further complaints of pain. Dr. Smith indicated in his chart note of June 24, 1981 that claimant is unable to cut hair due to the pain. Claimant was examined by Dr. Rosenbaum on July 13, 1981. Dr. Rosenbaum found no reflex changes, no muscle atrophy, no sensory changes, full range of motion for the lumbar and cervical spine and straight leg raising normal to 80°. In other words, no physical impairment. Dr. Rosenbaum felt that claimant did appear to be disabled from his regular job, but that he was able to carry out light activities in many types of employment.

Taking into consideration the factors for the rating of unscheduled disability, OAR 436-65-600, et. seq., we find the Referee's award to be excessive. There are no objective findings of permanent impairment other than the slight defect noted by the myelogram. Claimant's physical findings were normal, other than persistent pain. Considering the minimal nature of claimant's physical impairment, his favorable age and the considerable range of occupations still available to him, we find an award of 15% unscheduled permanent partial disability to be appropriate under the facts of this case.

ORDER

The Referee's order dated September 17, 1981 is modified. Claimant is awarded 15% unscheduled permanent partial disability for his low back injury of May 16, 1979. This is in lieu of and not in addition to the previous award of the Referee.

The attorney fee awarded by the Referee should be adjusted accordingly.

RODNEY A. DISBROW, Claimant
Rolf Olson, Claimant's Attorney
Ridgway Foley, Defense Attorney

WCB 81-01110
April 30, 1982
Order on Review

Reviewed by Board Members McCallister and Barnes.

The employer seeks Board review of Referee Knapp's order which granted claimant compensation for 25% unscheduled back disability. The employer contends this award is excessive.

Claimant sustained a compensable injury to his low back on April 28, 1980. He had had an injury to his back in 1969, but was essentially symptom-free until the 1980 industrial injury.

Claimant's back impairment is minimal. The January 14, 1981 Determination Order granted no permanent partial disability compensation because the Evaluation Division found no evidence of impairment. The medical consensus is that claimant's objective findings are minimal with some pain only on extremes of motion. Claimant is restricted to lifting no more than 50 pounds on a repetitive basis and should not walk for prolonged periods of time.

Claimant was working as a welder for Weyerhaeuser Company at the time of the injury. He also did welding work out of his home. He was able to return to his regular job at Weyerhaeuser after the injury with few problems. He occasionally received help with the extremely heavy work. Claimant testified that he had to reduce his home business significantly due to back pain. Mr. Lundgren, machine shop supervisor, although not directly responsible for claimant's work, testified that claimant was extremely competent in numerous types of welding and felt that the quality and quantity of claimant's work had not decreased since the injury. Claimant lost his job at Weyerhaeuser due to lack of seniority during a major layoff period. Mr. Lundgren would not hesitate to rehire claimant, should the opportunity arise.

Claimant is involved in numerous recreational activities such as hunting bear, deer, bobcat, birds and other wild game. He also operates a snowmobile on a regular basis and keeps his home supplied with firewood. Claimant attempted to show that these activities have been drastically reduced, but the testimony indicates that claimant participates in one or more of these activities every possible weekend.

Comparing OAR 436-65-600, et. seq., with claimant's impairment and other social/vocational factors, we conclude the award granted by the Referee was excessive. Claimant's impairment is minimal, his age (42) is neutral, his education (ninth grade plus GED) is neutral and his work background is excellent. Taking all elements into consideration, we find claimant has at least 63% of the job market still open to him. Comparing this finding against his impairment, age and job skills, we conclude claimant would be more properly compensated with an award equal to 48% for 15% unscheduled disability.

ORDER

The Referee's order dated September 23, 1981 is modified.

Claimant is hereby granted compensation equal to 48° for 15% unscheduled disability. This award is in lieu of that granted by the Referee's order.

Claimant's attorney's fee should be adjusted accordingly.

WANDA M. DYSINGER, Claimant	WCB 81-04771
James Francesconi, Claimant's Attorney	April 30, 1982
SAIF Corp Legal, Defense Attorney	Order on Review

Reviewed by Board Members Barnes and Lewis.

Claimant seeks Board review of Referee Howell's order which granted her compensation of 10% unscheduled low back disability. Claimant contends an award of 20% disability would be more accurate.

The Board adopts as its own the facts as recited by the Referee in his order. The sole issue before us is the extent of claimant's disability. The Referee applied the guidelines in OAR 436-65-600, et. seq., in reaching his decision. The parties also presented their interpretation of those rules in light of claimant's situation both before the Referee and in their briefs on Board review.

We are generally in agreement with the findings reached by the Referee. However, the guidelines in OAR 436-65-600 have been amended since the date of the Referee's order. Below is what we consider to be a more accurate computation:

Impairment	+10	
Age (34)		- 1
Education (Ninth grade)	+ 7	
Work Experience (SVP 2)		0
Adaptability (medium work)		0
Mental Capacity		0
Emotional & Psychological Findings		0
Labor Market Findings (14%)	+ 1	
(Based on GED of 3, SVP of 2, Medium Work)		
	<hr/>	
	+17	- 1

17 x .01 = .17
17 - .17 = 16.83

We conclude that claimant would be most accurately compensated with an award equal to 48° for 15% unscheduled disability for injury to her low back.

ORDER

The Referee's order dated November 9, 1981 is modified.

Claimant is hereby granted compensation equal to 48° for 15% unscheduled disability for injury to her low back. This award is in lieu of that granted by the Referee in his order.

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

RAYMOND ENGSTROM, Claimant
Deane Bennett, Claimant's Attorney
Noreen Saltveit, Defense Attorney

WCB 81-02512
April 30, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

The claimant requests Board review of Referee Leahy's order which found that the claimant failed to establish a worsening of his condition since July 8, 1980 and, therefore, upheld the employer's denial of his claim for aggravation.

Claimant contends that the Referee erred in requiring him to show a worsening of his condition subsequent to the date of issuance of the stipulated order of July 8, 1980, rather than from the period following the issuance of the Referee's order following the March 27, 1978 hearing. Alternatively, claimant contends that his condition has worsened since the date of the stipulated order.

Claimant sustained a compensable injury on August 3, 1970 which was initially diagnosed as joint sprain and myofascitis of the right upper extremity. In August, 1975 claimant underwent surgery on his left shoulder. Cardiac complications followed, and it was additionally found that claimant suffered from diabetes. A Determination Order issued on December 15, 1976 granting claimant 40% unscheduled permanent partial disability for the left and right shoulder. A hearing on the matter followed and the Referee increased the award to 75% unscheduled permanent partial disability. On October 3, 1979 claimant filed a request for hearing, apparently based on a denial of an aggravation claim filed subsequent to the previous hearing. The need for a hearing on this claim was circumvented by the July 8, 1980 stipulated order, which by its terms allowed the claimant the sum of \$5,000 in consideration of his withdrawal of the aggravation claim.

ORS 656.273(1) provides that:

"After the last award of arrangement of compensation, an injured worker is entitled to additional compensation, . . . for worsened conditions resulting from the original injury."

It is unnecessary for the resolution of this case to determine whether or not a disputed claim settlement can be an award or arrangement of compensation under the statute. It is of no consequence that the parties chose to label their agreement as either a "stipulation" or a "disputed claim settlement," for it is not the name that is controlling, but the terms of that agreement. Paragraph seven of that stipulated order provides:

"This disputed claim settlement will not affect the claimant's remaining aggravation rights under the 1970 compensable injury."
(Emphasis added.)

Webster's Third New International Dictionary, (1968), defines the word "remain" as meaning;

"To be a part not destroyed, taken away, or used up: be still extant, present, or available: be left when the rest is gone..."

It is therefore clear, from the unqualified language of the order itself that the claimant must prove a worsening of his condition from the time period subsequent to the issuance of that stipulated order.

We now turn to an analysis of the medical evidence to determine whether or not the claimant has established a worsening of his condition since July 8, 1980. A comparison of the post-July 8, 1980 medical evidence with that dated prior thereto, produces the conclusion that a worsening has not been established. It is incumbent upon the claimant to establish a worsening of his condition since July 8, 1980. As the Referee noted, however, the claimant's evidence suffers from a problem of imprecision in that the majority of it relates to the period beginning on March 27, 1978.

It is difficult to determine what worsening, if any, took place since July of 1980. Dr. Schuler, in his report of January 13, 1981 notes that the claimant is suffering from a continued pain problem, and increased crepitation (crackling sound), in the shoulder. In his January 29, 1981 report, Dr. Schuler summarizes the claimant's condition and treatments beginning on September 9, 1980. Claimant's main complaints in September were of pain in the shoulder, which Dr. Schuler felt was related to the prior shoulder injury. By October, 1980 the pain ran from the claimant's neck into the upper left extremity. Claimant's symptoms improved in November after physical therapy. Dr. Schuler notes that claimant's condition had significantly improved by December and found full cervical range of motion. Dr. Vessely, in his March 10, 1981 report could recommend no treatment that would be beneficial to the claimant.

Examination of the medical reports dated prior to July, 1980 indicates that the claimant was suffering from the same symptoms that he is contending support his current claim for aggravation. In fact, it would appear that the claimant is suffering from the same symptoms which were apparent at the time of the 1978 hearing, from which there was no appeal. Dr. Schuler's October 4, 1977 report indicates that claimant was suffering from "...much crepitation and pain and atrophy of the muscles about both shoulders." The factual findings made by the Referee at the first hearing further support this determination. The medical reports do not establish that the claimant's underlying condition has worsened since July, 1980. This appears to be an effort to reestablish the same aggravation claim which was disposed of by the stipulated order of July 8, 1980.

ORDER

The Referee's order dated August 21, 1981 is affirmed.

GARY A. FREIER, Claimant
Alan R. Jack, Claimant's Attorney
Ridgway Foley, Defense Attorney

WCB 79-07952
April 30, 1982
Order on Review

Reviewed by Board Members Barnes and McCallister.

The employer requests review of Referee Williams' order which awarded claimant 96° for 30% unscheduled permanent partial disability for an injury to his low back. The order also overturned a denial issued by the employer in response to an aggravation claim filed by claimant arising out of an off-the-job incident subsequent to closure of the claim. On review the employer argues that: (1) Claimant is not entitled to any award of disability in excess of that granted by the Determination Order; (2) claimant has failed to prove a compensable worsening; and (3) it was error for the Referee to rate the extent of claimant's unscheduled disability and at the same time reopen the claim as of August 13, 1979 based upon an aggravation of claimant's original injury.

Claimant sustained a compensable injury to his low back in November 1978. He was medically stationary in April 1979 according to his treating physician. A Determination Order issued September 14, 1979 awarding claimant 16° for 5% permanent partial disability. Prior to the mailing of the Determination Order, claimant experienced a recurrence of low back pain on August 13, 1979 while he was cutting firewood for his personal use on the employer's premises and after he had terminated his work shift.

Claimant filed an aggravation claim with the employer which was denied by letter of September 21, 1979.

The Referee awarded claimant permanent partial disability based upon the assessment of claimant's permanent disability prior to August 13, 1979 and ordered the employer to reopen the claim for the payment of benefits from that date forward.

I.

"After the last award or arrangement of compensation, an injured worker is entitled to additional compensation, including medical services, for worsened conditions resulting from the original injury." ORS 656.273(1).

The employer argues that Smith v. Ed's Pancake House, 27 Or App 361 (1976), states the rule applicable to this case, inasmuch as this case involves successive injuries. We disagree. Smith states the rule to be applied in successive injury cases where there is an issue concerning responsibility between successive industrial insurance carriers for consequences of two or more industrial injuries; responsibility is not the issue in this case.

We have here a situation in which claimant sustained a compensable industrial injury with a subsequent non-work-related injury or occurrence causing an exacerbation of claimant's symptoms. The issue is whether this subsequent incident represents a compensable worsening under ORS 656.273 or whether it represents a new non-industrial injury which is independent of

and, therefore, not related to claimant's earlier compensable injury. We find this is a compensable worsening.

The dispositive case is Grable v. Weyerhaeuser Company, 291 Or 387 (1981), which was decided after submission of briefs in this case. In Grable the court specifically rejected application of the "last injurious exposure rule," the rule of Smith v. Ed's Pancake House, supra, to the kind of successive injury situation presented in this case, where there is an industrial injury followed by a non-industrial injury or occurrence. 291 Or at 402.

The proper rule to be applied is stated in Grable:

" . . . an employer is required to pay workers' 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 subsequent off-the-job injury to the same part of the body if the worker established that the on-the-job injury is a material contributing cause of the worsened condition." 291 Or at 401.

The Referee applied the rule of Christensen v. SAIF, 27 Or App 595 (1976) in making his determination of compensability; i.e., ". . . once the work-connected character of an injury has been established, the subsequent progression of that condition remains compensable so long as the worsening is not shown to have been produced by an independent nonindustrial cause." 27 Or App at 599. As noted by the Grable court, the compensability issue in a case such as this may generally be determined equally well under either rule. 291 Or at 400.

Based upon the record before us, we conclude that the Referee correctly found that claimant's worsened condition is compensable. In an August 24, 1979 report to the employer, claimant's treating physician stated: "It is my medical opinion that Mr. Freier's current problem is essentially the same as that which I treated him for from 20 November 1978 through 30 April 1979. * * * I do believe that Mr. Freier's current condition is a direct result and causally related to his condition that I have treated him for before. * * * " In a November 13, 1979 chart note, claimant's physician reiterated his impression that claimant's problems at that time were "a continuum of" the problems that occurred in November 1978. We are satisfied that claimant has proven by a preponderance of the evidence that his original compensable injury was a material contributing cause of his worsened condition. He has, therefore, established a compensable worsening pursuant to ORS 656.273.

II.

The employer contends that the Referee was foreclosed from rating the extent of claimant's permanent disability because he ordered reopening of the claim for payment of benefits based on an aggravation as of August 1979. As the employer's brief puts it:

"The Opinion and Order directed the employer to reopen the claim of Mr. Freier as of August 13, 1980 (Opinion and Order, page 3). By necessity and by this order, claimant's condition has been declared not medically stationary as of that date; therefore, it is necessary for the parties to process this matter to a new Determination Order. For that reason, any award of unscheduled permanent partial disability is inappropriate and not authorized by statute: If Mr. Freier is not medically stationary, he is not yet ready to be rated for a permanent partial disability award. After all, the order directing reopening of the claim means that claimant is subject to curative medical care and treatment which could likely reduce or eliminate any permanent disability now allegedly existing." Employer/appellant's brief, page 12.

The Board agrees with the employer's position on this issue. It was error for the Referee to order reopening of claimant's claim based upon an aggravation and, at the same time, to rate the extent of claimant's disability on his original claim.

A worker's disability is rated as of the time of hearing. Gettman v. SAIF, 289 Or 609, 614 (1980); Livesay v. SAIF, 55 Or App 390, 394 (1981); Leedy v. Knox, 34 Or App 911 (1980).

A claim cannot be closed, and permanent disability rated, until a worker is medically stationary. ORS 656.268 (1). Harmon v. SAIF, 54 Or App 121 (1981); Austin v. SAIF, 48 Or App 7 (1980); Logue v. SAIF, 43 Or App 991 (1979); Pratt v. SAIF, 29 Or App 255 (1977); Johnson v. SAIF, 29 Or App 255 (1977); Johnson v. SAIF, 18 Or App 152 (1974).

"* * * [P]ermanent disability, if any, resulting from an accidental injury cannot be determined until the period of temporary total disability, or the healing period has ended. In other words, the amount of permanent disability, if any, suffered by an injured [worker] cannot be determined until the [worker] has secured the maximum benefit which can be given [the worker] by medical treatment." Helton v. SIAC, 142 Or 49, 51 (1933).

See also Dimitroff v. SIAC, 209 Or 316, 336 (1957).

Although the issue in Helton involved permanent disability awarded on an original claim while the worker was still temporarily and totally disabled, the court's reasoning applies equally to the situation in this case and supports our conclusion that the Referee erred in this regard.

This Board has previously held that it is improper to consider the extent of a worker's permanent disability when, at the time of hearing, the worker's claim is in an open status. Esperanza Blanco, 15 Van Natta 167 (1975), Jess Campbell, 15 Van Natta 146 (1975).

In Jess Campbell claimant had requested Board review of a Referee's order which refused to consider any aspect of permanent disability inasmuch as the worker's claim had not been closed pursuant to statute. Claimant contended that, although he was receiving temporary total disability benefits at the time of the hearing, he was entitled to litigate the issue of permanent disability as it related to his hemlock allergy which had been stationary for some time prior to the hearing.

The Board rejected claimant's contention, reasoning that:

"The Referee correctly ruled that no claim can be closed until the [worker's] condition becomes medically stationary and that permanent disability awards can be made only at the time the claim is closed. When claimant's claim was reopened it was reopened for all purposes. Thus the issue of permanent partial disability can only be considered after claimant becomes medically stationary. He was not medically stationary at the time of the hearing."
Jess Campbell, 15 Van Natta at 147.

The Referee's order in this case in effect found that claimant was stationary prior to August 13, 1979, and he rated claimant's permanent disability as it was prior to that date. Since disability is rated at the time of hearing, and claimant was not medically stationary at that time, claimant was entitled to have his claim reopened and remanded to the carrier for processing and payment of benefits according to law, including another closure pursuant to ORS 656.268; however, claimant was not entitled to have the Determination Order reviewed and his permanent disability evaluated in view of the fact that he was no longer medically stationary as of the time of the hearing.

ORDER

That portion of the Referee's order of July 10, 1980 which found that claimant had established a compensable worsening pursuant to ORS 656.273 is affirmed. That portion of the Referee's order which rated claimant's permanent disability is reversed, and the Referee's award of additional permanent partial disability is vacated.

JOHN P. GINTER, Beneficiaries of
R. Roger Reif, Attorney
Frank Moscato, Defense Attorney

WCB 80-00793
April 30, 1982
Order on Review

Reviewed by Board Members Barnes and McCallister.

The employer seeks Board review of that portion of Referee Foster's order which set aside the employer's denial in regard to the myocardial infarction the deceased worker suffered six months before his death. The worker's beneficiaries seek Board review of that portion of Referee Foster's order which upheld the employer's denial of death benefits.

The deceased worker (hereafter claimant) was a Methodist minister. He suffered a myocardial infarction while performing a wedding ceremony on May 26, 1979. His claim for workers compensation benefits was initially accepted. While recovering from the infarction, claimant went on vacation in Hawaii. While there he suffered an enlarged abdominal aortic aneurysm, underwent emergency surgery and expired shortly after the operation. Claimant's widow filed a claim for death benefits. The carrier denied the claim for death benefits. The carrier also then issued a backup denial of any responsibility for the claimant's May, 1979 infarction.

I

We conclude that if the underlying infarction claim is compensable, then the death benefits claim is compensable also. Long ago the Supreme Court stated that a death benefits claim is compensable when an industrial injury materially contributes to hasten death or results in death "earlier than would have otherwise occurred." Elford v. State Ind. Acc. Comm., 141 Or 284, 288-89 (1932). To the limited extent that questions like whether death resulted earlier than it would have otherwise are capable of proof one way or the other, we are satisfied that claimant's May, 1979 infarction was a material contributing cause of his November, 1979 death.

Dr. Wienke, who performed the emergency aneurysm surgery in Hawaii, reported that he believed even before the operation that the infarction just six months before made claimant a higher surgical risk, but that surgery was nevertheless essential. Post-operatively claimant developed chest pains, irregular heart beat and ultimately cardiac arrest. Dr. Wienke described the surgery and death as follows:

"After the long and difficult operative procedure, the aneurysm was finally reconstructed and he was starting to show signs of stabilization in the Intensive Care Unit when he had a sudden episode in the chest of pain, shortness of breath and irregular heart beats. We felt this was almost certainly an additional heart attack, although because he died so rapidly thereafter, we were never able to obtain any tests which could document whether or not it was a heart attack. The only other

possibility would be that this might have been a blood clot which developed in the lung, but is very unlikely since his blood had been anticoagulated during the surgery and had not fully recovered its clotting capabilities.

"Certainly, he would have had a much better chance of recovery from the surgery had he not developed this acute problem which was most likely an additional or an extension of his previous myocardial infarction."
(Emphasis added.)

There is admittedly contrary evidence. Noting that claimant had an earlier heart attack in 1964 at age 51, Dr. Rogers stated:

"Most people first having a coronary attack at age fifty-one would have been expected to have died sooner than fifteen years later."

But the Supreme Court has required us to determine whether death was hastened by an alleged compensable injury or disease. Elford, supra. Based on the report of Dr. Wienke, the only doctor on the scene to express any opinion, we conclude claimant's May, 1979 coronary attack did hasten his November, 1979 death.

II

The question remains of whether the May, 1979 coronary attack was itself compensable.

Four doctors have expressed opinions. Drs. Burton, Sutherland and Rogers all believe that claimant's work did not cause or contribute to his 1979 infarction. Rather, they believe that claimant suffered from coronary artery disease or arteriosclerotic disease of natural origin that was neither caused nor aggravated by claimant's work, and that claimant's 1964 and 1979 infarctions were merely clinical manifestations of the existence and progression of this disease. (So far as we know from this record, it has never been suggested that claimant's 1964 infarction was compensable.) Some of the doctors mention high blood pressure, obesity and a family history of heart disease as additional risk factors; as we understand the reports, the doctors regarded these additional risk factors as distinctly secondary to claimant's coronary artery disease.

Dr. Kloster presents the only opinion that could conceivably support a finding of compensability. We find there are serious problems in Dr. Kloster's approach and analysis in this case:

(1) Dr. Kloster's opinion appears to us to be fairly qualified, tentative and inconclusive. If this were the only defect, a close case could be presented. Clayton v. State Compensation Dept., 253 Or 397 (1969). But this is some reason to discount Dr. Kloster's opinion, especially when considered with the following more serious defects.

(2) Dr. Kloster's analysis and conclusions were based partly on interviews he conducted with claimant's family and friends. The record does not disclose the number, nature or extent of these interviews; nor does the record reveal to what degree they were the foundation for Dr. Kloster's analysis and conclusion. But we do know that the interviews played some role in Dr. Kloster's calculus. From this fact the employer argues that Dr. Kloster's opinion is based on facts not in evidence and the opinion should thus be found to be inadmissible. We do not regard this problem sufficient to make Dr. Kloster's report inadmissible. We do regard this problem sufficient to significantly detract from the probative value of Dr. Kloster's opinion. See Korter v. EBI Companies, Inc., 46 Or App 43, 51 (1980).

(3) Finally, there is the question of the reasons Dr. Kloster gave for his opinion. Dr. Kloster theorized that claimant was a "Type A personality," variously described as aggressive, over-competitive, compulsive, etc.; and that this personality type was or could have been instrumental in contributing to the cause of claimant's coronary artery disease and/or infarction. (If our paraphrase of Dr. Kloster's theory seems vague, it is because as discussed above, Dr. Kloster's presentation of his theory was a bit vague.)

While the "Type A personality" classification and its connection with possible stress-related disease is all a matter of considerable debate in the medical community, we accept Dr. Kloster's theory for sake of discussion. That theory does not, however, withstand analysis because: (1) Any personality characteristic is a 24-hours-a-day, 7-days-a-week phenomenon; (2) A majority of any worker's time is spent in a non-work environment, not a work environment; (3) Therefore, any interrelationship between a worker's personality and work environment cannot be the major cause of a disease because the personality is constant, but the work environment is intermittent. See SAIF v. Gygi, 55 Or App 570 (1982).

In sum, the opinions of Drs. Burton, Sutherland and Rogers all are to the effect that the progression of claimant's coronary artery disease and his 1979 infarction were absolutely unrelated to his work. Dr. Kloster's contrary opinion is flawed by inconclusiveness, reliance on undisclosed information and a theory that cannot be reconciled with Gygi. For all of these reasons, we are not persuaded that claimant's 1979 infarction is compensable.

ORDER

The Referee's order dated April 28, 1981 is reversed. The denial dated April 9, 1980 regarding the May 26, 1979 myocardial infarction is reinstated and affirmed. The denial dated December 26, 1979 of the claim for death benefits is affirmed solely on the ground that the myocardial infarction claim is not compensable.

NANCY GIVIGLIANO, Claimant
David Cash, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-03786
April 30, 1982
Order on Review

Reviewed by Board Members Barnes and McCallister.

The claimant seeks Board review of Referee Howell's order which upheld the SAIF Corporation's denial of claimant's occupational disease claim.

Claimant, 27 years of age, had a pre-existing condition of curvature of the spine. She was employed as a school bus driver and commencing in November, 1979 she developed low back pain. She had suffered no prior symptoms for many years. She sought medical treatment on November 28, 1979 from a chiropractor, Dr. Layman, but did not file a claim until February 17, 1981.

It was Dr. Layman's opinion that the school bus seat, which was crooked, caused claimant's pre-existing condition to become symptomatic.

The Referee made two conclusions. He felt that the evidence indicated that claimant suffered inflammation and/or bulging ligaments which represented more than a symptom and represented a worsening of the underlying condition and concluded that the test set forth in Weller v. Union Carbide, 288 Or 27 (1979) had been met. However, applying the Board's interpretation of the definition of occupational disease pursuant to ORS 656.802(1), set forth in Robert Sanchez, 32 Van Natta 80 (1981), he concluded that claimant's work activities were not the "sole cause" of her temporary aggravation of her underlying condition and affirmed the denial.

We find that Weller, supra, is not applicable in this case because claimant's pre-existing underlying condition was asymptomatic prior to the commencement of her back problems in November, 1979. See Patricia Lewis, 34 Van Natta 202 (1982). The Board's holding in Sanchez has been rejected by the Court of Appeals and is not the standard to be applied. The test is now found in SAIF v. Gygi, 55 Or App 579 (1982) where the court stated that if conditions at work, when compared to non-work exposure, are the major contributing cause of the disability, then compensation is warranted.

Having concluded that Weller is not applicable in this case and applying the test set forth in Gygi, we find that claimant's occupational disease claim is compensable as a temporary worsening of a pre-existing condition. It is not necessary that claimant prove any worsening of her pre-existing condition. It is sufficient that her underlying condition became symptomatic which required medical services and caused temporary disability and that claimant's work as a bus driver was the major contributing cause of her disability. We so find.

ORDER

The Referee's order dated November 2, 1981 is reversed.

SAIF's denial of claimant's occupational disease is set aside and the claim is remanded to it for acceptance and the payment of benefits as required by law.

Claimant's attorney is awarded \$1,000 as and for a reasonable attorney's fee, payable by SAIF, for both hearing and Board levels.

FRANK R. GONZALES, Claimant
Brian Welch, Claimant's Attorney
Scott Kelley, Defense Attorney

WCB 81-01630
April 30, 1982
Order of Abatement

The Board issued its Order on Review in the above entitled matter on April 21, 1982. On April 28, 1982 we received a Motion for Reconsideration from the employer.

In order to allow time to consider this Motion, that Order on Review is hereby abated. By this order claimant's attorney is required to file a response to the employer's Motion for Reconsideration and remand within 10 days, which response shall address the additional issue of whether there is now probable cause to believe that claimant committed perjury in his testimony denying any back injuries since 1974.

IT IS SO ORDERED.

FRANK R. GONZALES, Claimant
Brian Welch, Claimant's Attorney
Scott M. Kelley, Defense Attorney

WCB 81-01630
April 21, 1982
Order on Review

Reviewed by Board Members McCallister and Barnes.

Claimant seeks Board review of Referee Leahy's order dated June 4, 1981 which found that Referee Braverman's order of December 23, 1980, in an earlier proceeding, WCB Case No. 80-06812, did not require the self-insured employer to pay claimant temporary total disability compensation and, therefore, that the employer's refusal to pay those benefits was not unreasonable resistance to payment of compensation requiring an assessment of penalties and attorney fees.

Since the question is compliance with Referee Braverman's order in the earlier proceeding, we start with the terms of that order. Referee Braverman first stated the issues, in part, to be:

"1) The propriety of the denials issued respectively on August 27, 1979 and August 22, 1980 wherein the defendant has denied that claimant has suffered an aggravation or worsening of his back injury which occurred on July 26, 1974 since the last arrangement of compensation on May 10, 1979 nor at any time.

"2) Does claimant need further medical care and treatment for conditions related to his original accepted accident pursuant to ORS 656.245."

Referee Braverman's order precisely follows his statement of the issues:

"IT IS THEREFORE ORDERED, that the denial of August 27, 1979 and the merged denial of August 22, 1980 be rescinded with the claim remanded to the defendant for acceptance of an aggravation or worsening of claimant's back condition which is related to his original accepted injury of July 26, 1974.

"IT IS FURTHER ORDERED, that claimant specifically receive medical benefits for this back condition pursuant to ORS 656.245."

However, sandwiched between the above quoted passages, Referee Braverman may have planted the seeds of the present confusion when he stated:

"...claimant is entitled to uninterrupted medical benefits pursuant to ORS 656.245 and his claim should be reopened for further benefits if justified by additional medical opinion."

It is impossible for us to now be certain what was then meant by "claim should be reopened . . . if justified by additional medical opinion."

A claim for aggravation can seek additional medical services only. Mary Ann Hall, 31 Van Natta 56 (1981). But in the context of what was before Referee Braverman in the earlier proceeding - a probable need for back surgery - it should have been obvious to anybody vaguely familiar with the Oregon workers compensation system that if claimant was entitled to curative medical services, he was also entitled to temporary total disability benefits while unable to work following the contemplated back surgery.

Ideally, when setting aside the denial of an aggravation claim, as Referee Braverman did in the earlier proceeding, a Referee or the Board should specifically state the dates of claimant's entitlement to temporary total disability compensation. Many records, however, simply do not permit such specificity.

A claimant's entitlement to temporary total disability benefits begins upon medical verification of inability to work, ORS 656.273(6), and continues until the claimant returns to work or is medically stationary, ORS 656.268(2). Many records do not contain this data.

While we do not know precisely the record that was before Referee Braverman in WCB Case No. 80-06812, it would appear that between the date of claimant's aggravation claim that culminated in that proceeding and the date of the hearing: (1) there was no clear or single medical verification of inability to work; and (2) there were probably some periods, perhaps sporadic, when claimant was working. Given that inference about the situation as it existed when Referee Braverman entered his order in WCB Case No. 80-06812, our best guess about his intended meaning of "claim should be reopened . . . if justified by additional medical opinion" is that the Referee was saying more information was necessary to determine the periods and duration of claimant's entitlement to temporary total disability compensation.

Be that as it may, one thing is crystal clear from Braverman's prior order: claimant's aggravation claim was "remanded to the defendant for acceptance." Such wording imposes upon an insurer or self-insured employer the same duties it would have upon voluntary claim acceptance - to process the claim. In other words, if there were at the time of Referee Braverman's order gaps or uncertainties about the duration of claimant's entitlement to time loss compensation, it was primarily the duty of the self-insured employer to investigate the matter, ascertain and then pay time loss appropriate under the circumstances.

Instead, the self-insured employer did nothing, taking the position that Referee Braverman had ordered payment of medical benefits only. Even if Referee Braverman's order was not a model of clarity, we find the self-insured employer's interpretation of it to have been farfetched and unreasonable.

Not all unreasonable claim processing triggers possible entitlement to penalties and attorney fees. Instead, the statutory basis is limited to unreasonable delay, refusal or resistance to the payment of compensation, ORS 656.262(9), 656.382(1). The self-insured employer's unreasonable conduct here is one step removed from a literal refusal to pay compensation -- it refused to process the claim upon Referee Braverman having ordered it accepted and thereby determine claimant's entitlement to temporary total disability compensation. Can we interpret the statutory scheme to provide penalties in this situation? We think we can. See Morgan v. Stimson Lumber Company, 288 Or 595 (1980).

And we have. Orry W. Harmon, WCB Case No. 80-07664, involved a similar situation. In an earlier proceeding a Referee had ordered that claim reopened; the question in that proceeding was whether the SAIF Corporation had paid all temporary total disability compensation due under the Referee's order in the earlier proceeding. The Referee's order in WCB Case No. 80-07664 stated that after claim reopening was ordered:

"the Fund's duty of processing the claim required it . . . to make reasonable efforts to determine what was happening insofar as Dr. Thompson's release [to work] and then promptly pay any authorized benefits. . . . I am of the opinion the Fund unreasonably delayed the payment of benefits for the period from July 15, 1980 to October 16, 1980."

We affirmed and adopted the Referee's order. Orry W. Harmon, 34 Van Natta 247 (1982). Implicit in affirming and adopting the Referee's order in that case was agreement with the Referee's analysis; we now make it explicit that, after a claim is ordered reopened, failure to make reasonable efforts to determine the claimant's entitlement to temporary total disability or other compensation, which results in delayed payment of compensation, is a form of delay in the payment of compensation. If unexplained or unexcused, i.e., unreasonable, penalties should be assessed.

The remaining question is for what periods of time claimant should have been paid temporary total disability benefits. As noted above, claimant has apparently worked sporadically since making his aggravation claim. Despite having litigated the merits of the aggravation claim before Referee Braverman in WCB Case No. 80-06812 and having litigated this enforcement proceeding before Referee Leahy, the parties have yet to furnish any comprehensive (or even intelligible) evidence about claimant's medically authorized time loss. While, as noted above, we think it is primarily the employer's duty in processing the claim to ascertain this information, when a claimant has legal representation as this claimant has had continuously at least since the proceeding before Referee Braverman, we think the claimant bears some responsibility to clearly identify what periods of time loss are claimed. The claimant obviously is in a superior position to know when he is working, when he is not working, when he was hospitalized, etc. The record in this case does not reveal that claimant has ever furnished the employer with such information. We conclude that claimant's failure to so cooperate is relevant to the degree of unreasonableness of the employer's action or inaction and thus relevant to the amount of any penalty assessed.

The one thing that is most clear about claimant's inability to work is that he has been hospitalized on various occasions for diagnostic procedures and surgery. Any argument that claimant is not entitled to temporary total disability benefits while receiving compensable, curative medical services is unreasonable to the point of being preposterous. We will order claimant to receive temporary total disability while hospitalized and assesses the maximum possible penalty for not having previously paid these benefits.

It is certain that claimant is entitled to additional temporary total disability for periods following his hospitalizations; it is probable that claimant is entitled to additional temporary total disability for periods preceding his hospitalizations. The present record does not permit a definitive determination of these questions. The case will be remanded to the employer for the claim processing that should have occurred following Referee Braverman's prior order -- determination of the dates of claimant's medically authorized time loss. Considering that such claim processing is long overdue, and unreasonably so, and the fact that claimant has failed to state his claim for temporary total disability with any specificity, we will order a 10% penalty for not having previously determined and paid these benefits.

Claimant's attorney is entitled to an employer-paid attorney's fee under ORS 656.382(1) because of the employer's unreasonable resistance to the payment of compensation.

ORDER

The Referee's order dated June 4, 1981 is reversed.

The employer is order to ascertain the dates that claimant has been hospitalized for compensable treatment since making the aggravation claim that culminated in Referee Braverman's order in WCB Case No. 80-06812, to pay claimant temporary total disability compensation for those dates and to pay claimant additional compensation equal to 25% of temporary total disability due while hospitalized as and for a penalty for unreasonably delayed claim processing and payment of compensation; said amounts shall be paid within 10 days of the date of this order.

The employer is further ordered to ascertain the additional dates of claimant's medically authorized time loss other than during periods of hospitalization for compensable treatment since making the aggravation claim that culminated in Referee Braverman's order in WCB Case No. 80-06812, to pay claimant temporary total disability compensation for those dates and to pay claimant additional compensation equal to 10% of temporary total disability due for said additional dates as and for a penalty for unreasonably delayed claim processing and payment of compensation; said amounts shall be paid within 30 days of the date of this order.

Claimant's attorney is awarded \$1,200 as and for a reasonable attorney's fee for services caused to be rendered by the employer's unreasonably delayed claim processing and payment of compensation, payable by the employer.

RALPH F. GUERRA, Claimant
Robert Udziela, Claimant's Attorney
Dennis R. Vavrosky, Defense Attorney

WCB 80-08629
April 30, 1982
Order Denying Approval of
Disputed Claim Settlement

A Referee and the Board have ruled that the aggravation claim involved in this proceeding is not compensable. That ruling was not on the merits, but rather was based on the defense of res judicata. Ralph Guerra, 33 Van Natta 680 (1981). Claimant appealed to the Court of Appeals. The case is now before us again on remand from the Court of Appeals for consideration of whether to approve a disputed claim settlement that the parties have tendered.

The disputed claim settlement does not recite the basis for the alleged bona fide dispute regarding compensability. The Board, therefore, issued a letter-order on March 29, 1982 as follows:

"The Board has reviewed the disputed claim settlement you submitted for approval in the above case. We were unable to find a bona fide dispute over compensability within the meaning of ORS 656.289(4). Our understanding of that concept is that there must be some colorable factual or legal basis for each party's position regarding compensability. While we would very much prefer those factual/legal positions to be set out in the disputed claim settlement document, that is not necessarily essential. Please submit to us at your earliest convenience a supplemental written statement of the factual/legal position of each party. We will then further consider the question of approving your disputed claim settlement."

Claimant's attorney responded on April 2, 1982:

"The earlier opinions and orders in this case, as well as the Board's Orders on Review lead to but one conclusion, that this particular aggravation claim has been established as noncompensable, subject to review only by the Court of Appeals as to the correctness of that decision. Under those circumstances, I cannot see a better 'dispute' as to compensability of this aggravation claim. The 'colorable factual or legal' basis for the employer's position is that the Board has already held this matter res judicata and noncompensable; the claimant's position is that it is not res judicata and that he is entitled to a hearing on the merits."

As we understand this, counsel's position is that there is a bona fide dispute regarding compensability because counsel says there is a bona fide dispute.

The Board is required to exercise independent judgment about whether a bona fide dispute over compensability exists between the parties. Arlie H. Johns, 32 Van Natta 88 (1981). We do not understand the cryptic, one-sentence decision of the Court of Appeals in the Johns case to establish otherwise. 55 Or App 431 (1981).

Under McPherson v. Employment Division, 285 Or 541 (1979), certain statutory terms are primarily for administrative agency, not judicial interpretation. The Supreme Court has recognized that the McPherson doctrine applies to the Workers Compensation Board. Brown v. EBI Companies, 289 Or 455, 460 n 3 (1980).

McPherson held the statutory phrase "good cause" was primarily to be interpreted by the agency involved. We believe that "bona fide" as used in ORS 656.289(4) is substantially akin to the "good cause" language involved in McPherson and thus primarily for our interpretation.

And we have previously stated our interpretation:

"A bona fide dispute, as we understand it, means there is some legal and/or factual position for each party's position. Stated differently, a bona fide dispute is one in which a jury question would be presented if tried in the judicial system and neither party would be entitled to judgment as a matter of law." Arlie H. Johns, supra, 32 Van Natta at 89.

Despite the opportunity offered by our letter-order to explain the factual and/or legal basis of each party's position, as we understand the response quoted above no real, much less sufficient explanation has been offered. Therefore, the parties' disputed claim settlement will not be approved.

IT IS SO ORDERED.

MARGARET L. HARRIS, Claimant
Robert K. Udziela, Claimant's Attorney
Brian Pocock, Defense Attorney
Steven Frank, Defense Attorney

WCB 80-02418 & 80-06627
April 30, 1982
Order on Review

Reviewed by Board Members McCallister and Barnes.

This is primarily a dispute between successive carriers for the same employer in an occupational disease case. The second carrier, United Pacific Insurance Co., seeks review of that part of Referee Mannix's order which concluded that United Pacific was responsible for the claim and awarded a \$1400 attorney fee to claimant. Aetna Insurance Co. and the employer seek review of that part of the Referee's order which assessed a 10% penalty for unreasonable delay in claim processing and payment of interim compensation. The claimant has not requested Board review and has not submitted a brief herein.

The Board affirms and adopts the Referee's Order subject to the following comments.

Claimant was employed by North's Chuckwagon Restaurant (apparently owned by Lane Restaurant Co.) as a salad chef. In that capacity, prior to August or September of 1979, claimant was required to regularly lift 25-pound containers of salad. About that time, employer instituted a \$1.99 special, and the increasing demand for salad required claimant to prepare and carry salads in 50-pound containers. Claimant soon began to experience low back and left leg pain and numbness. She first sought medical care in December, 1979, and when conservative treatment failed to resolve the pain and numbness, claimant was hospitalized on January 21, 1980. Claimant never fully recovered from the impairment and apparently is now medically stationary with a 20-pound lifting limitation. Effective January 1, 1980, employer changed carriers from Aetna Insurance Co. to United Pacific Insurance Co.

The Referee concluded that claimant's condition more nearly fit the definition of an occupational disease rather than an industrial injury. Neither party has challenged that characterization, and on the facts of this case we decline to reach a different conclusion.

The Referee further concluded that pursuant to Mathis v. SAIF, 10 Or App 139 (1972), Davidson Baking v. Industrial Indemnity, 20 Or App 508 (1975), and Inkley v. Forest Fiber Products, 288 Or 377 (1980), responsibility for the claim should be placed on the carrier on the risk at the time of the last exposure which could have contributed to the condition, which is the same carrier on the risk when claimant became disabled (United Pacific). The Board agrees.

We recognize that this case presents one of the strongest situations for not applying the Mathis-Inkley rule in that: (1) Unlike many diseases, the time period of onset of claimant's condition is readily identifiable; (2) The medical evidence establishes a medical probability that the underlying pathology was present at the time the first carrier was on the risk; and (3) After December of 1979, claimant probably was experiencing only symptoms of the

condition. Nevertheless, the holdings of Mathis and Inkley are clear, and one rationale of these cases seems to be that while individual cases may yield unfair results, in the aggregate claims will equal out.

In view of our affirmance of the Referee's assignment of responsibility to the second carrier, it is unnecessary to decide whether the Referee erred in denying Aetna's motion to compel claimant to submit to an independent medical examination or postpone the hearing.

With respect to the penalty issue, the Referee assessed a penalty because Aetna failed to concede compensability until opening argument at the hearing, when the relevant medical evidence was available to Aetna at the time of its denial. Aetna contends that since the claimant has the burden of proving entitlement to benefits, it has the right to deny a claim regardless of the strength of the evidence showing compensability, and require the claimant to put on her case. While that may be the rule in criminal and civil cases generally, workers compensation law provides otherwise. See Edward M. Anheluk, 34 Van Natta 205 (1982); ORS 656.262(9) and 656.382(1). Considering the medical evidence as a whole, it does not admit of any reasonable conclusion but that the claim is and was compensable. Aetna's failure to concede compensability until the hearing was unreasonable.

Claimant was demonstrably harmed by Aetna's delay in conceding compensability in that had compensability been conceded earlier, the only issue would have been responsibility as between Aetna and United Pacific. Clearly, then, an ORS 656.307 order would have been appropriate. By hiding behind its unsupported and unsupported denial of compensability, Aetna was able to avoid the risk of an order designating it as the paying agent, and claimant was denied compensation benefits to which she was entitled.

ORDER

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

VERNON W. HUGHES, Claimant
Jeff Mutnick, Claimant's Attorney
Bruce Posey, Defense Attorney

WCB 79-09361
April 30, 1982
Order on Review

Reviewed by Board Members Barnes and McCallister.

The self-insured employer seeks Board review of Referee Williams' order which found that claimant's compensable hearing loss was binaural rather than limited to his left ear, awarded 31.68° for 16.5% binaural hearing loss and awarded 15% unscheduled permanent partial disability on account of claimant's tinnitus condition. The issues are: (1) whether this accepted hearing loss claim and the resulting permanent disability award should be limited to claimant's left ear; (2) in any event, the amount of permanent disability; and (3) whether claimant has suffered any loss of wage earning capacity because of his tinnitus condition.

Claimant worked as a cable splicer for the telephone company which required him to use a 20,000 cycle tone headset during about three months in 1970. That equipment was supposed to produce an inaudible tone, but it was apparently malfunctioning and produced an audible tone about 30 to 60 times louder than upper OSHA safety limits. Claimant saw a doctor in 1970 who documented some hearing loss. It was not, however, until 1978 that claimant made a workers compensation claim. Despite a possible timeliness defense, the employer accepted the claim and processed it to a Determination Order, dated September 20, 1979 which awarded claimant 1.5° for 2.5% left ear hearing loss.

I

It is agreed that claimant's 1970 use of the tone headset is a major contributing cause of his hearing loss in at least his left ear. Whether his right ear hearing loss is also compensable depends on resolution of some major inconsistencies in the evidence about claimant's 1970 use of that headset.

The 801 form claimant executed in 1978 refers only to "loss of hearing...left ear." Dr. Camp's December 27, 1978 report is capable of two interpretations: (1) that claimant used the headset 90% of the time while working, always in his left ear; or (2) that claimant used the headset 90% of the time in his left ear and 10% of the time in his right ear. Dr. Myers' March 28, 1979 report refers only to claimant's use of the headset in his left ear. Obviously, the statements of Drs. Camp and Myers had to be based on information from some source; the only possible source was the history they obtained from claimant.-

Claimant testified at the hearing that he used the headset about half the time in his left ear and about half the time in his right ear. The Referee found claimant to be "an absolutely credible witness."

Ordinarily, we give great deference to a Referee's credibility finding. Here, however, the Referee's credibility finding does not advance the decisional calculus. Claimant has presented different versions of what happened in 1970 on his 801 claim form, to Dr. Camp, to Dr. Myers and at the hearing. It is impossible for claimant to have been "absolutely credible" in all four contexts. We do not imply there was any deliberate misstatement; we only note that there can obviously be memory problems when a claim is asserted long after most statutes of limitations applicable in the judicial system would have run.

Considering all the evidence, we have sufficient doubts which prevent finding that claimant sustained his burden of proving more than he claimed on the 801 form he executed, i.e., proving compensable binaural hearing after only claiming left ear hearing loss. In so concluding, we have considered the opinion of Dr. Johnson, who has a Ph.D., not a medical degree. To the limited extent, if at all, the question of what claimant was doing in 1970 turns on medical evidence, we are more persuaded by the opinions of Drs. Camp and Myers.

II

The extent of disability issue becomes easier once it is determined that only the left ear hearing loss has been proven to be compensable.

All doctors generally agree that claimant's hearing loss is due in part to hereditary factors and presbycusis. The Evaluation Division relied on Dr. Myers' March 28, 1979 report stating that: (1) claimant had 22.75% hearing loss in his left ear; (2) claimant had 20.25% hearing loss in his right ear; (3) the difference being 2.5% greater hearing loss in the left ear; (4) since there had been no noteworthy right ear industrial noise exposure (per the above discussion of claimant's 1970 use of the malfunctioning headset), the left ear compensable hearing loss must be the 2.5% difference, with the rest of the hearing loss being due to hereditary factors and presbycusis and thus noncompensable. Permanent disability for hearing loss is based on the best available audiometric report. OAR 436-65-565(3); see Mike Toskovich, 34 Van Natta 125 (1982). Applying that rule here, we find Dr. Myers' approach to be logical and the most consistent with the requirements of the rule. We will reinstate the Determination Order.

III

Tinnitus is a condition characterized by a subjective sensation of hearing a ringing, buzzing, roaring, etc., sound. It is an entirely subjective complaint that cannot be objectively verified. Little is known about causation, although some data implicates tobacco and caffeine ingestion as probable causes.

The self-insured employer's opening brief could be interpreted as meaning it denies the compensability of claimant's tinnitus condition, a position for which a fairly strong argument can be made.

The employer's reply brief, however, explicitly states it is not contesting compensability, only whether any award of permanent disability is warranted. We assume this indirect acceptance of responsibility for claimant's tinnitus condition means the employer will continue to pay for claimant's tinnitus masker hearing aid (discussed below). The employer is thus to be complimented for two acts of compassion in this case, both failure to raise a timeliness defense and acceptance of the tinnitus condition.

The question remains of whether the tinnitus condition has produced any loss of wage earning capacity. It clearly has not. The Referee's contrary finding either ignored or overlooked the following uncontroverted evidence.

Claimant's tinnitus does not contribute to his hearing loss; it is a separate and distinct condition. Any problems that the tinnitus condition might produce, such as nervousness, irritability, difficulty sleeping, etc., can be completely alleviated by wearing a tinnitus masker hearing aid. Claimant has been furnished such a device. That he chooses not to wear it constantly does not create a compensable loss of wage earning capacity. Most significantly, since claimant's noise exposure in 1970, that was allegedly the genesis of the tinnitus condition, claimant has worked at his regular occupation without apparent difficulty for almost 12 years. We find no loss of wage earning capacity.

ORDER

The Referee's order dated July 8, 1981 is reversed.

It is recognized that claimant has a compensable left ear hearing loss and a compensable tinnitus condition.

The Determination Order dated September 20, 1979 awarding claimant 1.5° for 2.5% left ear hearing loss is reinstated and affirmed.

ROBERT L. KORTER, Claimant
Galton, Popick & Scott, Claimant's Attorneys
Gearin, Landis & Aebi, Defense Attorneys

WCB 78-04179
April 30, 1982
Order on Remand

This case is before us again on remand from the Court of Appeals for reconsideration in light of James v. SAIF, 290 Or 343 (1981). The James test has since been further refined in SAIF v. Gygi, 55 Or App 570 (1982). Under Gygi, the issue is thus whether claimant's work environment was the major cause of his psychological condition.

The Court of Appeals has already catalogued all of the circumstances of claimant's work experience that allegedly caused or contributed to his psychological condition diagnosed as "acute adjustment reaction of adult life." Korter v. EBI Companies, Inc., 46 Or App 43, 45-49 (1980). Based on the Court's factual findings, with which we substantially agree, the Court has already concluded that claimant "clearly experienced anxiety and depression as a result of a specific identifiable condition in his work environment." 46 Or App at 51.

We find nothing in the subsequent James and Gygi decisions that leaves any room for a different conclusion. Indeed, it is now difficult to understand the basis of the remand from the Court of Appeals in this case.

ORDER

The Board's Order on Review dated September 19, 1979 is vacated in part. The denial by the employer and its carrier dated June 16, 1978 is set aside and this claim is remanded to the carrier for acceptance and payment of benefits. The balance of the Order on Review is readopted and republished.

Board Member McCallister dissenting:

I cannot join the majority in its apparent belief that the remand of the Court of Appeals was a meaningless act. I instead assume the Court's remand contemplated that the Board would exercise independent judgment, not bound by any of the factual analysis in the Court's opinion at 46 Or App 43.

Based on my own independent factual analysis, I would adhere to all conclusions reached in the Board's prior Order on Review dated September 19, 1979.

BUD F. LACEY, Claimant
Robert Udziela, Claimant's Attorney
Frank Vizzini, Defense Attorney

WCB 81-02213
April 30, 1982
Order on Review

Reviewed by Board Members McCallister and Barnes.

The claimant seeks Board review of Referee Leahy's order which affirmed the carrier's denials of compensability of a rash condition and remanded claimant's low back claim to the carrier to process as an aggravation commencing on September 18, 1981. Claimant contends that his rash condition is a compensable consequence of his low back injury of April 3, 1980 and that the aggravation claim should have commenced compensation for temporary total disability as of January 9, 1981.

The facts as recited by the Referee are adopted as our own. On the issue of the compensability of the rash condition, we affirm the Referee's conclusion.

In January, 1981 claimant's main problem was his noncompensable rash condition for which he sought medical treatment. On January 30, 1981 Dr. Mason examined claimant for complaints of low back pain. Dr. Mason indicated he was awaiting the medical reports from Dr. Olmscheid. By February, 1981 claimant's rash condition again became the overriding problem. Claimant was examined by the Orthopaedic Consultants on February 26, 1981 and his chief complaint was his rash condition. The physicians felt that claimant's condition was not stationary until Dr. Mason concluded his investigation regarding claimant's back condition.

By a chart note of March 20, 1981 Dr. Mason recommended that claimant have a myelogram. Subsequently, claimant suffered a non-related myocardial infarction and the myelogram was delayed until June 1, 1981. Surgery, a laminectomy, was finally carried out on September 3, 1981.

The Referee found that "because of the uncertainties time loss shall begin as of the date of that letter September 18, 1981." The letter referred to by the Referee is the medical report from Dr. Mason which indicated claimant was hospitalized and underwent the laminectomy on September 3, 1981 and was unable to work then due to his April, 1980 injury.

Based on the evidence before us we find that claimant is entitled to compensation for temporary total disability on his aggravation claim commencing June 1, 1981, the date of his hospitalization for the myelogram. Claimant's inability to work between January, 1981 and June, 1981 was due to the noncompensable rash condition and the subsequent noncompensable myocardial infarction.

The Referee allowed claimant's attorney a fee of 25% of the increased compensation made payable by his order, not to exceed \$2,000. OAR 438-47-020 provides that when a claimant requests a hearing on a denied claim, that the Referee shall allow a reasonable attorney fee not to exceed \$3,000, to be paid by the carrier. Since this was a hearing on a denied claim, at least with regard to claimant's back aggravation, a carrier paid attorney fee should have been allowed. We, therefore, correct that portion of the Referee's order, and find claimant's attorney entitled to an employer paid fee in the amount of \$1,000.

ORDER

The Referee's order dated October 7, 1981 is modified.

Claimant's back claim is remanded to the employer/carrier with compensation for temporary total disability commencing June 1, 1981 and until closure is authorized pursuant to ORS 656.268.

Claimant's attorney is awarded an employer paid attorney's fee of \$1,000 for services in overcoming the denial. This is in lieu of and not in addition to the award made by the Referee. Claimant's attorney is additionally awarded 25% of the increased compensation made payable by this order, not to exceed \$750.

The remainder of the Referee's order is affirmed.

CHARLES LIVESAY, Claimant
Robert Gardner, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 79-10108
April 30, 1982
Order on Remand

On review of the Board's Order dated May 7, 1981 the Court of Appeals reversed and remanded to the Board with instructions to make an award of permanent total disability.

Now, therefore, the above-noted Board Order is vacated, and claimant is awarded permanent total disability benefits, effective September 30, 1980.

Claimant's counsel has been awarded an attorney's fee by the Court's final order; accordingly, no further allowance of a fee for services performed before the Court of Appeals is in order.

IT IS SO ORDERED.

VINCENT A. MADDALONE, Claimant
C. Rodney Kirkpatrick, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-10282
April 30, 1982
Order on Review

Reviewed by the Board en banc.

The claimant seeks Board review of Referee James' order which granted claimant an award of 80% unscheduled low back disability. Claimant contends he is entitled to an award of permanent total disability.

The claimant, 57 years of age, has been employed almost his entire work career as a butcher. On January 2, 1979 he tripped over a hose and injured his low back. The initial diagnosis was low back strain. In April, 1979 Dr. Utterback found claimant's condition medically stationary with restrictions of no prolonged standing, walking or any lifting over 30 pounds. The final diagnosis was degenerative arthritis with chronic mechanical lumbar strain.

The claim was first closed by a Determination Order of May 9, 1979 which granted claimant 10% unscheduled disability.

On May 30, 1979 claimant underwent a myelogram. Subsequently he was referred to Dr. Hill who performed a second myelogram on August 2, 1979 which revealed marked defects at L4-5 with a large bulge. On August 16, 1979 claimant underwent a laminectomy and discectomy, L4-5.

Vocational Rehabilitation personnel became involved with claimant and provided tutoring services with the hope he would qualify for a GED. They actively worked with claimant and he actively cooperated until he was granted his Social Security Disability.

Claimant was examined by the Orthopaedic Consultants on November 15, 1979. They felt that the majority of claimant's problem was secondary to osteoarthritis. He was, however, precluded from his regular occupation as a butcher but it was felt he could perform very light or sedentary work. Impairment, related only to this injury, was rated as moderate.

A second Determination Order of January 4, 1980 granted an additional award of 50% for a total award of 60% unscheduled disability.

The Referee found claimant had not satisfied the requirement of ORS 656.206(3) by failing to establish that he was willing to seek regular and gainful employment. He found that claimant had, in fact, retired. He found claimant was not permanently totally disabled but granted him 80% unscheduled disability.

The Board modifies the Referee's order and finds claimant is permanently and totally disabled. Claimant has a fourth grade Italian education with some community college course work but no high school equivalency certificate (GED). He speaks English well enough but does not read or write it well. Claimant's entire work history, except for farm work in Italy in his youth, has been in

the butchering trade. Claimant cannot return now to the butchering trade. Claimant cooperatively worked with vocational rehabilitation personnel but that effort was without favorable results. He finally requested and received Social Security Disability.

The Court of Appeals in Butcher v. SAIF, 45 Or App 313 (1980) stated:

"...it would be futile for claimant to attempt to become employed. We do not believe that the legislature intended that every injured worker, regardless of capacity to do so, must demonstrate an effort to become employed even where it is clear such an effort would be in vain."

ORS 656.206(3) requires a claimant to prove that he has made reasonable efforts to seek employment in order to establish that he is permanently and totally disabled. The Court of Appeals in Butcher created an exception to ORS 656.206(3). The Board in Dock Perkins, 31 Van Natta 180 (1981) addressed the scope of the Butcher decision:

"If the Butcher exception to the ORS 656.206(3) seek-work requirement is only applicable when the medical evidence shows total disability, claimant is not totally disabled. If the Butcher exception to the ORS 656.206(3) seek-work requirement applies when the medical evidence in combination with social/vocational evidence shows total disability, the Board agrees with the Referee that claimant is totally disabled.

"The Board, therefore, concludes that social/vocational factors are properly part of the Butcher calculus, . . ."

We find this case is not unlike Perkins. Claimant has an extremely limited education and is basically functionally illiterate in English. He has no transferable job skills and his IQ is at the low end of average. Claimant's impairment from this industrial injury alone is moderate but severe when also considering his pre-existing osteoarthritis. Claimant willingly and cooperatively worked with vocational rehabilitation personnel who really had doubts of finding claimant any gainful employment.

We conclude that claimant's social/vocational deficiencies, taken together with his age, lack of education, mental capacity and physical impairment precludes him from any type of suitable and gainful employment. Claimant is permanently and totally disabled.

ORDER

The Referee's order dated August 7, 1981 is modified. Claimant is hereby granted an award of permanent total disability commencing the date of the hearing, July 15, 1981. Claimant's attorney is granted as a reasonable attorney's fee, 25% of the increased compensation granted by this order not to exceed \$1,000.

FRANK MASON, Claimant
Stephen M. King, Claimant's Attorney
Marvin Nepom, Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-02026
April 30, 1982
Order on Review

Reviewed by Board Members McCallister and Barnes.

The SAIF Corporation seeks Board review of Referee Ail's order which found claimant permanently and totally disabled as of December 27, 1979. SAIF contends that claimant can still perform sedentary work and, therefore, the previous Determination Orders that awarded a total of 256° for 80% of the maximum 320° permanent partial disability compensation are adequate. Further, SAIF contends that claimant has failed to seek work within his ability and, therefore, is precluded from receiving an award of permanent total disability compensation due to the requirements of ORS 656.206(3).

Claimant is a 63-year-old high school graduate who has worked as a machinist for this employer since 1955. In 1968, claimant sustained a low back strain which required a laminectomy and disc removal at the L5-S1 level. That claim closed in 1969 with an award of 20% unscheduled disability compensation. The claim was reopened February 1973 through December 1974 for payment of temporary total disability compensation.

Underlying this low back condition is pre-existing degenerative spinal arthritis which has become severe in recent years. This condition is unrelated to the back injury. Claimant presently has limited ranges of motion in his lower back and chronic low back pain which is aggravated by standing too much, walking over ten minutes and sitting over twenty minutes. He has some numbness and tingling in the left leg.

In March 1975 claimant suffered a second compensable injury which caused a torn right shoulder rotator cuff. Arthrograms performed in March 1975 and December 1975 revealed the torn rotator cuff. In January 1976 claimant underwent an operation to repair the tear. The shoulder claim was closed in 1977 with an award of 40% unscheduled disability compensation and temporary total disability compensation from March 1975 through March 1977. The claim was reopened September 1977 through November 1977 for occupational and physical therapy at the Callahan Center and for payment of temporary total disability compensation.

A Determination Order of November 1977 awarded temporary disability compensation but no additional permanent disability compensation. A hearing on the back and shoulder claims resulted in 20% unscheduled disability award for claimant's shoulder by order of May 30, 1978. No additional permanent disability was awarded for claimant's back. Claimant then had a total award of 80% unscheduled permanent disability.

The shoulder claim was reopened in June 1978 through December 1979 for treatment and additional surgical repair of the torn right rotator cuff. No additional permanent disability was awarded in a Determination Order dated February 26, 1980. A hearing on the Determination Order resulted in the award of permanent total disability here in question.

Claimant presently has atrophy in his right shoulder, severely limited ranges of motion in his shoulder and one-third the grip strength in his right hand as compared to the left. He experiences disabling pain in his shoulder whenever his arm is moved from a position of relaxation lying in his lap. He has some numbness in his right hand.

Claimant also has considerable back impairment. However, the medical reports indicate that the majority of his recently increased impairment is the result of his progressive degenerative spinal arthritis.

ORS 656.206(1)(a) allows preexisting disability to be considered when determining whether a claimant is permanently and totally disabled. Also, the general rule is that the extent of disability is rated as it exists at the time of the hearing. However, when the preexisting disability is of a progressively worsening nature, we question whether we are to keep adding in that ever-increasing level of impairment past the original determination of disability to be considered in later aggravation claims.

We decide that when a claimant is affected by a pre-existing condition that continues to worsen after the date of the compensable injury, and that worsening is not related to the compensable injury, it is appropriate to consider the state of the claimant's pre-existing condition only as it existed at the time of the most recent compensable injury, when determining whether a claimant is permanently and totally disabled.

In Emmons v. SAIF, 34 Or App 603 (1978), the claimant suffered a disabling stroke subsequent to a compensable back injury, but prior to the hearing. The stroke was unrelated to the back injury. The court held that, ordinarily, disability would be determined at the time of the hearing, but that the facts presented an exception to that approach: ". . . . [U]nlike a pre-existing disability, see ORS 656.206(1)(a), a subsequent non-compensable injury is not relevant in determining the extent of the worker's permanent disability." Emmons v. SAIF, 34 Or App at 605.

By analogy, we find that a subsequent worsening of a pre-existing noncompensable disability cannot be used to determine whether a claimant is permanently and totally disabled.

This rule recognizes that an employer takes an employee as it finds him and, therefore, is required to pay for preexisting disabilities when, in combination with an on-the-job injury, the worker becomes totally disabled. Also, when a preexisting disability is subsequently aggravated because of work conditions, the employer is liable for a resulting total disability. But when the preexisting disability subsequently worsens by natural progression not caused by work and this worsening alone causes the total disability, the employer does not become liable for claimant's total disability but remains liable only for the compensable portion of the total disability.

We turn to an application of this rule to this case. Claimant's most recent compensable injury occurred in March, 1975. As of October 1973 Dr. Berselli, an orthopaedic surgeon, described claimant's back discomfort as moderate. He stated, "My prognosis is that the patient will have persistent back pain for an undetermined period of time."

As of May, 1974 Dr. Berselli described claimant's lower back as stiff, but with no terribly severe pain. Claimant had moderate limitation (30%) in all directions in the lumbar spinal region. This condition had been unchanged over the past year. No surgery was advised although conservative treatment was continued.

As of January 1975, two months before claimant's most recent compensable injury, Dr. Berselli stated that claimant's condition was totally unchanged since his last examination which found the claimant's back disability to be moderate. He noted localized osteoarthritis at the L4-5 and L5-S1 levels and that in four months they would look to see if fusion of the arthritic area would be beneficial. He recommended no surgery as of that date. Claimant was then working full time at his machinist job, but has not worked since his March 1975 injury.

Had it been shown that the subsequent worsening of claimant's degenerative arthritis was caused by his work, then we would have included that subsequent worsening in our calculation of disability. But, in January 1980, the Orthopaedic Consultants reported:

"With regard to his lumbar spine, we would describe the total disability as being moderate and due to the old injury as being mildly moderate. It is also to be realized that this man has progressive degenerative arthritis of the lumbar spine which is ongoing and that the condition will worsen with the passage of years. Most of these changes are rather far removed from the original laminectomy between L5 and S1 and are not related to the old back injury -- time being the main factor."

On the other hand, there is one medical statement that the arthritic changes might be related to the 1968 back injury. In a deposition in November 1980 Dr. Burroughs said that it was possible that the arthritic changes were related to the original injury and surgery of 1968, but that he could not state in terms of medical probability that there was a relationship. Therefore, like the Orthopaedic Consultants, we are persuaded that the recent worsening of the arthritis was not due to the old back injury and surgery.

Using OAR 436-65-600, et seq, the Dictionary of Occupational Titles machinist classification 600.280-022 with an assigned SVP of 7, GED of 4 and STR of 3, a residual functional capacity of "sedentary," and taking into consideration claimant's shoulder injury, back injury, and all social and vocational factors, we find that claimant's disability is 80%. Claimant's prior total award of 256° unscheduled permanent partial disability (80% of the maximum allowed) will be reinstated. That figure includes a 20% award previously awarded for his back injury and surgery and 60% award for his shoulder injury and surgery. It does not include any disability for the preexisting degenerative arthritis.

ORDER

The Referee's order dated February 6, 1981 is reversed. The prior awards totalling 256° unscheduled permanent partial disability compensation (80% of the maximum) are reinstated.

ROBERT M. MORRIS, Claimant
Dan O'Leary, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-00077 & 80-11614
April 30, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

The SAIF Corporation seeks Board review of Referee Leahy's order which awarded claimant a total of 15% permanent partial unscheduled disability on two separate claims. SAIF contends there is no evidence that claimant suffered any permanent impairment as a result of the injuries to his low back.

The Referee found: "In both cases there is the suggestion, corroborated by claimant's testimony, of minimal residuals." SAIF's argument focuses primarily on the Referee's use of the word, "suggesting," contending a suggestion of a fact is not proof of that fact by a preponderance of the evidence.

We understand the Referee's wording to mean that there is evidence which the Referee found cogent that claimant did suffer permanent impairment as a result of his low back injuries. As so understood, we affirm and adopt the Referee's order.

ORDER

The Referee's order dated June 12, 1981 is affirmed. Claimant's attorney is awarded \$400 as a reasonable attorney fee, payable by the SAIF Corporation.

LINDA O. MOSS, Claimant
Richard A. Sly, Claimant's Attorney
Stephen R. Frank, Defense Attorney

WCB 80-04993
April 30, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

The claimant seeks Board review of Referee Leahy's order which dismissed claimant's request for hearing on the grounds of late filing with no good cause shown.

We affirm the Referee's conclusion that no good cause was shown but for a different reason. We conclude that no good cause was shown as claimant's attorney apparently had enough mental ability to prepare and have claimant sign the request for hearing and his failure to then mail the document was due to negligence on his part. See W. Leonard Bradbury, 32 Van Natta 246 (1981).

ORDER

The Referee's order dated October 21, 1981 is affirmed.

THOMAS E. MORRISON, Claimant
David Hittle, Claimant's Attorney
Roger Warren, Defense Attorney

WCB 81-00262
April 30, 1982
Order on Review

Reviewed by Board Members McCallister and Barnes.

Claimant seeks Board review of Referee Mannix's order which reduced the Determination Order award from 15% unscheduled low back disability to 5%. Claimant contends he is entitled to an award greater than that granted by the Determination Order.

Claimant sustained a compensable injury on March 7, 1980 to his low back. The sole issue is the extent of his resulting disability. The claimant's credibility is seriously in question. In essence, claimant and his two witnesses testified to a large amount of low back pain and limitations due to this pain. Five witnesses for the defense testified to claimant's numerous strenuous activities, "faking" an examination with the Orthopaedic Consultants, and his anger at his employer and desire to "milk" the system. The Referee found these defense witnesses to be credible and determined the claimant had ". . . consciously sought to exaggerate the extent of his disability."

We do not intend to substitute our finding on credibility for that of the Referee. However, even considering claimant's lack of credibility, we conclude the award granted by the Referee is inadequate. The medical consensus is that claimant does have some permanent impairment, although minimal. The Orthopaedic Consultants listed objective findings equal to 10% loss of function of the whole man. Dr. Mahoney agreed with their findings. Because Dr. Rosenbaum found very few objective findings, and because there is strong evidence that the Orthopaedic Consultants' exam was not entirely accurate, we find claimant's impairment is in the range of 5%.

Impairment alone is not the basis for an award for unscheduled disability. Claimant is 42 years old, has an eleventh grade education, has achieved a GED and has taken one semester of classes at a community college. Claimant has been advised to restrict his activities to some extent and, giving him every benefit, we conclude he is limited to medium work. A thorough consideration of claimant's case in light of OAR 436-65-600, et. seq., reveals that he has 36% of the general labor market open to him. When all the factors are combined, we conclude the claimant would be properly compensated with an award of 48° for 15% unscheduled low back disability.

ORDER

The Referee's order dated September 21, 1981 is reversed.

The Determination Order of December 15, 1980 is reinstated and affirmed.

ALBERT L. NELSON, Claimant
Kenneth D. Peterson, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-09749
April 30, 1982
Order on Review

Reviewed by Board Members Barnes and McCallister.

The SAIF Corporation seeks Board review of Referee Mannix's order which overturned its denial of aggravation and remanded claimant's claim to it for acceptance and the payment of compensation and further ordered it to pay claimant compensation for temporary total disability, as interim compensation, from August 29, 1980 through September 14, 1980 and from October 1, 1980 through October 15, 1980 and an additional sum of 10% of this amount as and for a penalty for SAIF's unreasonable resistance to the payment of compensation. Claimant's attorney was granted \$150 as and for a fee for SAIF's unreasonable conduct.

The SAIF contends that no aggravation of claimant's condition has occurred and further that it is not responsible for interim compensation, a penalty or attorney fee.

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

On the issue of whether claimant's condition related to his February, 1976 industrial injury has worsened, we reverse.

As the Referee noted, and as the entire medical record demonstrates, there is no objective medical evidence of a worsening of claimant's condition since the last award or arrangement of compensation. Claimant's treating physician, Dr. Buck, was unable to find any objective evidence of a worsening in early 1979. Claimant was seen by Dr. Rosenow at the Mayo Clinic in April, 1979. Dr. Rosenow indicated that claimant basically needed reassurance that he suffered from a non-serious injury. Claimant was seen thereafter by Dr. Bowen who found mild chondritis with marked psychogenic overlay. Dr. Bowen stated that it was his experience that "...these people eventually either forget to complain about the discomfort or it does improve with time." Dr. Bowen felt that claimant's condition had not changed since 1976 for better or worse. Dr. Buck concurred with Dr. Bowen's opinion. Dr. King examined claimant on September 30, 1980. Dr. King reported that he found nothing to warrant opening of the claim, and no medical treatment was available which would alter claimant's condition. Dr. King opined that claimant would never be rid of the psychogenic component of his condition.

In February, 1981 claimant was examined by Dr. Holland, a psychiatrist. Dr. Holland felt it quite evident that claimant was pursuing permanent total disability benefits, so that his retirement income would be assured. Dr. Holland stated that claimant has manifested dependent personality traits throughout his life which make the possibility of compensation appealing to him. In other words, Dr. Holland is simply stating that claimant would prefer to receive compensation benefits rather than to continue working.

The Referee stated that the medical and psychological evidence show that the psychogenic component represents the effect of claimant's injury upon his personality. We interpret Dr. Holland's report differently. Dr. Holland seems to be stating that it is the effect of receiving compensation, not the injury, which has had an effect on the claimant. We also disagree with the Referee's diagnosis that the psychological difficulties (if claimant is indeed experiencing any) caused claimant to focus on his pain, resulting in a greater subjective feeling of pain, causing him to turn to seek additional compensation. That particular diagnosis is nowhere to be found in any of the medical reports in evidence. Dr. Holland certainly does not go so far as to make this diagnosis. He merely finds that the "industrial situation" (emphasis added), caused claimant's dependant personality traits to focus on the compensation aspect of the situation.

The strongest medical evidence to support claimant's contention is that of Dr. Buck in September, 1980, where he indicates that, according to claimant, his condition has significantly worsened since 1975. We find this to be insufficient in view of the fact that Dr. Buck is unable to find any objective evidence whatsoever of any worsening of claimant's condition. The claimant's personal opinion that his condition has worsened is some evidence, but only scant evidence. That is one of the reasons we find this case to be distinguishable from Pumpelly v. SAIF, 50 Or App 303 (1981). In that unusual case, claimant had not presented any objective medical evidence to establish a worsening of her condition. In this case, not only has claimant also failed to present any objective medical evidence of worsening, claimant was actually examined by numerous physicians who have presented evidence that claimant's condition has not worsened. These adverse reports make it all the more necessary for the claimant to come forward with objective evidence of a worsening of his condition.

The Referee noted six elements which convinced him that claimant had proven a worsening by a preponderance of the evidence. The first factor was claimant's complaints of increased pain. As noted previously, these complaints have absolutely no objective basis. The second and third factors were claimant's excellent work history and decision to leave work due to his pain. Dr. Holland stated that claimant told him he had to "get something someplace" and he was looking for monthly compensation until he could obtain Social Security benefits. Claimant apparently had intentions of retiring in Arizona, as noted by Dr. Holland. The fourth factor noted by the Referee related to Dr. Buck's acceptance of claimant's complaints, who then opines a worsening has occurred. We have already dealt with this factor above. The Referee's fifth factor, no previous psychological problem, seems to go more toward proving aggravation of his psychological condition, which was not in issue. The sixth factor noted by the Referee was medical verification of a psychogenic component explaining claimant's pain reaction and discounting the possibility of malingering. On the contrary, Dr. Holland indicates that underlying psychopathology of the claimant is conducive to a desire to remain on compensation.

Contrary to the Referee's opinion, we find that it is necessary under the circumstances of this case for the claimant to establish a worsening of his condition with objective medical evidence. Having failed to do so, the denial of his claim for aggravation must be affirmed.

SAIF also contends that the Referee was unjustified in ordering it to pay interim compensation for the periods of August 30, 1980 through September 14, 1980, and from October 1, 1980 to October 15, 1980. With regard to the period from August 30, to September 14, 1980, we agree with SAIF. Dr. Buck's report dated September 26, 1980 indicates that claimant had not been able to work since August 29, 1980. Based on Silsby v. SAIF, 39 Or App 555 (1979), the Referee found that SAIF was required to pay time loss benefits to the claimant from the date of his disability rather than from the date of notice of a medically verified inability to work. Since we have found the claimant's aggravation claim to be noncompensable, we reverse that portion of the Referee's order. Kosanke v. SAIF, 41 Or App 17 (1979), held that if a claim for aggravation is not allowed, all claimant is entitled to under ORS 656.273(6), is payment from 14 days after notice, and not from the date of disability. SAIF's conduct in not paying compensation for this period of time was not unreasonable, and therefore SAIF is not subject to a penalty.

With regard to the issue of time loss payments from October 1, to October 15, 1980, and the penalty and attorney fee of \$150 assessed by the Referee, we affirm.

ORDER

The Referee's order dated May 1, 1981 is affirmed in part and reversed in part. That portion of the order which reversed the SAIF Corporation's October 16, 1980 denial is reversed, and that denial is reinstated and affirmed.

That portion of the order which allowed claimant temporary total disability compensation from August 29, 1980 through September 14, 1980 and assessed a 10% penalty on such compensation is reversed.

The attorney fee, based on the denial, of \$850 is reversed.

The balance of the Referee's order is affirmed and claimant's attorney is granted 25% of the temporary total disability due claimant by the Referee's order, from October 1, 1980 to October 15, 1980.

RAYMOND ORSBORN, Claimant
Gerald Doblje, Claimant's Attorney
Ridgway Foley, Defense Attorney

WCB 81-03928
April 30, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

The employer seeks Board review of that portion of Referee Daron's order which granted claimant an award of permanent total disability effective April 17, 1981. The employer contends that the Referee applied an improper legal standard.

Claimant was injured in July of 1978 while working as a barker operator at the veneer mill in Valsetz, Oregon. The accident produced serious injuries primarily to claimant's feet and lower legs, with some knee involvement. A number of surgeries followed. Ultimately, a Determination Order awarded claimant 30% loss of the right foot and 30% loss of the left foot. Claimant requested a hearing.

Valsetz is described in the record as either a one-company town or merely a company town. The parties appear to agree, and in any event we find, that there is no work available to claimant at the veneer mill in Valsetz.

The Referee interpreted Barnhardt v. Louisiana Pacific Corp., 50 Or App 329 (1981), and Hampton v. SAIF, 23 Or App 74 (1975), as standing for the proposition that a claimant seeking permanent total disability need only seek work in the community where he lives or is injured. The Referee found: "Claimant is permanently incapacitated from regularly performing any gainful and suitable occupation in the Valsetz area where he lived at the time of his injury. . . ." The combination of the Referee's interpretation of Barnhardt and Hampton with his finding about available work in Valsetz produced the permanent total disability award the Referee granted.

The employer takes rather violent exception to the Referee's reading of Barnhardt and Hampton. This again presents the problem of interpreting whether the decisions of the Court of Appeals are based on factual findings, which would not be binding on us, or are based on legal conclusions, which would be binding on us. We previously discussed this problem in Joe McKenzie, 31 Van Natta 101 (1981), modified on other grounds, 56 Or App 394 (1982):

"The Referee relied on Edwards v. SAIF, 30 Or App 21 (1977), for the proposition that a temporal connection is insufficient to prove causation. When appellate judicial review is de novo, there is always a problem in interpreting the appellate court's decision: Was it based on an issue of fact or on an issue of law? To illustrate, did the Court of Appeals intend to hold in Edwards that evidence of a direct temporal relationship is never, as a matter of law, sufficient to prove causation or, instead did the Court of

Appeals only intend to rule in Edwards that it found the evidence of temporal relationship in that case to be insufficient as a matter of fact? The Board adopts the latter interpretation of Edwards."

Hampton and Barnhardt present the same interpretation problem. In Hampton the Court only commented that the defense had failed to point "to any job which he can perform available to the claimant in the area where he lives." 23 Or App at 78 (emphasis added). In Barnhardt the Court stated: "We also note, as pointed out by the psychologist at DPD, claimant lives in an area where employment opportunities are limited." 51 Or App at 332 (emphasis added). Were these statements of the factual basis of the Court's decisions on de novo review or a legal holding that an injured worker's job search need not extend beyond the area where he lives?

Based on the context and content of the above-quoted passages, we believe them to have been more in the nature of factual comments. This conclusion is reinforced by the wording of the relevant statute, enacted after Hampton and after the facts giving rise to Barnhardt. 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."

We find it impossible to believe that the Court, deciding cases that arose before ORS 656.206(3) was enacted, intended to hold that "reasonable efforts" never need extend beyond the area where a worker lives, even if that area is the smallest one-employer community in the state, which Valsetz may well be.

Moreover, statutory terms like "reasonable efforts" are generally held to be for agency definition, not judicial definition. McPherson v. Employment Division, 285 Or 541 (1979). With that understanding of our authority, we take this opportunity to elaborate on ORS 656.206(3).

Reasonable efforts to obtain suitable employment means those efforts that a prudent person, not suffering from an industrial injury, would make to obtain or retain employment. As for the expected geographical range of a job search, there are two principal components. The first is the size of the community where the worker lives. The larger the community, presumably the more numerous and diverse are employment opportunities; conversely, jobs are likely more limited in smaller communities. It follows that "reasonable efforts" to obtain employment can include a willingness to relocate, at least for workers in smaller communities.

The second component of reasonable efforts would be the worker's job skills. Certain jobs are relatively commonplace; if a worker, by training and experience, could qualify for relatively ubiquitous jobs, a job search of modest geographic scope would be reasonable. Other jobs are much more specialized, even unique; if a worker, by training (or as is often the case, retraining) and

experience, could only qualify for relatively specialized jobs, a reasonable job search might have to be fairly extensive in geographic scope.

A recent situation that came to the Board's attention illustrates these concepts. A worker employed as a millwright in the Albany area was industrially injured and unable to return to that position because of permanent impairment. While recovering from his injury, the worker learned of an open position as a community college teacher in the Portland area, teaching millwright classes in a trades program. The injured worker happened to have all of the credentials needed to teach at the community college level. The worker was able to obtain the teaching job and moved to Portland.

Had he not obtained employment and relocated, and instead had been seeking a permanent total disability award, our "reasonable efforts to obtain employment" analysis would have been something like: Albany is a relatively smaller community; the job skills of a millwright are about average in specialization. Balancing these considerations, a reasonable job search would have extended beyond just the Albany area.

In sum, we agree with the employer's contention that the Referee's analysis cannot be sustained. It does not follow, however, that the Referee reached the incorrect result.

Claimant was 50 years old at the time of hearing. He has a ninth grade education. Almost all of his work experience is in heavy manual labor; he worked at the mill in Valsetz for more than 20 years before his 1978 injury.

The employer repeatedly argues that claimant is physically able to do sedentary work. Though serious, claimant's impairment only involves his legs. Claimant's doctor did express the belief that claimant could perform a sedentary "button pushing" job because "there are no limitations regarding his upper extremities." The flaw, we find, in this line of argument is that for more than two years after his 1978 accident claimant on several occasions attempted to return to his barker operator job; indeed, claimant's doctor thought claimant's efforts to return to that job were "heroic"; and that job was basically a sedentary job; but claimant was physically unable to perform it to his employer's satisfaction. The seek-work requirement of ORS 656.206(3) can be satisfied in a number of ways -- and we are satisfied that repeated and heroic but unsuccessful efforts to return to about the easiest job in a veneer mill amount to a reasonable effort to seek work. We further find that there is now no labor market, Valsetz or elsewhere, in which claimant can reasonably and realistically expect to be able to sell his services.

ORDER

The Referee's order dated July 31, 1981 is affirmed. Claimant's attorney is awarded \$750 for services rendered on this Board review, payable by the employer.

IVAN OUCHINNIKOV, Claimant
John Mayfield, Claimant's Attorney
John Unwin, Attorney

Claim CV 0082200
April 30, 1982
Order--Crime Victims Act

Reviewed by Board Members Barnes and Lewis.

This case arises under the Compensation of Crime Victims Act (ORS Chap. 147). The Department of Justice denied claimant compensation on the ground of late filing for benefits. The issue is whether claimant had good cause for filing after the six month filing period provided for under ORS 147.015(6)(a).

On June 20, 1978, claimant was severely beaten about the head by two assailants who were in the course of perpetrating a robbery and burglary. Claimant was hospitalized for approximately two weeks after the incident and suffers residual lapses in mental functioning as a result of the injuries sustained. Claimant was 76 years old at the time of the incident and was self-employed as a farmer in the Russian community near Woodburn. One of the assailants was apprehended in May, 1979, convicted, and sentenced on a date not specified in the record. No order of restitution was entered by the trial court. Claimant was not informed of the existence of the Criminal Injuries Compensation Account (hereinafter the "Fund") or his right to apply for benefits under the Victims Compensation Act until June 23, 1980. Within about two weeks after becoming informed of the Fund, claimant submitted an application for benefits, received by the Department of Justice on July 8, 1980. Claimant neither speaks nor understands the English language. The application alleges approximately \$1200 in unpaid medical bills and \$7840 in lost earnings. The Department of Justice in its original Order dated August 20, 1980 and in its Order on Reconsideration dated March 24, 1981 denied the claim on the ground that claimant failed to file within six months after the injuries were sustained or to show good cause for filing within an extended period of time.

ORS 147.015(6) provides as follows:

"A person is entitled to an award of compensation under ORS 147.005 to 147.365 if:

* * *

"(6) His application for an award of compensation under ORS 147.005 to 147.365 is filed with the department:

- (a) Within six months of the date of the injury to the victim; or
- (b) Within such further extension of time as the department for good cause shown, allows."

Unlike other legislation respecting time limits for filing complaints, claims, etc., ORS 147.015(6) does not have an outside limit for filing.

In denying the claim the Department said:

"While under normal circumstances lack of knowledge of the Fund might be considered a reasonably good excuse for not filing within the time period, there is also the question of whether or not the Fund has been prejudiced by the late filing. In this instance it would appear that the fact that the assailant has already been apprehended and tried and sentenced severely (sic) prejudices the Fund's right to receive court ordered restitution or in other ways effect a possible recovery of potential claim costs."

Claimant contends, first, that good cause exists for the late filing because of the claimant's age and the effect that the injuries had on his mental capacity, his lack of command of the English language, his lack of knowledge of the existence of the Fund and how to apply for benefits, and the fact that claimant was not represented by counsel. Claimant further contends that the degree of prejudice, if any, visited upon the Department with respect to recouping monies that might be paid out is irrelevant to the determination whether good cause exists to allow a late application for benefits.

To dispose of the latter contention first, the determination of what constitutes good cause justifying inaction is in the nature of an equitable judgment requiring consideration of factors affecting all the parties. It is appropriate to consider the consequences to the Department, flowing from claimant's failure to apply for benefits in a more timely manner.

Claimant contends that he did not have notice of the Fund or his right to apply for benefits. We note the provisions of ORS 147.365(1):

"All law enforcement agencies in this state shall deliver cards to victims of crime stating the procedure to be followed in applying for compensation under ORS 147.005 to 147.365.

"(2) No law enforcement agency shall be civilly liable for a failure to comply with subsection (1) of this section."

There is no evidence in the record that claimant received any such card or other written notice. To the contrary, the evidence is that claimant was not informed of the Fund or how to apply for benefits until June, 1980. After becoming aware of the Fund, claimant promptly filed a claim. Considering his lack of notice of the Fund or application procedures, together with his age, lingual handicap, and functional impairments, we conclude that claimant has established a prima facie case of good cause for late filing. Cf., Burkholder v. SAIF, 11 Or App 334 (1972).

The Department contends that it has been prejudiced in its ability to recoup Fund expenditures from the assailant because of claimant's late filing. We note the following statutory provisions:

"(1) The acceptance of an award made pursuant to ORS 147.005 to 147.365 shall subrogate the state, to the extent of such award, to any right or right of action accruing to the applicant or recipient.

"(2)(a) On behalf of the state, the department may bring suit against an assailant for money damages, but must first notify the applicant or recipient of an award and give him an opportunity to participate in the prosecution of the suit." ORS 147.345. * * *

"(1) The state has a claim for the amount of compensation paid under ORS 147.005 to 147.365 upon all claims, demand or causes of action against an assailant to recover for the injuries or death of a victim which were the basis for an award. ORS 147.355.

"(2) At the time an award is paid under ORS 147.005 to 147.365 the department shall give written notice of this claim to the applicant and all other recipients of the award. The claim attaches to any verdict, judgment or decree entered and to any money or property which is recovered on account of the claim, demand, cause of action or suit against the assailant after notice is given.

"(3) On petition filed by the department on behalf of the state or by the applicant or other recipient of an award, the Circuit Court for Marion County, on written notice to all interested parties, shall adjudicate the rights of parties and enforce the claim." ORS 147.355

These statutes make clear that the Department has a number of remedies to recoup from the assailant Fund monies paid out to victims. Not included in the list is seeking court-ordered restitution at the time of sentencing. It may be that the Department has the right to seek such orders. It also may be that the Department has the right to seek restitution as a condition of parole, or by attaching any state income tax refund owing to the assailant. Regardless of what remedies the Department may have clearly, the Department has the remedies set forth in ORS 147.345 and 147.355. It is difficult to see how the Department has been seriously prejudiced in its ability to recoup any benefits merely because one possible implied remedy is no longer available. We note, also, that in the event that the other assailant is brought to justice, the Department may seek restitution as part of the sentencing of that individual. -581-

We conclude that claimant has established good cause for filing late, and any "prejudice" to the Fund is minimal, particularly when compared to the financial consequences to claimant arising from the violent physical attack visited upon him.

ORDER

The Department of Justice's Order on Reconsideration dated March 24, 1981 is reversed, and the claim is remanded to the Department of Justice, Crime Victims' Compensation Division for processing and payment of compensation in the amount and in the manner provided by law.

HENRY A. SCHMIDT, Claimant
Mark Bocci, Claimant's Attorney
Roger Warren, Defense Attorney
Mildred Carmack, Defense Attorney

WCB 80-05040 & 81-01030
April 30, 1982
Order on Review

Reviewed by Board Members Barnes and McCallister.

Employers Mutual of Wausau (Wausau) and Hiway Products Company (Hiway) request Board review of Referee Mulder's order which found them to be responsible for payment of claimant's medical bills incurred from 1978 to the present.

Claimant suffered acute lumbosacral strain in 1968 while employed by Hiway, which is insured by Wausau. Claimant eventually received a 50% unscheduled permanent partial disability award. In 1976, while working for Avison Lumber which is insured by the SAIF Corporation, claimant again suffered an acute lumbar strain. Claimant was awarded an additional 50% unscheduled permanent partial disability as a result of this injury.

In July, 1978 claimant again experienced low back pain requiring medical treatment. The pain from 1978 to the present was not the result of any further injuries. Claimant's physician submitted his medical bills to SAIF for payment. SAIF denied responsibility for payment, stating there had been no aggravation of the 1976 injury. However, claimant was only seeking payment of his medical expenses under ORS 656.245 and not aggravation reopening of his claim. On December 20, 1979 SAIF denied responsibility entirely for claimant's symptoms, asserting they were related to back problems prior to the 1976 injury. Claimant requested a hearing.

First, we agree with the Referee's finding that the December 20, 1979 denial was the point from which the time for requesting a hearing began to run. Claimant did not file his request within 60 days of that denial but did file within 180 days. Thus, under ORS 656.319(1) claimant had the burden of showing good cause for failure to file within the 60 day limit. The Referee found that claimant met this requirement and we concur with that finding.

The second issue is which carrier is responsible for paying claimant's medical bills since 1978. We discussed this issue in a similar situation in Jimmy Faulk, 34 Van Natta 109, 110 (1982):

"In Crosby v. General Distributors, 33 Or App 543 (1978), the claimant suffered an injury in 1971 for which he was awarded 20% unscheduled permanent partial disability. In 1973 claimant sustained a second injury, covered by a different insurer, for which he received an additional 30% unscheduled permanent partial disability. Claimant thereafter filed an aggravation claim based on the 1971 injury. The court, in denying the claim, ruled that the 'last injurious exposure rule' applied, stating:

'Where a subsequent injury contributes independently to a claimant's disability, the first injury is effectively superseded and the latter insurer is solely liable for the entire disability.' (Emphasis added.) 33 Or App at 545.

"We, therefore, find, based on Crosby, that at least in a situation where some permanent disability is found in relation to the new injury, that the insurer on the risk at the time of that injury is liable for any subsequent worsening or need for medical care where the same bodily part is involved."

SAIF is responsible for the 50% permanent disability from the more recent, 1976 injury and claimant's current condition and need for medical treatment is at least partially the result of that injury.

ORDER

The Referee's order dated August 14, 1981 is modified. The SAIF Corporation shall pay for claimant's medical treatment for his low back condition and shall reimburse Employers Mutual of Wausau for expenditures made pursuant to the Referee's order. The balance of the Referee's order is affirmed.

JOHNNY SMITH, Claimant
Douglas S. Green, Claimant's Attorney
R. Kenney Roberts, Defense Attorney
Dennis VavRosky, Defense Attorney

WCB 77-01889 & 78-01678
April 30, 1982
Order on Remand

On review of the Board's order dated February 6, 1981 the Court of Appeals reversed the Board's order in part and remanded the claim to the Board for entry of an order in accordance with the order of the Court.

NOW, THEREFORE, that portion of the Board's order awarding claimant 256° for 80% unscheduled permanent partial disability for injury to his right shoulder hereby is vacated and set aside, and the Referee's award of permanent total disability is reinstated, effective April 15, 1980. EBI is the carrier responsible for payment of claimant's permanent total disability benefits.

Claimant's attorney is allowed as and for a reasonable attorney's fee a sum equal to 25% of the increased compensation awarded by the Court of Appeals, not to exceed \$1,000. Said attorney's fee is payable out of claimant's award of compensation and not in addition thereto. OAR 438-47-045(1). This attorney's fee is for services rendered before the Court of Appeals, and is in addition to, not in lieu of, all attorney fees ordered paid by the Board's Order on Review: i.e., a \$1,000 attorney's fee payable by EBI in addition to and not out of claimant's award of compensation, OAR 438-47-040(2); and 25% of the increased permanent partial disability award granted by the Board for an aggravation of claimant's right shoulder injury, which was not to exceed the sum of \$3,000, for services rendered before the Board and Referee.

IT IS SO ORDERED.

FRANK J. TURNER, Claimant
Michael A. Greene, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-00353
April 30, 1982
Order on Review

Reviewed by Board Members Barnes and McCallister.

Claimant requests Board review of Referee Neal's order which awarded claimant an additional 10% unscheduled permanent partial disability for his low back, over and above the Determination Orders of November 17, 1980 and December 23, 1980 which allowed claimant benefits for temporary total disability only. The Referee also apparently affirmed the partial denial of claimant's aggravation claim, issued by the SAIF Corporation on April 1, 1981.

Claimant contends that he is entitled to an additional 27 days of time loss benefits based on Dr. Gritzka's letters of October 27, 1980 and November 21, 1980. Claimant also contends that he is permanently and totally disabled, or alternatively, that he is entitled to a greater permanent partial disability award than that allowed by the referee.

The November 17, 1980 Determination Order allowed claimant time loss benefits from October 19, 1979 through October 1, 1980. Dr. Gritzka's letter of October 27, 1980 indicated that he had examined claimant on October 1, 1980, and that based upon that examination, he concluded that claimant's condition was medically stationary. Claimant is not entitled to an additional 27 days temporary total disability benefits merely because Dr. Gritzka's letter was written on that date. The termination date of claimant's temporary total disability benefits will remain unchanged.

With regard to claimant's contention that he is permanently and totally disabled, we agree with the Referee that the record is totally devoid of any evidence on this issue whatsoever. Claimant to date has received a total of 35% unscheduled permanent partial disability for his low back. Claimant's treating physician, Dr. Gritzka even indicates in his letters of October 27, 1980 and November 21, 1980, that claimant's previous 25% unscheduled disability award, allowed by Stipulated Order of May 16, 1980 was adequate.

Based on Leedy v. Knox, 34 Or App 911 (1978), claimant requested the Referee to make a determination on the amount of his permanent disability, even though claimant was enrolled in a program of vocational rehabilitation at the time of the hearing. Since claimant was medically stationary, the Referee complied with the request. The claimant admits in his brief that the matter will be resubmitted to the Evaluations Division, again, and his permanent disability redetermined at that point. We note our decision in Charles T. Tackett, 31 Van Natta 61 (1981), which allows carriers to suspend payment of permanent partial disability awards pending completion of an authorized program of vocational rehabilitation.

ORDER

The Referee's order dated July 21, 1981 is affirmed.

DON WINTERS, Claimant
Rolf Olson, Claimant's Attorney
Katherine O'Neil, Defense Attorney

WCB 80-05962
April 30, 1982
Order on Review

Reviewed by Board Members McCallister and Lewis.

Claimant requests Board review of Referee Seifert's order which affirmed the October 7, 1980 denial issued by the SAIF Corporation. The issue presented is compensability. The claimant contends that the Referee was in error in finding that the claimant was not a subject worker as defined in ORS 656.126(1), on the date of the injury.

Claimant was first employed by Hoffman Construction Company to work as a carpenter on the employer's "Clay Tower Project" in Portland in 1978. In August, 1979 claimant sustained a cervical injury while descending a flight of stairs. Dr. Don Poulson released claimant to work on February 20, 1980. Claimant, however, failed to return to work on the Portland project. Sometime in March, 1980 claimant contacted one of the employer's construction superintendents concerning possible work on a construction project which the employer was involved with in Seattle, Washington. Subsequently, claimant was notified that he was to report to Seattle to begin work as a carpenter on that project on April 1, 1980. On April 11, 1980, while removing some two-by-fours from a concrete foundation on the Seattle project, claimant injured his back.

Claimant returned to Salem following his injury, but reported for work in Seattle on April 14, 1980. Thereafter, claimant completed an accident report, terminated his employment and returned again to Salem on April 18, 1980. Claimant's claim was accepted by the Supervisor of Industrial Insurance of the State of Washington on a medical only basis. On August 22, 1980 claimant completed a form 801, which was submitted to the SAIF Corporation. On October 7, 1980 SAIF denied the claim on the grounds that claimant was a subject Washington worker at the time of the injury on April 11, 1980.

Samuel Motta, an assistant superintendent for Hoffman Construction for approximately four years, and who was familiar with the claimant, was deposed by counsel for SAIF. Mr. Motta indicated that Hoffman Construction maintained its main office in Portland, and that it engaged in construction projects in various states other than Oregon. Although Mr. Motta was an employee whose work extended from project to project, members of the work crews, such as carpenters, were generally hired from the local project areas, on a job-by-job basis. Claimant had to be hired specifically for the Seattle project, in order to be employed on that project. It was necessary for claimant to make an independent inquiry or application for that job before or after completion of the Portland project. Claimant would not have automatically proceeded to the Seattle job following completion of the Portland project.

Further evidence, revealed at the hearing, indicated that claimant and his family maintained a residence in Salem from December, 1978 until moving to Montana in January, 1981. Several of claimant's co-workers on the Portland job also worked on the Seattle project. Claimant, Mr. Motta and another worker, while working on the Seattle job, lived in a trailer provided by the employer. Claimant returned to Salem on weekends, riding back from Seattle with Mr. Motta. Claimant's wages were paid by check drawn on The Oregon Bank. Workers compensation premiums for the Seattle project were paid to the State of Washington. Although there is a reciprocal agreement between Oregon and Washington, which provides for resolution, by agreement, of conflicts in jurisdiction over injuries incurred by workers employed in one of the two states, but injured in the other, the agreement basically reiterates the language of ORS 656.126(1). Kolar v. B&C Contractors, 36 Or App 65, 71 (1978)..

The Referee, applying ORS 656.126(1), as interpreted by Kolar, found that the claimant was a non-subject worker under the Oregon Workers Compensation Act and, therefore, affirmed SAIF's denial. We agree with the Referee's reasoning and determination.

The Referee noted that the critical issue under ORS 656.126(1) is whether or not a worker is permanently employed in Oregon. In the recent Court of Appeals decision in Langston v. K-Mart, ___ Or App ___ (1982), the Court, using virtually identical language, confirmed that to be the proper determinant. The Court noted that the inquiry is focused on to what extent the claimant's work outside of Oregon was temporary in nature. In that case, the claimant was originally employed in Washington, but was assigned by the employer to a job in Oregon, with the understanding that it was to be permanent. The claimant was then assigned to another position that involved no duties in Oregon, although she continued to maintain an Oregon residence, and paid Oregon income taxes. The Court found the claimant, when she sustained an industrial injury in California, to be a non-subject worker. This was despite the fact that she had previously worked for the employer in Oregon. The Court pointed out that one of the main factors for finding the claimant in Kolar to be a subject worker was the fact that claimant,

although injured in Washington, was scheduled to return to work on projects in Oregon following completion of the Washington assignments. Although previously performing work for the Oregon employer, the claimant in Langston performed no duties in Oregon following her shift in job assignments.

We find the present fact situation to be substantially similar. Although claimant previously performed work for Hoffman Construction in Oregon, maintained a residence in Oregon and apparently paid his dues to a Portland union local, he was not a subject worker at the time of his injury. Claimant was employed on a job-by-job basis with the employer. Claimant's employment with Hoffman would have terminated following completion of the Portland project, had he not applied for and been accepted for work on the Seattle

project. There is no indication in the record that claimant had any form of employment with Hoffman to return to Oregon, following completion of the Seattle assignment. Since each work project with the employer is severable, with no employment being extended beyond the completion date of each specific project, claimant cannot be said to have suffered an industrial injury while temporarily out of the state, incidental to his Oregon employment. Claimant had no Oregon work that his Seattle employment could have been incidental to on the date of the injury, and is, therefore, not a subject worker for the purposes of that injury.

ORDER

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

DONALD M. BROWNELL, Claimant
Keith E. Tichenor, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-06509
May 5, 1982
Order Denying Request for
Attorney's Fee

The Board issued its Order on Review herein on April 5, 1982. On a request for review by SAIF, the Board affirmed the Referee's determination of compensability of claimant's right hernia and lower back conditions and reversed the Referee's determination of compensability of claimant's hip condition.

Claimant's counsel has now moved the Board for an award of an attorney's fee pursuant to ORS 656.382(2) which provides in pertinent part:

"If a request for hearing, request for review or court appeal is initiated by an employer or insurer, and the Referee, Board or court find that the compensation awarded to a claimant should not be disallowed or reduced, the employer or insurer shall be required to pay . . . a reasonable attorney's fee . . ." (Emphasis added.)

The Board's order disallowed claimant's claim for compensation for his hip condition, which was previously found to be compensable by the Referee. Accordingly, the Board's order constitutes a disallowance of compensation pursuant to the statute, and claimant's attorney is therefore not entitled to an attorney's fee on Board review. See also Zelda M. Bahler, 33 Van Natta 478, 482-483 (1981).

ORDER

Counsel's request for an award of an attorney's fee on Board review is denied.

THOMAS C. HARRELL, Claimant
Jan Wyers, Claimant's Attorney
Peter Hansen, Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-06296
May 6, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

Claimant seeks Board review of Referee Shebley's order which found claimant was entitled to time loss payments from June 3, 1981 through July 6, 1981. The Referee found claimant was not entitled to penalties and attorney fees for the carrier's conduct in ceasing to make time loss payments. Claimant failed to file a brief, but it is on this last issue that he appeals.

Claimant sustained an injury to his knee on August 4, 1980. In an attempt to get claimant back to work quickly, the employer offered him a light-duty job doing receptionist and bookkeeping duties. Claimant performed his job for a couple weeks, took time off for additional surgery, and then returned to the light-duty job. On June 2, 1981 he had an argument with his supervisor and was fired. Claimant contends he is entitled to time loss benefits between June 2, 1981, the date he was fired, and July 6, 1981, the date he was released for regular work by his treating physician.

SAIF Corporation requests that the Board affirm the penalty issue, but reverse the Referee on the time loss issue. They contend claimant's actions on June 2, 1981 were a "constructive refusal" to return to work. They ask that we consider this situation under ORS 656.325(5).

We find that claimant was not entitled to temporary disability compensation for the period in question and, therefore, reverse the Referee's order on this issue. ORS 656.325(5) provides that if an injured worker refuses employment prior to claim determination, the carrier is entitled to cease making temporary total disability payments and to start making temporary partial payments, if the worker's treating physician has been notified of the specific duties to be performed by the worker in the course of the tendered employment and the physician agrees that the worker is capable of performing such employment.

The Referee decided the issue of claimant's entitlement to time loss based upon Jackson v. SAIF, 7 Or App 109 (1971). Jackson is inapplicable because it dealt with an issue of termination of time loss payments. This case involves an issue of reinstatement of time loss payments after those payments have been properly terminated due to a worker's return to regular, albeit modified, employment.

No statute or decision directly addresses the issue of a claimant's entitlement to temporary disability compensation when the claimant is capable of performing modified employment during a time that the worker is not medically stationary, the worker has returned to modified employment at his regular wage and then is terminated for reasons not related to his compensable injury. Some guidance is offered by ORS 656.212 and the Department rules concerning payment of temporary partial disability compensation, OAR 436-54-222.

"When the disability is or becomes partial only and is temporary in character, the worker shall receive for a period not exceeding two years that proportion of the payments provided for temporary total disability which his loss of earning power at any kind of work bears to his earning power existing at the time of the occurrence of the injury." ORS 656.212

Subsection (1) of 54-222 is addressed to the computation of the rate of temporary partial disability compensation due a worker. Subsection (2) states the rule that no temporary disability compensation is due a worker if the worker's post-injury wage earnings are equal to or greater than the wage-earnings at the time of the worker's injury. Subsection (3) states:

"An insurer or self-insured employer shall cease paying temporary total disability compensation and commence making payment of such temporary partial disability compensation as is due from the date an injured worker accepts and commences any kind of wage earning employment prior to claim determination."

Subsection (5) states:

"An insurer or self-insured employer shall cease paying temporary total disability compensation and start making payment of such temporary partial disability compensation as would be due in subsection (1) when an injured worker refuses wage-earning employment prior to claim determination under the following conditions:

"(a) the attending physician has been notified by the employer or insurer of the specific duties to be performed by the injured worker and the physical requirements thereof;

"(b) the attending physician agrees that the offered employment appears to be within the worker's capability; and

"(c) the employer has provided the injured worker with a written offer of the employment which states the beginning time, date and place; the duration of the job; the wage rate payable; an accurate description of the job duties and that the attending physician has said the offered employment appears to be within the worker's capabilities."

Subsection (6) (b) states:

"Temporary partial disability compensation payable pursuant to subsection (5) shall continue to be paid until . . . the duration of the offered job has expired or that the offer of such employment is withdrawn. (The employer discharging the worker because of violation of normal employment standards shall not be considered a withdrawal of offered employment.)"
(Emphasis added.)

While we do not find that claimant's actions amounted to "a constructive refusal" to return to employment, we do find that claimant's behavior on June 2, 1981 constituted a "violation of normal employment standards" and that the employer was justified in terminating claimant's employment.

Claimant's inability to continue working in his modified job situation was not the result of his compensable injury. It was the result of his own actions, independent of his injury. Accordingly, claimant is not entitled to receive temporary disability compensation for the period of time in question.

We agree with the Referee's conclusion that SAIF's failure to pay time loss benefits for this period was not unreasonable.

ORDER

The Referee's order dated August 6, 1981 is affirmed in part and reversed in part. That portion of the order which found that claimant was entitled to temporary total disability compensation for the period June 3, 1981 to July 6, 1981 is reversed, and the attorney's fee allowed claimant's attorney based thereon is set aside. The Referee's decision not to impose a penalty for unreasonable failure to pay time loss is affirmed.

SADIE M. KIMBREL, Claimant
SAIF Corp Legal, Defense Attorney

Own Motion 81-0317M
May 6, 1982
Own Motion Order on Reconsideration

The SAIF Corporation has moved for reconsideration of the Board's Own Motion Order dated December 18, 1981. That order stated, "we conclude claimant is entitled to any necessary medical services at this time" relating to her 1962 industrial back injury. SAIF's Motion for Reconsideration points out that claimant was involved in an automobile accident in September of 1981 in which she apparently injured her back and argues any need for medical services is due to the 1981 automobile accident, not the 1962 compensable injury.

We vacate our December 19, 1981 Own Motion Order insofar as it required SAIF to provide any medical services. Questions involving disputed medical services are not part of the Board's own motion authority, but rather are questions involving a claim that can be the subject of a request for hearing at any time. ORS 656.245(2).

IT IS SO ORDERED.

WALTER T. BOND, Claimant
Douglas Green, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-03727
May 10, 1982
Order of Dismissal

A request for review, having been duly filed with the Workers Compensation Board in the above-entitled matter by 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.

PATRICIA A. BROWN, Claimant
J. David Kryger, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-00636
May 10, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

The SAIF Corporation requests Board review of Referee Nichols' order which disapproved its denial of claimant's aggravation claim. The main issue is the compensability of claimant's aggravation claim.

Claimant is 25 years old and was employed by Foothills Investment Company in Sweet Home to build ridge caps from cedar shingles. The form 827 indicates that claimant's date of injury or exposure was January 31, 1979. Dr. Hartman examined claimant on February 2, 1979 and found swelling of the forearms and wrists. His diagnosis was swelling and inflammation secondary to chronic irritation. The claim was deferred by SAIF until a statement of work relatedness was obtained from Dr. Hartman. Dr. Hartman indicated in his February 28, 1979 letter to SAIF, that claimant's work involved continuous flexion, extension and rotation of the wrists and that such motions could cause chronic irritation and occasional inflammation. The claim was accepted by SAIF and a Determination Order of March 14, 1979 allowed temporary total disability benefits from February 5, 1979 through February 14, 1979.

Claimant did not return to her job at Foothills Investment following her release for work. In March, 1979 claimant went to work for Lake County Forest Products on a green chain, but quit after about one month. Claimant has not been employed since then. On November 19, 1980 claimant returned to Dr. Hartman with complaints of pain in the elbows, hands and fingers. By December 9, 1980 she had improved, but had not been released for work. On January 2, 1981 SAIF denied claimant's aggravation claim. Claimant was thereafter referred to Dr. Ladd who, on March 13, 1981, diagnosed bilateral epicondylitis. In his March 31, 1981 letter, Dr. Hartman indicated that it was his opinion that claimant's condition and symptoms were consistent with the type of work she had been performing, and that there was a ". . . reasonable medical probability that her work was a material contributing factor to the development of her epicondylitis."

The Referee, based on James v. SAIF, 290 Or 343 (1981), found claimant's aggravation to be the result of an occupational disease contracted while she was employed at Foothills Investment Company, and, therefore, the responsibility of SAIF. We agree with the Referee's determination. In establishing a claim for occupational disease, a claimant is ordinarily required to establish that the at-work exposure, when compared to any non-employment exposure, is the major contributing cause of the disability. Gygi v. SAIF, 55 Or App 570 (1982). Unlike many occupational disease cases, the medical evidence in this case establishes with a reasonable degree of precision that claimant's work exposure at Foothills Investment Company was the actual and only exposure that precipitated claimant's condition. When Dr. Hartman's opinion is read in context with the progression of claimant's symptoms and the circumstances surrounding her condition, we find that the burden of proof has been satisfied. Claimant testified that she had experienced no problems with her wrists and forearms prior to her work at Foothills Investment. There is no evidence presented of any off-the-job activities which could be viewed as a contributory cause of her condition. Dr. Hartman's initial diagnosis in February, 1979 is consistent with Dr. Ladd's findings and diagnosis in March, 1981. Claimant experienced continued pain following her initial problems in February, 1979. Considering all of the relevant evidence together, we find claimant has established that her exposure at Foothills Investment Company was the major cause of her bilateral epicondylitis.

SAIF has also raised an issue concerning the refusal of claimant's counsel to allow the claimant to be deposed, and the resulting effect on its ability to investigate this case. By letter to claimant's counsel dated March 9, 1981 SAIF indicated that it was confirming a March 5, telephone call which apparently had established a time for the taking of the claimant's deposition. By letter of March 12, 1981 claimant's counsel refused to allow the taking of the deposition. Nearly three months later, on June 4, 1981, SAIF, requested that the claimant provide answers to a series of questions. Claimant's attorney submitted claimant's handwritten response on June 26, 1981 and indicated his willingness to provide further information. At the hearing, SAIF moved for exclusion of all medical evidence due to the refusal of claimant's attorney to allow the deposition, but the Referee denied the motion.

There is no statute or rule in workers compensation law which allows the taking of a deposition as a matter of right. It has been an informal practice, however, that such depositions are routinely allowed by claimant and defense counsel as a matter of courtesy, as well as a tool for discovery. Such a practice is ultimately beneficial to all parties, even though it may not be particularly desirable in each specific case. In a series of cases, the Hearings Division has developed a somewhat formalized procedure concerning the taking of depositions. Following a

refusal to allow the taking of a deposition, the aggrieved party may file a motion with the Presiding Referee, requesting that the obstinate party be ordered to allow the taking of the deposition. The motion must indicate that extraordinary discovery is required, and state why it is needed in that particular case. If the Pre-

siding Referee is satisfied that such discovery is required, the taking of the deposition will be ordered. Generally, depositions are allowed more frequently when compensability is in issue. The transcript in this case indicates that both claimant's attorney and defense counsel were aware of the ordinary procedure.

Once it was apparent there was a problem regarding the deposition, SAIF had several months before the hearing in which to file a motion with the Presiding Referee requesting that the taking of the deposition be ordered. SAIF did not do so. The Referee's refusal to allow a continuance was, therefore, well taken. See Richard Gallagher, 34 Van Natta 90 (1982).

ORDER

The Referee's order dated September 15, 1981 is affirmed. Claimant's attorney is awarded \$400 as a reasonable attorney's fee for services rendered on Board review, payable by the SAIF Corporation.

ISLA M. HALLIGAN, Claimant
Richard Springer, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-06804
May 10, 1982
Order Withdrawing Own Motion
Determination and Order Dismissing
Request for Hearing

This claim arises from an August 2, 1972 industrial injury. Claimant's claim was reopened by stipulated order dated March 22, 1979. Pursuant to the stipulation, the parties reserved the right to contest the date on which claimant first became entitled to temporary total disability benefits.

On July 21, 1981 the Board issued an Own Motion Determination allowing claimant temporary total disability from March 11, 1979 through May 19, 1981 and an award of 32° for 10% unscheduled low back disability.

Thereafter, claimant submitted a motion for reconsideration of the Board's Own Motion Determination and, apparently simultaneously, filed a request for hearing raising the issues of entitlement to temporary total disability and the propriety of the Board's issuance of an Own Motion Determination rather than closure pursuant to ORS 656.268.

Having reconsidered the facts and procedural history of this claim, the Board deems it appropriate to vacate its Own Motion Determination of July 21, 1981. This claim should properly be closed by submission to the Evaluation Division pursuant to ORS 656.268.

It further appears to the Board that until a Determination Order issues, there are no issues pending which are ripe for adjudication by the Hearings Division.

ORDER

The Board's Own Motion Determination of July 21, 1981 is hereby vacated, withdrawn and set aside, and this claim is remanded to the Evaluation Division for closure pursuant to ORS 656.268.

It is further ordered that the claimant's request for hearing filed on or about July 24, 1981 and assigned WCB Case No. 81-06804 be and hereby is dismissed.

JUANITA M. DesJARDINS, Claimant	WCB 80-04796
Richard Kropp, Claimant's Attorney	May 12, 1982
Brian Pocock, Defense Attorney	Order on Review

Reviewed by Board Members Barnes and Lewis.

The carrier has requested review of Referee Wolff's order which found claimant permanently and totally disabled as of June 24, 1980. The carrier's main contention is that the medical evidence does not support the Referee's conclusion, and that most of claimant's problems are attitudinal in nature. We disagree and affirm the Referee's award of permanent total disability.

Claimant was compensably injured in October 1974 when she was engaged in her employment as an apartment house manager. In attempting to quiet an unruly tenant, she was thrown across the room, which caused her to fall against a hearth on her tailbone. When she attempted to rise and leave the apartment, the tenant once again assaulted her and she fell to the floor on her knees.

This incident resulted in injury to claimant's low back and a worsening of pre-existing low back problems. She was hospitalized for a two-and-one-half week period immediately thereafter, during which time she was in pelvic traction. Claimant also sustained an injury to her right knee which was surgically repaired six months following the incident.

The claim for this injury was closed by an April 5, 1976 Determination Order which awarded claimant temporary total disability from the date of injury until March 6, 1976, 22.5° for a 15% loss of claimant's right leg and 96° for 30% unscheduled disability for injury to her low back. Claimant subsequently requested a hearing on this Determination Order.

In October 1976 claimant was moving from one apartment to another in an apartment complex she had recently started to manage for another employer. She lifted two dishes from a box on a counter, turned and reached to put them away when she felt something shift in her back and experienced sudden pain. She was hospitalized for ten days in November 1976 for pelvic traction to alleviate increased low back and leg symptoms.

In January 1977 the carrier denied reopening of the claim, contending that claimant's condition was not the result of her 1974 injury but constituted a new and separate injury. A hearing was held in April 1977, the issues being propriety of the denial, as well the April 5, 1976 Determination Order. Claimant's contention was that she was not medically stationary at the time of closure or at the time of the hearing. Alternatively, claimant sought additional permanent disability.

The Referee found that claimant was medically stationary in March 1976 and that the October 1976 incident, which resulted in the need for medical services and temporary total disability compensation, was causally related to claimant's 1974 compensable injury. The claim was remanded to the carrier for acceptance and payment of benefits by an order of October 25, 1977. No review of this order was requested.

The claim was again closed by a Determination Order of January 13, 1978. Claimant was awarded additional temporary total disability compensation for the period of October 31, 1976 through December 7, 1977 and no additional permanent disability.

Claimant was hospitalized in March 1978 for severe depression and minor tranquilizer withdrawal. By a denial letter of June 1, 1978, the carrier denied responsibility for psychiatric problems claimant was experiencing. By stipulation the carrier subsequently accepted responsibility for certain psychiatric problems. Pursuant to this stipulation, which was approved August 30, 1978, the claim was submitted to the Evaluation Division which issued a Determination Order dated May 21, 1980. Claimant was awarded additional temporary total disability compensation from January 14, 1978 through April 11, 1980, and no additional permanent disability.

Claimant requested a hearing on this Determination Order, arguing that she was permanently and totally disabled. The Referee found that:

"[W]hile neither physical nor psychiatric limitations and disabilities would justify a finding of permanent and total disability, it would appear that the combined effect of both make it impossible for claimant ever again to do any suitable and gainful work on a regular basis."

As previously indicated, claimant's medical problems did not originate with her 1974 industrial injury. In May 1967 claimant had fallen as she was cleaning a sidewalk in front of an apartment house, which caused L-5 nerve root compression on the right due to a disc herniation at the L4-5 interspace. A laminectomy and discectomy was performed at that time by Dr. Tsai.

Claimant experienced continuing problems, including a minor accident while moving a refrigerator, and was eventually hospitalized by Dr. Bartell for pelvic traction in November 1969 and again in September - October 1970. Claimant was in an auto accident in November 1970, and low back symptoms she then experienced were attributed to her May 1967 injury. She was treated for back pain

in February and March 1971. She went until September 1973 without seeing Dr. Bartell. She was then involved in another auto accident. She was subsequently treated with a series of diathermy treatment and hospitalized for two weeks in November - December, 1973 for cervical and pelvic traction. Dr. Bartell continued treating claimant's low back symptoms with diathermy and muscle relaxers (injections) during February, March and early April, 1974. He felt these symptoms were related to and were an aggravation of claimant's May 1967 injury. Dr. Bartell did not see claimant again for low back problems until after the October 1974, injury.

Claimant also had a history of emotional or psychiatric problems prior to the 1974 injury. In 1955 claimant spent 40 days in Eastern Oregon State Hospital for treatment of depression caused by the break-up of her marriage. Claimant was hospitalized for one week in December 1967. Dr. Bartell's chart notes indicate that she was admitted due to "[A]ttempted suicide by overdose of tranquilizer," and that this was due to depression caused by her back injury. The psychiatric diagnosis was "[N]eurotic depressive reaction, conversion reaction, phobic reaction and hysterical personality disorder".

The back injuries sustained by claimant as a result of the 1974 incident were diagnosed as coxodynia and lumbar strain with irritation of the left S1 nerve root. Her right knee condition was diagnosed as a posterior tear of the right medial meniscus and mild chondromalacia of the right patella. As previously indicated, a medial meniscectomy was performed.

After the October 1976 incident and consequent hospitalization in November 1976, claimant was examined in December by Dr. Martens. His diagnosis was discogenic back pain due to scarring or disc herniation.

After claimant's request for reopening was remanded to the carrier by the Referee's order of October 25, 1977, claimant was examined by Dr. Martens for an orthopedic consultation on December 7, 1977. Dr. Martens reported that claimant's complaints consisted of pain in her low back which was aggravated by any excessive bending, twisting, lifting, standing or prolonged walking; that claimant was having difficulty with household activities such as vacuuming, scrubbing and waxing floors; and that she experienced low back pain and pain in both knees during any of these activities. Dr. Martens reported that it would be necessary for claimant to engage in some occupation which did not require prolonged standing, walking, bending, lifting, twisting or overhead work.

Claimant was admitted to Good Samaritan Hospital on January 14, 1978 for "intensive conservative treatment including pelvic traction and Hubbard tank." Provisional diagnosis was possible discogenic back pain. A lumbar myelogram was performed, and the findings were within normal limits. A neurological consultation was obtained, and EMG and nerve conduction velocity examinations of the lower extremities were performed and reported to be entirely normal.

Claimant was discharged January 25, 1978, and the final diagnosis was chronic and recurrent strain, lumbosacral spine. In his discharge summary, Dr. Martens reported: "She has not responded to any conservative measures which is unusual. I would expect some relief of her pain with bedrest, but this has not been the case. I strongly recommend that she be evaluated by the Northwest Pain Center in Portland, Oregon . . ."

Claimant was again hospitalized from February 28, 1978 until March 14, 1978. She was admitted for depression and chronic pain. The diagnosis was depression, endogenous, secondary to chronic pain; depression, reactive, secondary to loss of function; and withdrawal symptoms from mild tranquilizers, specifically Valium. Upon discharge claimant's depression was partially resolved and her Valium addiction was entirely resolved. Dr. Schenkel treated claimant during this hospitalization and discharged her on a combination of four medications. Dr. Schenkel continued to be claimant's treating psychiatrist. Shortly after claimant's discharge from the hospital, Dr. Schenkel indicated that in his opinion claimant's psychological problems were "a fairly direct result of her injury in 1974."

In June 1978, Dr. Schenkel reported that claimant was taking a relatively large amount of medication to control her anxiety, although her driving and daily activities were not limited by her psychiatric symptoms. Dr. Schenkel indicated that claimant seemed only marginally compensated, and it was his belief that she would be unable to tolerate stress inherent in employment. He indicated at that time that this would most likely be a permanent situation. Claimant had been under Dr. Schenkel's care since February 1978, and Dr. Schenkel stated in this report that during that period of time claimant had been, as she was then, totally disabled.

Dr. Martens had reported in May 1978 that although he had not examined claimant since January of that year, if she was continuing to have the same problems, she was totally disabled from any gainful occupation until she learned how to manage her chronic lumbosacral strain. During this period of time, claimant was treating with a chiropractor, Dr. Hews, who diagnosed chronic cervical thoracic syndrome complicated by spinal curvature and lumbar disc removal. He indicated that claimant's spine was unstable and prone to exacerbation. He found permanent partial impairment of the spine with recurring spinal symptoms, and he recommended light duty work only.

Dr. Martens examined claimant once again in December 1978. He had not examined her since the time of her hospitalization in January 1978. He reported that she was having the same complaints as she had for the past two years -- pain in her low back and legs, aggravated by any bending, twisting, lifting, prolonged standing, walking or sitting. His diagnosis was chronic and recurrent strain, lumbosacral spine. Once again he recommended evaluation and treatment at the Pain Center. He reported no change in claimant's right leg and low back disability since his first examination in December 1976. Claimant eventually was seen at the Pain Center, with no apparent results.

Claimant was seen for an independent psychiatric exam in December 1978 by Dr. Colbach, whose reports, as well as the reports generated by Dr. Schenkel during this period of time, were addressed in large part to the compensability of the psychiatric problems which had been denied by the carrier; however, portions of these reports lend an understanding of the relationship between the claimant's psychiatric problems and her continuing pain. Dr. Colbach reported:

"At this time, if I had to give her any official diagnosis, I would probably say that she is a chronically depressed woman, with a depression of neurotic proportions, who also seems to be suffering from back pain. It is quite possible that much of this pain is psychosomatic or hysterical in nature, and related to her depression. There do seem to be some obvious secondary gains to her illness. Life has been hard for her, and at this point in time she seems to have given up. Her illness affords her a socially acceptable way out."

In a followup report, Dr. Colbach concluded:

"[T]hus at this point it would seem that her psychiatric problems are long-standing and predate her injury in 1974. Certainly her 1974 injury did not help these problems, but they do not appear to have been a materially contributing factor."

In May 1979 Dr. Schenkel reported:

"Hysterical personality has contributed to her clinical situation in that it has rendered her more likely to develop chronic pain from the accident, and she is more likely to exhibit symptoms of anxiety and use her somatic symptoms as a means of gratifying her dependancy needs. Nevertheless, her hysterical personality does not relieve the accident of responsibility for the resulting pain, depression, and minor tranquilizer addiction. I have not attempted to treat her hysterical personality, although I have prescribed some tranquilizers to help her control her anxiety."

As previously indicated, by stipulation the carrier accepted responsibility for the psychiatric conditions diagnosed and treated by Dr. Schenkel.

Claimant was examined by the Orthopaedic Consultants in March, 1980. Claimant's chief complaint at that time was back pain. She also described pain in both knees. The Consultants reported that

claimant would be unable to return to her occupation as an apartment manager even with limitations, but that she would be able to engage in some other occupation which would probably have to be sedentary. Claimant's low back impairment due to the 1974 injury was rated as moderate; her right knee impairment was rated as mild. The Consultants noted ". . . it is obvious that a functional problem is present."

Beginning in April 1980, claimant was referred to Cascade Rehabilitation Counseling by the carrier for evaluation and placement services. The rehabilitation counselor recommended intensive job placement activities with claimant beginning immediately. He indicated that claimant would need employment that was sedentary, non-physical and relatively slow-paced. He felt that claimant would be able to perform well in a position such as counter sales in a small store, gate guard or a PBX operator in a position that was not very demanding. The counselor felt that claimant was most likely to find employment through some kind of government sponsored program. He also recommended referral to a diet reduction program combined with a mild exercise program, in view of claimant's obesity, inactivity and lack of any physical therapy program. It was this counselor's opinion that, "[a]s a result of her inactivity and obesity, her physical condition has been deteriorating."

The counselor reported that several times during his interview with the claimant she expressed concern about her ability to work in view of the fact that she felt that she was unable to properly care for herself very well. He indicated that claimant felt that she was at that time totally disabled in spite of the fact that her physicians had released her for light duty.

The record does contain three releases for work: one dated April 1, 1980 from claimant's chiropractor, Dr. Hews, indicating that claimant was released for light duty work; one dated April 1, 1980 from Dr. Bartell, claimant's former orthopedic physician, also indicating that claimant was released for light duty work; and one from Dr. Schenkel, claimant's psychiatrist, dated April 4, 1980. In his letter to the rehabilitation counselor, Dr. Schenkel reported that claimant had no psychiatric problems which would prevent her from working at that time.

"Her back is certainly her major disability. Because she has not worked for some time, and because she has a relatively high level of stress dealing with the disability imposed on her by her back, I would suggest that the employment certainly be a low stress situation."

The next report contained in the record after Cascade Rehabilitation Counseling's initial report is Cascade's closing report dated May 1, 1980. It was the counselor's recommendation at that time that claimant's case be closed and job placement procedures terminated. The counselor felt claimant was not motivated to seek employment at that time, and that claimant viewed job placement efforts as harassment rather than help. He reported his impression that claimant had apparently chosen to retire. He stated:

"Should Mrs. DesJardins become motivated to seek employment in the future, there are certainly several possibilities available for her in the Albany area. Positions such as counter sales in a small store, gate guard, PBX operator in a non-demanding position would be suitable vocational objectives for her. Specific and careful job

placement would be needed in order to find an employment situation that would not be too stressful for her.

* * *

"This counselor believes that employment which is physically and mentally non-demanding could be arranged for Mrs. DesJardins through one of these government programs [CETA, Linn-Benton Community College special program, Green Thumb program]. This counselor would be happy to work with Mrs. DesJardins at some time in the future should she choose to actively seek employment."

The two letters from Cascade Rehabilitation Counseling indicate that the counselor's initial impression of claimant was that she was not motivated to work. This impression lasted and was reinforced by claimant's statements regarding her physical limitations. Cascade Rehabilitation Counseling apparently made no effort to place claimant in the labor force due to their perception of her attitude. The counselor refers to job placement programs and employment situations which would be available to claimant, but there is no indication that any effort was made by this counselor either to have claimant placed in an employment situation or have her trained for some occupation which would be suitable to her situation.

Claimant made contact with vocational personnel at Linn-Benton Community College. A June 1980 letter to claimant signed by a job skills instructor and a living skills instructor discusses claimant's reading skills and her ability to compete in a vocational program at the college:

"As per our discussion regarding your recent assessment results, your reading skill-level indicates you would probably be able to successfully compete in a vocational program at Linn-Benton Community College. However, your statements concerning physical discomfort while sitting, standing and lifting and limited use of your hands would certainly make us hesitate to recommend such a course. From our observations it is evident that you are in constant physical discomfort which affects your ability to attend to task for extended periods of time. Unfortunately, we have

not been able to identify a vocational program that would accommodate your physical limitations.

"If you find that through therapy or medication this condition is relieved, we would be very willing to consider you for our program."

The job skills instructor at the college, Carolyn Miller, testified at the hearing concerning claimant's vocational retraining potential and job performance capabilities. Mrs. Miller testified that she had been a job skills instructor for seven years prior to the hearing. She described the efforts made by staff members at the college to locate viable employment or job training opportunities for claimant. Mrs. Miller clearly stated that her conclusions and the conclusions of her fellow staff members were not simply based upon claimant's assertions regarding her physical limitations; rather, their conclusions were based upon independent observations of claimant's ability or inability to engage in any activity for any length of time. Mrs. Miller had four separate opportunities to observe claimant while she was at the college.

Mrs. Miller testified that in her opinion claimant did not possess any vocational retraining potential. She based that conclusion upon assessment reports she had received and her observations of claimant:

". . . most of the positions that we are able to find for people are positions where you must do some activity for a specified length of time. From the reports that I received, I do not feel that Mrs. DesJardins is capable of doing that in any of the areas that we have been able to search out in the seven years that we have been placing people into jobs. I don't feel that there is any place for Mrs. DesJardins to work or any campus vocational program that she would be capable of handling because of her limited ability to stand or sit for long periods of time. If she were to be in a classroom setting, she would need to be in there for a long period of time. Most of those vocational classes that we offer require a lot of either sitting, standing or range of motion. She is not, in my estimation, capable of doing that. I found nothing in the community that would be available for her to train where these limitations would not be a factor."

Mrs. Miller also stated that in her opinion claimant was not at the present time capable of being placed in any type of employment situation. This conclusion was based upon contacts made with employers in the community in efforts to locate suitable employment for claimant. The college staff includes job developers

working in a tri-county area. Mrs. Miller testified that two job developers were working on claimant's case. Neither job developer was able to locate any type of position for which claimant would be physically qualified. Two job contacts were made with banking institutions in the community. No further job contacts were made once it was determined that it would be futile to continue to search for other similar employment situations in view of the physical requirements for the job and the impossibility of training claimant. In discussing claimant's vocational handicaps with regard to her physical limitations, Mrs. Miller testified that it was not only difficult to find an employer willing to hire claimant because of her physical limitations, but virtually impossible for claimant to sit through the hours of classroom instruction required to place her in a job within her physical limitations.

Dr. Martens examined claimant in June 1980 and found her limitations to be: no bending, stooping, twisting, kneeling, climbing stairs, prolonged standing, walking, sitting or driving; avoidance of overhead work and lifting in excess of ten/fifteen pounds. Dr. Martens expressed his opinion at that time that the physical requirements for those jobs for which claimant would be vocationally qualified were beyond her physical capabilities. In his opinion, claimant was permanently and totally disabled from any gainful and suitable employment on a regular basis.

Dr. Schenkel's report of June 20, 1980 indicates that he had seen claimant four times in the preceding year, and that she was doing quite well from a psychiatric point of view. The diagnoses were endogenous depression, secondary to chronic pain, and hysterical personality with concomitant anxiety. It was the doctor's opinion that claimant's 1974 accident caused her endogenous depression and aggravated her hysterical personality due to chronic pain. Dr. Schenkel reported: "[A]lthough Mrs. DesJardins' psychiatric problems are not in and of themselves disabling, I believe that she is in fact, quite disabled due to her chronic pain. In my opinion, her pain level is high enough that she would not be able to tolerate the increased stress of any employment." He expressed the opinion that claimant was then unable to work.

The depositions of Dr. Martens and Dr. Schenkel were taken in October 1980. Dr. Martens testified that changes reflected in claimant's 1980 X-ray examination, as compared to her 1971 X-ray exam, could be explained on a normal wear and tear basis without

regard to any injury in 1974. He indicated that claimant was approximately 60 pounds overweight, but that even if she were down to a more favorable weight she would still be experiencing chronic pain.

Dr. Martens testified that there were no changes in claimant's x-ray or physical exam to account for her chronic pain syndrome, and that most of her physical restrictions, other than overhead work, probably preexisted her 1974 injury at least to a certain extent. He admitted that his findings alone would not substantiate claimant's feeling that she was unable to work, but that a combination of his findings and Dr. Schenkel's findings would. In response to questions propounded by defense counsel attempting to identify that portion of claimant's disability attributable to her

1974 accident, Dr. Martens testified that all of the findings he had made upon examination of claimant were probably present prior to claimant's 1974 injury, ". . . but they weren't causing her any problems", and ". . . she was still able to work at a job."

It was Dr. Martens' opinion that claimant's chronic pain syndrome had worsened due to her 1974 injury, although the best evidence that he could point to in support of this conclusion was the fact that prior to this injury, claimant was capable of performing her employment activities as an apartment manager and after the injury she was not. Dr. Schenkel testified in his deposition that claimant was permanently and totally disabled due to chronic pain. He attributed a partial disability to claimant's anxiety, which was largely a result of her hysterical personality, as well as chronic pain which causes chronic depression. He indicated that neither factor made her totally disabled, even taken together; but that the balance of her problem--pain, which he attributed to organic problems--did result in her being permanently and totally disabled.

A year and one half prior to this deposition, Dr. Schenkel had reported that claimant's hysterical personality had contributed to her clinical situation and that she was more likely to exhibit symptoms of anxiety as a means of gratifying her dependency needs. In the course of his deposition in October of 1980, however, Dr. Schenkel rejected the notion that claimant's pain was purely psychophysiological, stating that there was an absence of the kind of interpersonal difficulties that people get into when they have psychologic pain. Dr. Schenkel also rejected defense counsel's contention that claimant had simply made up her mind not to work anymore. He based this conclusion on claimant's non-verbal behavior--her "interview behavior"--which indicated that she was actually experiencing pain. Dr. Schenkel testified that he had experience working in a pain ward in a veterans' hospital in San Diego, and he was able to describe behavior that is typical of a person in pain. When questioned whether claimant was being candid or truthful in relating her symptoms of pain, Dr. Schenkel admitted that, although it was a hard call, his overall impression had been that claimant was being "pretty straightforward." He testified that there was no absolute proof of claimant's veracity in this regard, but based upon his experience he was generally able to ascertain whether a person was being manipulative in reporting pain. He indicated that signs of manipulation were not present in claimant's case and that, in fact, indications were to the contrary.

Dr. Schenkel clearly stated his opinion that the pain syndrome was the cause of claimant's disability. In discussing the etiology of her pain, Dr. Schenkel testified: "I feel her pain is largely organic in nature, and I think that the 1974 accident is at least a material contributing factor."

In an October 1980 letter report, claimant's treating chiropractor, Dr. Hews, indicated that claimant had been under active care since September 1980; that claimant was experiencing neck pain, low back pain, left leg pain, that her arms were going numb, and that at that time he considered claimant to be totally disabled.

A December 17, 1980 report from Crawford Rehabilitation Services, Inc., to the Field Services Division contains the impressions of a vocational consultant who interviewed claimant in her home earlier that month:

"At the time of our interview, Ms. DesJardins exhibited great pain. Based on that initial encounter, coupled with medical and psychiatric evaluations, Ms. DesJardins appears to have limited employment potential.

"Her own self-evaluation discourages attempts at employer contact. Ms. DesJardins states she is ill or in pain so much of the time, she feels she wouldn't be able to hold down a job and report to work or for training on a regular basis. Although she states she is willing to cooperate, her own attitude about her ability appears to preclude achieving such a goal.

"There is an obvious conflict between Ms. DesJardins' professions of willingness to participate in employment or training, and what her physical capacities and endurance actually appear to be. Based on observations and evaluations by Link Benton Community College and the personal interview with Ms. DesJardins, during which time she displayed continual suffering, the client's ability to go out and seek work is definitely questionable.

* * *

"Based on observations of the client, along with vocational, medical and psychiatric evaluations, Ms. DesJardins appears to be unable to participate in employment or training at this time. Closure of the file is recommended."

At the time of the hearing, claimant was 55 years of age. She had completed her second year of high school and then obtained a diploma through a correspondence course. She started to work as a nurse, but decided not to pursue nursing as her chosen career after two to two-and-a-half years of training. Other than a job in a seed company and two jobs bartending, the balance of claimant's vocational history was devoted to apartment managing. At the time of her 1974 injury, claimant had been managing apartments for this employer for fourteen years. After recuperating from her 1974 injury, claimant managed apartments for another employer for approximately one year. She then managed apartments and thirty houses for a third employer for a five-month period ending in February 1977. Claimant has not been employed since that time.

Permanent total disability is:

". . . 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. * * * [A] suitable occupation is one which the worker has the ability and the training or experience to perform, or an occupation which the worker is able to perform after rehabilitation." ORS 656.206(1)(a).

Claimant has the burden of proving that she is permanently and totally disabled, that she is willing to seek regular gainful employment and that she has made reasonable efforts to obtain such employment. ORS 656.206(3).

Permanent total disability is established by evidence demonstrating that, as a consequence of a compensable injury, the claimant has been rendered unable to sell his or her services on a regular basis in a hypothetically normal labor market. Wilson v. Weyerhaeuser, 30 Or App 403, 409 (1977); OAR 436-65-700. It is now axiomatic that there are two types of permanent total disability: that arising entirely from medical or physical incapacity; and that arising from physical conditions of less than total incapacity plus non-medical conditions which together result in permanent total disability. Wilson v. Weyerhaeuser, supra.

Some of the medical reports in this case indicate that claimant would be capable of light, sedentary work. The employer relies upon the report of the Orthopaedic Consultants, which indicates that claimant's low back impairment was moderate, her right knee impairment was mild, and that claimant would be able to pursue gainful employment, although not her former occupation. Dr. Bartell, claimant's former treating orthopedic physician, reported on April 7, 1980 that in his opinion, claimant was capable of performing light duty work which did not involve stooping or positioning her arms above her shoulders for any length of time.

Claimant's complaints in the six to twelve months preceeding the hearing involved pain in her low back:

"Well, I'm having a lot of muscle spasms in my back. It radiates down--the pain just feels like there is a spike or something drove right in the middle of my back. It pains down through [both] legs and into my big toes."

Claimant testified that she was in pain at the hearing, and that it seemed to her as though she was in pain more often than not. She described the pain as a deep sensation in her spine, with muscle spasms on both sides of her back. She described a feeling of numbness in addition to pain, which was also characteristic of both knees. Claimant testified that she is never able to sleep through

an entire night but always finds it necessary to get out of bed to walk around and massage her back or lay on a heating pad for a period of time. Although a hot bath would afford some relief, claimant was often hesitant to take a hot bath in the middle of the night for fear of being unable to get out of the bathtub. She also testified that her pain varied depending upon her activities or attempted activities. She had not been able to sweep the floor or vacuum, both of which would cause her back to spasm. She also described pain in her neck, shoulders and arms. When she would raise her arms or use them very much, they would become numb. She would be able to sometimes sit for half an hour, but she would find it necessary to shift around in her chair. Her standing was restricted to similar limitations. She testified that she was able to walk two or three blocks before it would be necessary for her to take a rest. She was unable to bend, and she limited her lifting to no more than approximately ten pounds. Negotiating stairs was a problem, largely due to her knees. She performed exercises shown to her by her physician, which would help when her back muscles would spasm. Certain exercises she was unable to perform due to the pain and discomfort they caused. She also testified that she was able to drive approximately ten miles before becoming uncomfortable. She no longer fishes or hunts, and she perceived her overall condition as getting worse since about September of 1980.

There is little in the way of objective medical findings to support claimant's complaints of continuing pain. Dr. Martens, claimant's treating orthopedic physician at the time of the hearing, indicated in reports and testimony that there was little in the way of objective findings to substantiate claimant's complaints of chronic pain. He testified that from a strictly organic point of view claimant was not permanently and totally disabled. Her x-rays showed moderate degenerative disc disease in her lower cervical spine, with no marked evidence of narrowing of the disc spaces in her lumbar spine, although he testified that there probably was some narrowing of the disc spaces which had occurred since her last set of X-rays. Any such changes could be explained on a normal wear and tear basis without regard to her 1974 injury. Dr. Martens considered claimant's obesity, and the fact that she had previously had a laminectomy, in the course of discussing the effects of the strain to her low back which occurred in 1974. He indicated that there were not necessarily objective findings with the strain, and that it was difficult to measure the severity of a strain.

Dr. Martens was of the opinion that claimant's 1974 injury was a material contributing factor to her condition at the time of his deposition in October 1980, and this was his conclusion in spite of the lack of objective evidence to substantiate claimant's subjective complaints. The basis for his conclusion appears to be the fact that claimant was able to work prior to her 1974 injury, and since that time, she was unable to work because the pain overwhelmed her. He testified that although a strain in and of itself generally heals within three to six weeks, a response to a strain can last longer, and this was such a case. In Dr. Martens' opinion, claimant was a good example of a person with a chronic pain syndrome.

Dr. Schenkel, claimant's psychiatrist, was clearly of the opinion that the cause of claimant's pain was organic and that the pain was not psychogenic. Dr. Schenkel testified that, although chronic pain is not a psychiatric problem in etiology, treatment of her chronic pain was a psychiatric concern.

The employer argues two points. First, the fact that there are no objective medical findings to substantiate claimant's complaints of pain indicates that claimant is malingering, and that she hopes to receive an award of total disability in order to finance an early retirement. Secondly, the fact that Dr. Schenkel reports that there is no psychiatric problem preventing claimant's return to work and that her major disability is her back, indicates that there is no psychiatric component which is contributing to claimant's disabling pain. Accordingly, although claimant may, in fact, be permanently and totally disabled, her disability is not a result of her 1974 injury.

It is, in fact, clear that claimant is presently unable to pursue any gainful employment on a regular basis, and that she is, therefore, totally disabled. What is less clear is the relationship of this disability to the 1974 injury.

We are persuaded that claimant's complaints of chronic pain are genuine. The Referee found all witnesses to be credible, including claimant. Dr. Schenkel's reports and testimony, particularly the portion in which he discusses the genuineness of claimant's pain experience, are informative and persuasive.

In our opinion, the absence of objective evidence to support or substantiate claimant's complaints of chronic pain is not fatal to establishing a causal connection between her 1974 injury and her present disability. We disagree with the employer's contention that claimant's inability to perform in a suitable employment situation is the result of attitudinal problems. "A broken body can cause a broken spirit," Seaberry v. SAIF, 19 Or App 676, 683 (1974), and the point on the spectrum between psychopathological and attitudinal breakage at which each case falls is a question of degree which the factfinder must infer from all the evidence." Wilson v. Weyerhaeuser, 30 Or App at 412.

Some of claimant's statements to some of the vocational experts could be construed as indications that she was unwilling to cooperate. For example, she felt that she was too incapacitated to care for her own personal needs let alone pursue employment. We believe that these statements are justified in light of claimant's severe physical limitations.

In Morris v. Denny's, 50 Or App 533 (1981), several doctors had noted that claimant did not appear motivated to find work, although she was physically capable of light to sedentary tasks. One physician reported that claimant basically saw herself as retired. As in this case, claimant did not see herself as capable of returning to work in any area.

We note that this is not a situation in which we are determining whether or not claimant satisfied her burden under ORS 656.206(3) to establish that she was willing to seek regular gain-

ful employment or that she made reasonable efforts to obtain employment. In fact, notwithstanding her reluctance, claimant did cooperate with a job placement effort as discussed above, which proved to be futile in view of her physical limitations. Furthermore, claimant spoke to potential employers. She testified that she went to two florist shops, two veterinary clinics and two dental clinics, as well as apartment houses. Due to her physical limitations, she was unable to obtain employment.

Morris v. Denny's and Wilson v. Weyerhaeuser are relevant here because of their discussion of the term "motivation". It is our impression that the employer has substituted the term "attitude" for the term "motivation", as that latter term was used prior to the Court's decision in Wilson v. Weyerhaeuser. In Wilson, the Court admonished the factfinder not to use the term motivation as a talismanic phrase, but to consider all of the evidence, ". . . free from the limiting semantical framework of 'motivation'. . ." 30 Or App at 412. It is our opinion that the term "attitude", as used by the employer, is subject to the same limitation.

We conclude that claimant's attitude is that she believes she is unable to pursue gainful employment and that this attitude is the result of her physical limitations; it is not our opinion that claimant's physical limitations or her inability to obtain employment are the result of her attitude.

Chronic pain syndrome is a little-understood phenomenon among medical practitioners. Nelson H. Hendler, M.D., and Judith Alsofrom Fenton try to impart an understanding of the nature of chronic pain in their book, Coping with Chronic Pain (Clarkson N. Potter, Inc., 1979):

"The anguish of chronic pain is a two-way street. The patient who has not responded to surgery or medications, and who is misunderstood by those who treat him, causes many problems for his family and physicians. His disorder is not visible or measurable by standard indicators, and still his complaints persist, placing his doctors and relations at a loss for the proper response. Because chronic pain does not show up on x-rays or electrical tests and is not manifested by a fever or broken limb, it is often ascribed to psychological origins. The victim of chronic pain must

learn to live with the disdain and disbelief, or at the very least, lack of sympathy, of those who are closest to him.

* * *

"Whereas acute pain can be readily tied to a source, the sources of chronic pain are often uncertain. Whereas acute pain can be called a symptom of a wound, a burn, a fracture, a collapsed lung, chronic pain is more correctly described as a disease it-

self, rather than a symptom of something else. But it is a complex disease, which often has an underlying organic cause that is nearly impossible to detect.

* * *

"It's easy to see why so many physicians fail to diagnose chronic pain or trace it back to its source--they simply don't know what their patients are talking about. It's also easy to see that the communication of pain can cause a psychological problem for the chronic-pain sufferer. The person with acute pain can point to his broken leg and say what's bothering him, but the person with chronic pain, pain whose origins are less defined, pain that lingers on in time--that person is not understood by his family, his friends or even his own doctor. What is so obvious to the chronic-pain sufferer, a dull ache that continually destroys his sleep, is invisible to others and, what's almost worse, may not seem to be a serious problem to other people.

"Another problem for chronic-pain sufferers is that their pain generally cannot be measured or tested for with readily-available diagnostic equipment. A hidden pain, for which no clear remedy can be prescribed, can evolve into a life-style for some people.

* * *

"The fear of pain also lowers the pain threshold. The fear of pain probably works in tandem with anxiety to lower the threshold--if you are anxious about pain occurring, you probably will feel the pain more than if you were not expecting the pain to occur at all.

* * *

"The answer, of course, is up to the individual, and that is why pain, particularly chronic pain, is so hard to diagnose and treat. While science has discovered many mechanisms and attributes of pain and how to deal with them, the way individuals perceive pain remains a vast field for theoretical answers. It can't be accurately measured, and that makes the diagnosis and treatment difficult." pp. xvi, 6, 7, 18, 20.

Our reading of the record impresses us that claimant suffers from chronic pain syndrome, that claimant's industrial injury in 1974 is a material contributing cause of claimant's chronic pain syndrome and that due to her chronic pain, claimant is presently permanently and totally disabled.

ORDER

The Referee's order of February 24, 1981 awarding claimant compensation for permanent total disability effective as of June 20, 1980, is affirmed.

Claimant's attorney is awarded \$800 as and for a reasonable attorney's fee for services rendered on Board review, payable by the carrier in addition to and not out of claimant's award of compensation.

PAULINE BOHNKE, Claimant
J. Rion Bourgeois, Claimant's Attorney
Daryll Klein, Defense Attorney

WCB 80-02336
May 14, 1982
Order on Remand

On review of the Board's order dated July 29, 1981, the Court of Appeals reversed the Board's order and remanded with instructions to award claimant 75% permanent partial disability.

NOW, THEREFORE, the above-noted Board order is vacated and claimant is awarded 75% unscheduled permanent partial disability.

IT IS FURTHER ORDERED that claimant's attorney is allowed 25% of the increased compensation awarded claimant by the Court of Appeals for services rendered before the court.

IT IS SO ORDERED.

RONALD BRONSKI, Claimant
John S. Stone, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-08410
May 14, 1982
Order on Review

Reviewed by Board Members Lewis and Barnes.

The SAIF Corporation seeks Board review of Referee Leahy's order which (1) excluded seven of 41 exhibits offered by the parties; (2) affirmed SAIF's denial of claimant's neck injury aggravation claim; (3) reversed SAIF's denial of claimant's low back injury aggravation claim; (4) awarded additional temporary total disability ; (5) awarded 10% unscheduled permanent disability; (6) ordered attorney fees of \$400 plus 25% of the permanent disability award as a penalty; (7) awarded additional attorney fees of 25% of the increased compensation and \$900 in attorney fees, carrier paid, for prevailing on a denied claim; and (8) ordered SAIF, within 30 days of the order, to either pay the surgical and hospital bills arising from claimant's back fusion surgery or institute a complaint against the surgeon under OAR-436-69-510. The principal issue raised by SAIF's brief in support of its request for review was whether the Referee erred in excluding the seven exhibits.

Procedurally, the facts of the case are that over a course of about one year, claimant submitted three requests for hearing. SAIF received a copy of each request. Each request contained the following request:

"WE HEREBY REQUEST FROM THE STATE ACCIDENT INSURANCE FUND, THE DIRECT RESPONSIBILITY EMPLOYER OR ITS INSURANCE CARRIER, COPIES OF ALL MEDICAL REPORTS, MEDICAL DATA, MEMORANDA, NOTES OF PHYSICAL AND/OR MENTAL CONDITION, HOSPITAL AND CLINICAL RECORDS, X-RAYS, SUMMARIES AND ABSTRACTS OF REPORTS AND RECORDS AND STATEMENTS TAKEN FROM THIS CLAIMANT NOW IN ITS POSSESSION AS WELL AS COPIES OF ALL SUCH DOCUMENTS RECEIVED IN THE FUTURE."

Five days before the hearing, counsel for SAIF mailed 40 exhibits to claimant's attorney and the Referee. On the day of hearing, SAIF offered an additional exhibit (Exhibit 41). Claimant's counsel at the hearing objected to admitting seven of the exhibits on the ground that SAIF violated the 10 day rule of OAR 436-83-400(3). In support of his objection, claimant's counsel alleged that he previously had obtained 34 of the exhibits and was prepared to respond to them, but that he was surprised and prejudiced by late receipt of the other seven exhibits.

SAIF argues that if the Referee excludes any of the exhibits made available less than 10 days before the hearing, he should have excluded them all, particularly since claimant's counsel failed to submit a list of exhibits and the burden of proof was on the claimant. SAIF also asserts that it is unfair to exclude those exhibits that were harmful to claimant's case but to admit the helpful ones.

The criteria employed by the Referee to determine admissibility was not whether the exhibit objected to helped or harmed claimant's case, but whether claimant was surprised and prejudiced by receiving the exhibits at such a late date. We find that claimant was surprised and prejudiced by late submission of the seven exhibits in question. Any surprise or prejudice to the claimant would have been forestalled had SAIF complied with OAR 436-83-460, which provides as follows:

"Upon demand of any claimant requesting a hearing, the DRE/SAIF and its representatives shall within 15 days of mailing said demand furnish to claimant or his representative, without cost, copies of all medical and vocational reports and other documents relevant and material to the claim which are then or come to be in the possession of the DRE/SAIF or its representatives, except that evidence offered solely for impeachment need not be so disclosed. . ."

However, SAIF failed to comply with that rule either. Continuing the hearing for cross-examination of the physicians and others whose reports made up the offending exhibits was impractical because the reports involved no fewer than five different professionals.

SAIF argues that it is unfair to exclude Exhibit 41 in particular on the ground of the 10 day rule because SAIF did not receive it until the day before the hearing. Exhibit 41 is the report of a medical consultant prepared based upon a review of the medical and other information available to SAIF. The record reveals that SAIF did not request the review until 33 days after receipt of the last medical report included in the review and 27 days before the hearing. There was no showing by SAIF why, with the exercise of due diligence, the review could not have been requested or received sooner. Moreover, SAIF had already requested and received, well in advance of the hearing, a report based upon a paper review by another medical consultant. Inexplicably, SAIF failed to send that report or any other report to claimant and the Referee more than 10 days prior to the hearing. Some of the exhibits in question were in SAIF's possession six to ten months before the hearing.

We have previously upheld, even complimented Referees for enforcing OAR 436-83-400(3). Millie Thomas, 34 Van Natta 40, 41 (1982):

"The Board concludes that the Referee in no way abused his discretion in refusing to admit proposed Exhibit 16. Rather, exclusion of Dr. Thomas' March 10, 1981 report was eminently proper and appropriate under the facts and circumstances of this case. The Board commends the Referee for enforcing a simple, unambiguous rule which is designed to effectuate the entire hearing process."

The same comments are applicable here.

Neither party has requested review of those portions of the Referee's order relating to the denial of compensation for claimant's neck condition, imposition of penalties, award of attorney's fees, or contingent payment of certain medical bills. Therefore, we decline to review those issues. We note, however, that it may be inappropriate to both exclude exhibits because of lack of timely disclosure and to impose a penalty because of the same lack of timely disclosure.

ORDER

The Referee's order dated August 31, 1981 is affirmed.

Claimant's attorney is awarded \$300 as and for a reasonable attorney fee for services rendered before the Board on behalf of the claimant, payable by the carrier in addition to and not in lieu of the allowance made by the Referee.

KATHERINE CASTEEL, Claimant
Robert Udziela, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-01021 & 80-04530
May 14, 1982
Order on Application for
Attorney's Fee

This claim is now before the Board for an allowance of an attorney's fee for services rendered before the Court of Appeals, pursuant to OAR 438-47-045(1) and Morris v. Denny's Restaurant, 53 Or App 863 (1981).

The Court of Appeals increased claimant's award of unscheduled permanent partial disability from 10% to 50%. Accordingly, claimant's attorney is allowed 25% of the increased compensation awarded by the court, not to exceed the sum of \$1,500.

This fee is in addition to and not in lieu of the attorney's fee allowed by the Board's Order on Review dated June 11, 1981, which was allowed pursuant to OAR 438-47-040(2), as well as any attorney's fee previously paid to claimant's attorney out of the award of compensation granted by the Referee's order.

IT IS SO ORDERED.

HAROLD CURRY, Claimant
SAIF Corp Legal, Defense Attorney

Own Motion 81-0215M
May 14, 1982
Notice of Hearing

The Board issued an order on April 14, 1982 directing the SAIF Corporation to show cause why it should not be penalized for a possible "unreasonable interference in the doctor/patient relationship in the course of claimant's compensable treatment." In response, SAIF has submitted an affidavit stating its version of the relevant facts and has requested an evidentiary hearing on this matter.

Notice is hereby given that the Board will conduct an evidentiary hearing as requested by SAIF on Monday, June 14, 1982 at 9:30 a.m. at 480 Church Street, SE, Salem, Oregon 97310.

JOHN GALANOPOULOS, Claimant
Ivan S. Zackheim, Attorney
Robert F. Reide, Attorney

WCB 81-04249
May 14, 1982
Interim Third-Party Distribution
Order and Notice of Hearing

Presently before us is a request to determine the extent of the carrier's lien pursuant to ORS 656.580(2), and to make a proper distribution, pursuant to ORS 656.593, of the proceeds of the third-party recovery obtained by claimant. Claimant also raises an issue concerning the proper allowance of an attorney's fee, in view of OAR 438-47-095, which limits the attorney's fee in third-party claims to one-third of the gross recovery obtained by the claimant.

Claimant sustained a compensable ankle sprain in November, 1977 which was accepted by State Farm Insurance Company, the employer's compensation carrier. The claim was closed by a Determination Order of January 20, 1978 which awarded claimant temporary total disability for a one-month period with no award of permanent disability.

Claimant consulted a podiatrist, Dr. Aizawa, on January 6, 1978. Dr. Aizawa performed surgery on February 1, 1978 to repair claimant's sprained ankle ligaments. Dr. Aizawa treated claimant from February, 1978 until January, 1979 with injection therapy. Claimant continued to experience ankle instability and pain, and he consulted an orthopedic surgeon, Dr. Thompson, in March of 1979. Dr. Thompson performed a second surgery in May, 1979 which was successful. Due to this second operation claimant suffered a loss of range of motion within the ankle joint.

In August, 1979 claimant filed a malpractice suit against Dr. Aizawa alleging negligent treatment of and permanent damage to his right ankle, right foot and sural nerve. Claimant ultimately was awarded a jury verdict of approximately \$139,400.

A subsequent Determination Order dated April 13, 1981 awarded claimant 13.5% for 10% loss of his right foot.

State Farm claims a lien against the third-party recovery in the amount of approximately \$41,240 in temporary total disability benefits, and approximately \$7,600 in medical benefits.

Claimant contends that the carrier is not entitled to assert a lien against any portion of the third-party proceeds due to the fact that the negligent injury to claimant's sural nerve is a separate and distinct injury from the ankle sprain which was caused by claimant's industrial accident. Claimant contends alternatively that, even if the carrier is entitled to assert a lien against the proceeds of claimant's third-party recovery, that lien must be limited to recovery of that portion of the carrier's claim costs which are attributable to the malpractice. The carrier contends that if the Board adopts the claimant's alternative position, then it is entitled to recover all expenditures made on or after January 6, 1978 the date claimant first visited Dr. Aizawa.

We have previously held that the consequences of medical malpractice arising out of treatment of a compensable injury or disease are themselves compensable. Donald P. Neal, 34 Van Natta 237 (1982); see also Wimer v. Miller, 235 Or 25 (1963). If the consequences of malpractice are compensable, then compensation carriers should be entitled to reimbursement of expenditures made on account of the malpractice when the worker elects to proceed against a physician in a third-party proceeding. "If the law frowns on double recoveries in third-party actions, it does so nonetheless when the third party is a doctor; and if the law aims to reimburse the compensation payor for his expenditures, it aims to do so no less when the expenditure is occasioned by the effects of malpractice." 2A Larson, Workmen's Compensation Law, §72.70 (1982).

We believe that while the law aims to reimburse the carrier for its expenditures, reimbursement should be limited to those additional expenses incurred due to the consequences of the malpractice. This appears to be the majority position on the issue of the extent of reimbursement from the proceeds of a third-party malpractice recovery, and we conclude that such a reading of the statute accomplishes a fair and sensible result. Cardillo v. Long Island College Hospital, 382 N.Y.S. 2d 642, 86 Misc. 2d 438 (1976); Brum v. International Terminal Operating Co., Inc., 312 A 2d 507, 125 N.J. Super. 558 (1973); Heaton v. Kerlan, 166 P. 2d 857, 861, 27 Cal. 2d 716 (1946); Industrial Commission v. Standard Ins. Co., 370 P. 2d 156, 158, 149 Colo. 587 (1962); 2A Larson, supra, §72.65(b).

This gives rise to a practical problem of how to segregate payments on account of the original (pre-malpractice) portion of a compensable injury from those portions which are attributable to the "aggravation" occasioned by the malpractice. The burden of proof is upon the carrier to establish the extent of the expenditures attributable to the malpractice. Dodds v. Stellar, 30 Cal. 2d 496, 183 P. 2d 658 (1947). The record before us does not permit a proper determination of which expenditures are attributable to the original compensable injury and which arose out of the aggravation caused by the physician's malpractice. Furthermore, we are not convinced that either party has had an adequate opportunity to develop this issue, although the carrier has quoted certain figures in its brief supposedly representing that portion of its expenditures occasioned by the malpractice. Accordingly, we deem it appropriate to set this matter for an evidentiary hearing at which time the parties will have a full and fair opportunity to present evidence on this issue. We encourage the parties to attempt to resolve this matter on their own, if at all possible, before the hearing date.

Claimant's attorney's fee agreement with his attorney called for payment of 40% of the gross recovery obtained in the event that the malpractice action went to trial. OAR 438-47-095 states: "In third party claims. . . the attorney's fee shall in no event exceed 33-1/3% of the gross recovery obtained by the claimant."

The jury's verdict was in excess of \$139,000. Counsel's affidavit in support of a fee equal to 40% of the gross recovery details the facts surrounding the length and difficulty of the trial

and its preparation, as well as the settlement negotiations made prior to trial. Counsel argues that in view of the favorable results obtained and the highly contingent nature of this cause of action, it is only fair that the attorney's fee agreement be upheld and counsel be allowed 40% of the gross recovery, as opposed to 33-1/3%.

The express language of the rule governing attorney fees in third-party claims is that the attorney's fee shall in no event exceed one-third of the gross recovery. While we may believe that in certain cases one-third of the gross recovery obtained in behalf of a worker does not adequately compensate the plaintiff's lawyer, which may be particularly true in medical malpractice and some products liability cases, we are prohibited from allowing any fee in excess of that permitted by our rules. A change in the rules may be in order, but any such change will have to await rulemaking proceedings and cannot be accomplished on a case-by-case basis. Accordingly, claimant's attorney will be allowed 33-1/3% of the gross recovery obtained by claimant as and for a reasonable attorney's fee.

INTERIM ORDER AND NOTICE OF HEARING

State Farm Insurance Company has a lien against the proceeds of claimant's third-party recovery, but only to the extent of the expenditures made by the carrier which are due to the malpractice.

The Board reserves ruling on the present value of the carrier's reasonably to be expected future expenditures for compensation, if any, until the record is more completely developed on the issue of which expenditures are attributable to the malpractice.

Claimant's attorney is allowed 33-1/3% of the gross third-party recovery as and for a reasonable attorney's fee.

THIS MATTER IS SET FOR HEARING ON MONDAY, JUNE 21, 1982 AT 9:30 A.M. AT THE BOARD'S OFFICES IN SALEM, OREGON, 480 CHURCH SE. This hearing shall be conducted before the Board. Each party shall file with the Board all documentary evidence and provide copies thereof to the other party as soon as practicable and not less than ten days prior to hearing.

MARGARET L. HARRIS, Claimant
Robert K. Udziela, Claimant's Attorney
Brian Pocock, Defense Attorney
Steven Frank, Defense Attorney

WCB 80-02418 & 80-06627
May 14, 1982
Order on Reconsideration

The Board issued its Order on Review in the above entitled matter on April 30, 1982. We affirmed the Referee's assignment of responsibility for claimant's occupational disease to the second carrier (United Pacific) for the same employer.

United Pacific seeks reconsideration of the Board's order in light of Bracke v. Baza'r, Inc., 51 Or App 627 (1981). United Pacific contends that where (1) the claimant will be compensated by one carrier or the other, and (2) the evidence establishes with medical probability that the exposure causing the condition occurred when the first carrier was on the risk, the "last injurious exposure" rule need not be applied. United Pacific contends that under Bracke there was no contribution to claimant's condition during the time United Pacific was on the risk. We correct the page number in our citation to Inkley v. Forest Fiber Products, 288 Or 337, instead of 377, but otherwise adhere to our prior decision.

Bracke stands for the proposition that an employer cannot use the last injurious exposure rule to defeat an otherwise compensable claim where the claimant has proved that the previous employment was responsible in fact for the claimant's condition. To some extent Bracke is inconsistent with Inkley, and Mathis v. SAIF, 10 Or App 139 (1972). Yet, the Court of Appeals discussed Mathis in the course of deciding Bracke. Moreover, as between the rationale of Bracke (a Court of Appeals decision) and the holding of Inkley (a Supreme Court decision), we are bound by the Supreme Court decision.

Admittedly, Inkley, Mathis, and Bracke all involved multiple employers and situations in which a different holding might have resulted in the claimant receiving no compensation for a clearly occupational condition. Here, the issue is not compensability, but responsibility as between two carriers for the same employer. If given the opportunity to review the issue, the Court of Appeals or Supreme Court may reach a different result than the Board in this case. However, for the time being, we feel we are bound by the holding of Inkley.

The carrier's motion is denied and our order is readopted and republished.

IT IS SO ORDERED.

WANDA LEWIS, Claimant
J. David Kryger, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-08230
May 14, 1982
Order Denying Remand

On or about January 7, 1982 claimant requested review of the Referee's order of December 23, 1981. Thereafter, on or about April 20, 1982 claimant moved the Board to remand this claim to the Referee for further evidence taking pursuant to ORS 656.295(5), for inclusion of a particular physician's report and "any such further evidence bearing on this issue."

Claimant's request for remand is denied. Robert A. Barnett,
31 Van Natta 172 (1981).

IT IS SO ORDERED.

JOSEPH E. LOGSDON, Claimant
Kenneth Bourne, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-05284
May 14, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

The claimant requests Board review of Referee Mulder's order which upheld the SAIF Corporation's denial of his claim and denied his request for penalties and attorney fees.

Claimant was employed by the University of Oregon Health Sciences Center at the time of the alleged industrial accident. Claimant sustained a compensable injury to his back on March 5, 1981 while reaching for a vacuum pump. He suffered no permanent impairment from this injury and returned to work on March 22, 1981. On June 12, 1981 the employer received an affidavit from claimant's attorney, alleging that claimant suffered an injury at work on May 13, 1981. A form 801 was completed by the employer upon receipt of the affidavit. On June 22, 1981 SAIF issued a letter of denial stating that there was insufficient evidence that claimant suffered an on-the-job injury.

Claimant, in his affidavit, states that the injury occurred on May 13, 1981. By the time of the hearing, however, claimant testified that he was actually injured on May 6, and later, that the actual date was May 7. The claimant contended that he and two co-employees were attempting to move an 800-pound ice machine, when it slipped off a four-wheel cart, and that while attempting to hold the machine, he suffered severe back pain. Claimant testified that he immediately reported his injury to his supervisor, Mr. Meyers, but stated that he did not fill out a claim form as he thought that he was only required to inform his supervisor of the incident, even though the claimant had filed a claim for back injury in March, 1981. Claimant continued to work until May 13, at which time he terminated his employment effective May 29. Claimant did not return to work, however, after May 13.

Claimant produced two witnesses at the hearing. Both witnesses testified that they remembered an incident where they were helping claimant move an ice machine when claimant indicated that he hurt his back. Neither witness was able to give a specific or even a particularly general date of the incident. Claimant's supervisor, Mr. Meyers, testified that he did not remember claimant reporting an injury to him in May. Although claimant contended that his witnesses were present when he notified Mr. Meyers of the incident, neither of them remembered the conversation.

Claimant testified that he worked on May 6, 1981 and that it was a busy day for him. Time records, however, indicated that he called in sick on May 6. A breakdown of claimant's time records for May 7 indicated that he did not work on an ice machine on that day, but on air conditioners and a research refrigerator.

The Referee found that claimant failed to prove that a compensable injury occurred. He cited numerous inconsistencies and evasions on the part of the claimant. The Referee additionally found that SAIF's denial letter was issued within 10 days of notice of the claim, and, therefore, no interim compensation was due and no penalty or attorney fee was warranted.

Claimant argues that he has established his case by fixing the date of injury with reasonable certainty, through his testimony and that of his witnesses. We also, as was the Referee, are not convinced by claimant's argument. There are simply too many inconsistencies in this record. Claimant has not convincingly established a connection between his back difficulties and the alleged May incident. As we stated in Richmond C. Johnson, 33 Van Natta 612 (1981), the Board will defer to the Referee's conclusion if it is based on a credibility finding unless there is a compelling reason not to do so. We find no compelling reason here to do otherwise.

ORDER

The Referee's order dated September 29, 1981 is affirmed.

ROY McFERRAN, Jr., Claimant
Gary Galton, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 79-11077
May 14, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

Claimant seeks Board review of Referee Williams' order which granted 25% permanent partial disability and denied other requested relief, i.e., greater permanent partial disability, greater temporary total disability and carrier-paid penalties and attorney fees. We affirm.

Claimant was working as a truck driver-deliverer when, in October, 1977, he injured his right shoulder moving a heavy freezer. The following July Dr. Berselli performed a surgical excision at the distal end of the right clavicle. Claimant recovered from the surgery reasonably well but continued to experience pain in his right shoulder upon exertion. In November, 1978 Dr. Utterback suggested the possibility of right shoulder tendonitis. However, the sparse medical evidence does not verify this diagnosis or any causal connection between the possible tendonitis and claimant's October, 1977 injury.

Claimant returned to his former job and his claim was closed by Determination Order dated May 18, 1979 which awarded 5% permanent partial disability. Claimant testified that his work over the following three months caused considerable and increasing pain in his right shoulder. In August, 1979, upon Dr. Berselli's advice to seek lighter employment, claimant quit his truck driving job. Again, however, the evidence is skimpy about whether the doctor's advice was because of compensable consequences of claimant's October, 1977 injury or for some other reason.

Three different doctor's letters were submitted to SAIF shortly after claimant quit his job. The first is Dr. Utterback's letter of August 22, 1979:

*The following is information requested in your letter of 21 August 1979.

*Roy McFerran was seen in this office on 27 June 1979 and continued with about the same discomfort in the right shoulder. That symptom complex is most likely secondary to chronic supraspinatous tendonitis. Surgery has been offered by Robert Berselli, M.D., but Mr. McFerran is dubious that it would be of benefit. He is gradually having more difficulty as time progresses and will probably at some time be forced to discontinue heavy labor.

*He was told that surgery has a very good chance of improving his symptom complex but that no guarantee could be given. Surgery should be accomplished if it is a question between that and no work at all. He was advised, however, at this time to begin looking for an occupation that did not require heavy lifting above shoulder level.

"If any further information is desired,
please feel free to contact this office."

The second is Dr. Berselli's letter of September 15, 1979:

"The above noted patient in my opinion
needs to be retrained. He has a chronic
tenosynovitis of his right shoulder. I
don't think he requires surgery, and I
think he needs to be retrained for an
occupation which would not put as much
strain on his shoulder as his prior
occupation has done.

"I hope you will concur with this."

The third is Dr. Berselli's letter of October 2, 1979:

"The above noted patient still complains of
persistent pain in his right shoulder. He
notes the discomfort to be particularly
severe whenever he attempts to do anything,
even minimally strenuous, with his right
arm. I think the patient is still disabled
from working and think that he should be
enrolled in a Vocational Rehabilitation
Program. I think his time loss benefits
should continue until he is able to return
to modified work. I trust this letter is
of aid to you in your determination."

SAIF treated the last of these three letters as an aggravation
claim - only out of an abundance of caution, SAIF argues - and
timely made payments of interim temporary total disability compen-
sation while the claim was in deferred status. SAIF then denied
the aggravation claim on November 21, 1979 and ceased paying
interim compensation at that time.

There is more than a little confusion about what issues are
now before the Board. The parties have not filed briefs on Board
review, but instead rely on extensive briefs filed before the
Referee. Claimant's briefs filed before the Referee refer to dif-
ferent issues under different headings - the statement of issues
section, the argument section and the prayer for relief. All
briefs are characterized by a relatively high level of emotionalism
and a relatively low level of illumination. Out of our own abun-
dance of caution, we will discuss all issues that may be involved.

I

Claimant argues his aggravation claim was perfected by either
Dr. Utterback's August 22, 1979 letter or Dr. Berselli's September
15, 1979 letter and thus interim compensation was due from one of
those earlier dates rather than the October date upon which SAIF
began paying interim compensation after receiving Dr. Berselli's
October 2, 1979 letter. Claimant relies on Stevens v. Champion
International, 44 Or App 587 (1980).

We find nothing in Stevens that supports claimant's position. That decision was based in part on ORS 656.273(3): "A physician's report indicating a need for further medical services or additional compensation is a claim for aggravation." Under this standard, neither Dr. Utterback's August letter nor Dr. Berselli's September letter was an aggravation claim. Neither indicated a need for further medical services; indeed, Dr. Berselli's letter rejects the possibility of surgery. Neither indicated a need for additional compensation. The real thrust of both letters was that claimant might or would require vocational rehabilitation. However, under the law then in effect, claimant's eligibility for and possible participation in vocational rehabilitation was beyond SAIF's control.

II

Claimant argues his time loss payments should have been started in August, 1979 following Dr. Utterback's letter or at the latest in September, 1979 following Dr. Berselli's first letter. Our conclusion that those letters were not aggravation claims disposes of this contention. Moreover, even if either of those letters were an aggravation claim sufficient to activate the duty to accept or deny within 60 days, neither of those letters constituted medical verification of inability to work because of a worsened condition within the meaning of ORS 656.273(6) and thus did not activate any duty to pay temporary total disability compensation.

Claimant also argues his time loss payments should have continued beyond SAIF's November 21, 1979 denial. The basis of this latter contention is not clear. Claimant's brief refers to SAIF's denial letter being "defective" but does not develop this point in the argument section. Just as a guess, claimant may be contending SAIF's denial letter was defective because claimant's attorney was not sent a copy. We rejected a similar contention in Evelyn LaBella, 30 Van Natta 738, 742 (1981), affirmed without opinion, 54 Or App 779 (1981):

"The statutes state that written notice of denial 'shall be furnished to the claimant,' ORS 656.262(5), and 'shall be given to the claimant,' ORS 656.262(6). It may well be that service of a denial on a claimant's attorney would be functionally the same as service on the claimant under an agency theory. But it does not follow that there is any legal or policy basis for requiring service on a claimant's attorney in addition to service on the claimant."

The point in LaBella was whether failure to copy claimant's attorney was good cause for a tardy hearing request. We answered that question in the negative. The same analysis is applicable here. Failure to copy claimant's attorney with a denial letter does not in any way make the denial "defective."

III

Claimant's request for hearing challenged SAIF's November 21, 1979 denial of his aggravation claim. Claimant's brief lists his challenge to that denial as an issue, but does not present any argument on the point.

The Referee concluded:

"An analysis of the medical reports submitted to the employer commencing in August of 1979, fairly interpreted as a whole, does not substantiate claimant's position that his claim should have been reopened for additional payment of temporary disability, though the reports are strong evidence that claimant's permanent [disability] award was inadequate."

We generally agree with the Referee's analysis with the additional observation that to the extent, if any, that claimant may be relying on the tentative diagnosis of right shoulder tendonitis to establish that his right shoulder condition had worsened since the May 18, 1979 Determination Order, we find no medical evidence that establishes any causal link between claimant's October, 1977 injury and his possible tendonitis condition.

IV

An an "alternative" to proving his aggravation claim, claimant contends he was entitled to claim reopening under the doctrine established by the Board in Cecil B. Whiteshield, 4 Van Natta 203 (1970), and Alfred West, 10 Van Natta 232 (1973).

Whiteshield and West have to be interpreted in historical context. At the time those cases arose, former ORS 656.271(1) required: "The claim for aggravation must be supported by a written opinion from a physician that there are reasonable grounds for a claim." This requirement was interpreted to be jurisdictional; in other words, there was no aggravation claim that needed to be denied and no Board jurisdiction to entertain a request for hearing on such a denial unless the whole process had started with a valid physician's report.

Whiteshield and West were primarily jurisdictional holdings -- if a worker claimed his condition worsened within one year of a Determination Order, the worker did not have to comply with the physician's-report requirement of former ORS 656.271(1) in order for there to be Board jurisdiction to consider that issue ancillary to the worker's request for hearing on the Determination Order. Because of the subsequent repeal of former ORS 656.271(1), we need not consider whether those jurisdictional holdings were correct under the prior statutory scheme. Despite the repeal of former ORS 656.271(1), however, Whiteshield and West continue to be cited for a variety of substantive, i.e., other than jurisdictional, propositions. Claimant seems to here argue, by way of his "alternative" argument, that he was entitled to claims reopening within one year of the May 18, 1979 Determination Order without the need to

establish any worsening of his condition. The Referee interpreted Whiteshield and West somewhat differently: "The gist of those cases is that the issue of a claimant's condition being medically stationary can be reviewed in light of developments during one year after closure, without the necessity of the claimant proving an aggravation as such."

Under the current statutory scheme, Whiteshield and West are not support for these broader propositions. While a claim for aggravation reopening possibly need be nothing more than a statement by a claimant, his doctor or his attorney that his condition has worsened, Stevens v. Champion International, supra, if the claim is denied then the facts of worsened condition and causal connection with the prior industrial injury still have to be proven, usually by medical evidence. ORS 656.273(7): "Adequacy of a physician's report is not jurisdictional. If the evidence as a whole shows a worsening of the claimant's condition the [aggravation] claim shall be allowed." The need to prove worsening and causal connection is exactly the same whether the aggravation claim is made within one year of a Determination Order or at any other time. ORS 656.273(1): "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." Furthermore, subject to infrequent exceptions such as in William Bunce, 33 Van Natta 546 (1981), the question of whether a worker was medically stationary at the time a Determination Order issued is reviewed based on the then, i.e., at the time the Determination Order issued, available information. There is no "one year trial period" in which to determine whether the claimant was or was not stationary at the time of claim closure.

Given the rule that the claimant's permanent disability is rated as of the time of the hearing, a claimant's permanent disability can increase between the date of the Determination Order and the date of the hearing and the claimant is thus entitled to an increased permanent disability award at the time of the hearing. To the extent that the basis of Whiteshield and West was recognition of this truism, those cases and many others to the same effect remain valid. Also, at the time of a hearing, it can be found that the Determination Order awarded an incorrect amount of temporary total disability benefits for time loss incurred before the Determination Order issued. But when a claimant, pursuant to a request for hearing, seeks temporary total disability compensation for any period of time after a Determination Order was issued, such an issue is only viable for litigation purposes if the claimant either is arguing premature closure or is challenging a post-Determination Order denial of an aggravation claim.

In summary, the one year period in which to request hearing following a Determination Order, ORS 656.319(2), is just that -- a limitation period on the right to request a hearing on the extent of disability awarded by Determination Order. That one-year period has no other significance and has no impact on any substantive rights or duties. To the extent that Whiteshield or West can be divorced from their historical context and thus can be interpreted otherwise, those cases are overruled.

V

Claimant contends that he is entitled to greater permanent partial disability than the 25% unscheduled award granted by the Referee. We affirm and adopt that portion of the Referee's order rating the extent of claimant's permanent disability with the additional observation that if claimant is relying on the tentative diagnosis of right shoulder tendonitis as part of his compensable disability, we find no medical evidence that establishes any causal link between claimant's October, 1977 injury and his possible tendonitis condition.

VI

Claimant's brief identifies no fewer than three separate grounds for imposition of penalties and no fewer than three separate grounds for ordering carrier-paid attorney fees. We are not persuaded that claimant is entitled to any greater relief than ordered by the Referee.

ORDER

The Referee's order dated February 2, 1981 is affirmed.

JAMES A. NORRIS, Claimant	WCB 81-01383
Leeroy O. Ehlers, Claimant's Attorney	May 14, 1982
SAIF Corp Legal, Defense Attorney	Order on Review

Reviewed by Board Members Lewis and Barnes.

Claimant seeks review of Referee Pferdner's order which awarded him 100% permanent partial disability. Claimant contends he is permanently and totally disabled. SAIF Corporation cross-requested review, contending the Referee's permanent partial award is excessive.

The Referee concluded that claimant is permanently and totally disabled but that he could not make such an award because the claimant was working part-time. While we agree with the Referee's conclusion that claimant is permanently and totally disabled, we do not find that claimant's limited work activity prohibits an award of permanent total disability.

Claimant suffered a severe occupational spinal injury in 1962. He underwent a laminectomy, a two-level fusion from L4 to S1 and also apparently sustained a compression fracture of L-2 in that injury. He later developed a pseudoarthrosis in the fusion area which was explored and repaired in 1968. This fusion has now once again separated. Claimant also strained his back in 1978 when he slipped while climbing up onto a log loader. The current, December 29, 1979, injury resulted from a five foot fall from a loader. Claimant landed straddling a steel outrigger. He suffered a lumbar strain that is now considered to be chronic.

A threshold question is whether claimant has suffered any permanent impairment as a result of the December 1979 injury. He was examined twice by Orthopaedic Consultants following the injury. They concluded that claimant was suffering from:

- "1. Status post laminectomy and fusion, L-5/S-1 and L-4/L-5, 1964;
2. Status post exploration and repair of pseudarthrosis, 1968;
3. Probable L-4/L-5 pseudarthrosis, pre-existing.
4. Chronic lumbar strain;
5. Compression fracture, L-2, remote;
6. History of rectal and urinary tract bleeding, of unknown cause;
7. History of edema of left foot and leg, of unknown cause;
8. Bilateral pretibial dermatitis, unrelated."

Based on this diagnosis, Orthopaedic Consultants concluded:

"We believe that Mr. Norris has returned to his pre-injury status. We have no further diagnostic procedures or curative treatment to recommend with regard to the back. The permanent impairment does not seem to be increased by the recent injury."

Claimant's treating physician, Dr. Smith, has concluded that claimant's lumbar spine condition is getting progressively worse. He concurred in Orthopaedic Consultants' diagnoses, but stated on December 11, 1980:

"...I would disagree with their statement in the last paragraph. I feel that Mr. Norris has not returned to his pre-injury status, referring to the 1979 injury... I believe that he has further impaired function at this point than he did prior to the injury of 1979. I believe his impaired function is at least bordering on moderately severe and if he were not working for his brother, he probably would not be working at all."

Additionally, the uncontroverted testimony at the hearing was that claimant was able to work a full work day and often worked overtime without discomfort prior to the 1979 injury, but has not been able to do so since the 1979 injury. We find Dr. Smith's opinion that claimant has been further impaired as a result of the 1979 injury to be more persuasive than the opinion of Orthopaedic Consultants.

For a disability to be permanent and total, it must be one:

"...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." ORS 656.206(1)(a).

Claimant's brother has employed him on an uneconomical, generally part-time basis since the 1979 injury. Although claimant has worked some 8 hour shifts, from the testimony we find he has generally worked 4 hours a day or less. And this has not been continuous work; claimant must periodically take breaks to lie down. He cannot remain in one position for more than 20 minutes at a time due to pain in his back. He occasionally needs someone to hold him up for awhile after he gets off a loader until he can stand on his own.

After the date of the Referee's order finding this work activity foreclosed the possibility of an award for permanent total disability, the Supreme Court decided Harris v. SAIF, 292 Or 683 (1982):

"The determination of permanent total disability status does not turn upon whether the claimant has money-earning capacity, but rather upon whether the claimant is currently employable or able to sell his services on a regular basis in a hypothetically normal labor market." 292 Or at 695.

"A severely disabled worker who through luck or pluck is able to generate an income cannot be denied permanent total disability status simply because he or she has demonstrated an ability to 'earn money.'" 292 Or at 696.

The fact that claimant's brother has temporarily made available to him a part-time job which he is allowed to perform at his own pace does not mean that claimant is capable of performing regular work activities within the meaning and intent of ORS 656.206(1)(a).

Claimant's physical impairment from his series of back injuries, culminating in the December, 1979 injury, is severe. Claimant has no usable job skills other than logging and truck driving, from which we find he is now precluded notwithstanding the generosity of a family member. He is 52 years old and functionally illiterate. These social/vocational factors in addition to his chronic back problems make claimant a poor candidate for rehabilitation. Although he has tried, claimant has been unable to obtain any employment since his 1979 injury other than that with his brother.

ORDER

The Referee's order dated August 26, 1981 is reversed. Claimant is awarded compensation for permanent total disability effective December 11, 1980, the date of Dr. Smith's closing examination.

Claimant's attorney is allowed 25% of claimant's increased compensation, not to exceed \$2500, as and for a reasonable attorney fee; this attorney fee is in lieu of and not in addition to that allowed by the Referee.

DONNA L. PICHETTE, Claimant
Todd Westmoreland, Claimant's Attorney
Keith D. Skelton, Defense Attorney

WCB 81-07628
May 14, 1982
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.

PAUL L. RICHARDSON, Claimant
Jerome F. Bischoff, Claimant's Attorney
R. Ray Heysell, Defense Attorney

WCB 81-4483
May 14, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

The employer seeks Board review of Referee Danner's order which set aside the denial of claimant's aggravation claim and remanded the claim to the employer for acceptance. The sole issue is compensability of the aggravation claim. We agree with the Referee's conclusion, but for a different reason than that given by the Referee.

Claimant originally sustained a low-back injury in 1976 while in the employ of Roseburg Lumber Company. Following a lengthy period of recovery, claimant received a 30% unscheduled disability award and a vocational rehabilitation plan was implemented whereby claimant became an independent cement finishing contractor. Claimant enjoyed some initial success in his business but at the time of the incidents herein apparently had returned to work as an employee for another employer, Claterbos Construction.

On October 4, 1980, claimant sought medical care at a hospital emergency ward for low back pain. Although the hospital records indicated that the precipitating incident was "lifting a box", at the hearing claimant testified that in fact the incident involved shoving rocks off an embankment in the course of constructing a rip-rap. Warnings by the Referee at the hearing suggest that claimant speaks rapidly and does not always make himself clearly understood.

Again on March 9, 1981, claimant sought emergency medical care at a hospital for low back pain. The precipitating event this time involved use of a wheelbarrow. Claimant testified that he was balancing a wheelbarrow filled with rock and gravel while his 16 year old son lifted it over a form in the course of pouring

a concrete driveway at claimant's own house. A great deal of confusion has arisen in this case because the Referee found that: (1) Claimant denied that this wheelbarrow incident ever happened, and (2) that the incident happened while claimant was working as a self-employed cement finisher. The record is very clear that claimant never denied that the incident took place; in fact he testified in considerable detail concerning exactly what happened. The record is also very clear that claimant was working on his own home, and not in self employment or as anyone's employee.

On May 7, 1981, claimant sought emergency medical care because he was experiencing "weakness, dizziness, and nausea". Claimant had some history of experiencing what may have been seizures or a stroke.

On May 13, 1981, claimant submitted an aggravation claim supported by a letter from his then treating physician, who was also the physician who had seen claimant at the emergency room on a number of occasions. The Referee found, and we concur, that the physicians's letter constitutes a sufficient aggravation claim under ORS 656.273(3).

The confusion arising from the Referee's finding that the wheelbarrow incident took place in the course of claimant's self-employment was compounded further by the Referee's holding that the burden of proof was on the employer to show that claimant had worker's compensation coverage while engaged in self-employment. Since the record did not clearly establish whether claimant had compensation coverage at the time of the wheelbarrow incident, the Referee concluded that the aggravation was compensable within the meaning of Grable v. Weyerhaeuser Co., 291 Or 387 (1981), because the incident was "non-industrial" in the sense that claimant did not have worker's compensation coverage. Of course, it is irrelevant whether he did or did not have worker's compensation coverage at that time because he was not engaged in employment when he aggravated his low back condition.

Some confusion may have also arisen from the timing of claimant's aggravation claim. He filed the claim after the May 7th visit to the emergency ward for what may have been a seizure or stroke. We do not understand the claimant to argue that any disability or medical services occasioned by his history of seizures or strokes is compensable. Only time loss, medical services, or increased permanent disability arising from the aggravation of his low back condition would be compensable.

In sum, we find there was no intervening industrial injury in March of 1981 (the wheelbarrow incident) because that incident did not occur in the course of any employment. We also find that the October of 1980 incident (lifting a box or shoveling rocks) could have been an intervening industrial injury, but this record contains so little information about that incident that we are not persuaded it was an intervening new injury.

We come then to an application of Grable. Was claimant's 1976 low back injury a material contributing cause of his low back condition following the March, 1981 wheelbarrow incident? From our review of the medical evidence, we answer that question in the affirmative.

ORDER

The Referee's order dated September 8, 1981 is affirmed.

Claimant's attorney is awarded \$400 as and for a reasonable attorney fee for his services on behalf of the claimant before the Board, to be paid by the employer in addition to and not in lieu of the attorney fees awarded by the Referee.

DEAN D. TEEL, Claimant
Mark R. Bocci, Claimant's Attorney
Michael J. Sweeney, Attorney
Ronald W. Atwood, Defense Attorney

WCB 80-00757
May 14, 1982
Order of Dismissal

The employer/insurer has requested review of the Referee's order denying the employer's motion to dismiss claimant's request for hearing. Although the Referee's order has appended to it the notice of appeal rights, the order is not a final, appealable order and is, therefore, not reviewable by the Board at this time.

ORDER

The employer/insurer's request for review is dismissed as premature.

JUANITA TREVINO, Claimant
January Roeschlaub; Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-01912 & 80-07954
May 14, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

Claimant seeks Board review of Referee Knapp's order which found claimant had failed to prove her right knee condition worsened since the last arrangement of compensation, found claimant's 1980 left knee condition was causally linked to the right knee injury in 1977 but sustained the SAIF Corporation's denial of responsibility for the left knee condition on the ground that claimant did not have good cause for requesting a hearing more than 60 days after SAIF's denial of the left knee claim.

Claimant's brief refers to "a claims history tangled enough to result in . . . a monumental misapprehension on the part of the Hearing Referee." We agree that both the claims history and this record are confusing. We do not agree that there was a misapprehension on the part of the Referee; or, alternatively, we share that misapprehension.

We affirm and adopt those portions of the Referee's order which ruled claimant had failed to prove that her right knee condition worsened after the Determination Order. We have doubts that claimant has proven a causal link between her 1977 right knee injury and her 1980 left knee condition, but we need not resolve that issue one way or the other because, even if claimant's current left knee condition is otherwise compensable, her hearing request was not timely.

SAIF denied claimant's claim for compensation for her left knee condition on May 21, 1980. Claimant did not request a hearing on that denial until September 2, 1980. Under ORS 656.319 (1)(b) the question is whether "there was good cause for failure to file the request by the 60th day after notification of denial."

The Referee's good cause analysis was built on a foundation that started with Sekermestrovich v. SAIF, 280 Or 723 (1977). We have previously stated it is "a fundamental flaw" to build "on the foundation of Sekermestrovich v. SAIF . . . without . . . appreciation of the significant change in that precedent effected by Brown v. EBI, 289 Or 455 (1980)." Florence M. Clark, 32 Van Natta 153, 154 (1981). More specifically, we have consistently interpreted Brown to mean that the question of what is "good cause" within the meaning of ORS 656.319(1)(b) is a policy question for this Board to resolve under the McPherson v. Employment Division, 285 Or 541 (1979), line of cases; thus prior judicial constructions are not binding. William P. Stultz, 34 Van Natta 170 (1982); Bernice Hams, 33 Van Natta 682 (1981); W. Leonard Bradbury, 32 Van Natta 246 (1981); Evelyn M. Partlow, 32 Van Natta 178 (1981); Florence M. Clark, supra; Cecil Black, Jr., 30 Van Natta 746 (1981); Evelyn M. LaBella, 30 Van Natta 738 (1981); Donna P. Kelly, 30 Van Natta 715 (1981); Curtis A. Lowden, 30 Van Natta 642 (1981); James Griffin, 30 Van Natta 593 (1981).

So treating the good cause question in this case, we agree with and adopt the following from the Referee's analysis:

"Claimant relies on her inability to read, write or understand English as her defense for not filing within 60 days.

* * *

"Claimant has spent all of her 45 years in the United States and has been in Oregon since 1962. Most of her nine children have attended school and are able to speak both Spanish and English. Claimant did not avail herself of resources that she knew existed in the community that could have interpreted the [denial] letter. She had had previous experience with the filing of a claim and would have received other notices from SAIF. . . . She had sufficient resources to interpret the letter and take appropriate action. She did nothing until her compensation was terminated. She voluntarily disregarded a denial letter she knew came from the agency on whom she had made a claim and was paying her medical expenses. She had an obligation to determine the content of the letter and act accordingly. She did nothing and thereby forfeited her right to a hearing concerning the compensability of her claim."

The case closest on point is Evelyn M. Partlow, supra. There we concluded that a worker's "voluntary and deliberate refusal to accept certified mail does not establish good cause for an untimely hearing request." 32 Van Natta at 178. We here conclude that a failure to take steps necessary to understand mail is substantially the same as a refusal to accept mail.

ORDER

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

WILLIAM VALTINSON, Claimant
Peter McSwain, Claimant's Attorney
Darrell Bewley, Defense Attorney

WCB 80-07387
May 14, 1982
Order on Remand

On review of the Board's Order dated June 30, 1981, the Court of Appeals reversed the Board's Order and reinstated the Order of the Referee dated December 2, 1980.

Now, therefore, the above-noted Board Order is vacated, and the above-noted Referee's Order is republished and affirmed.

IT IS SO ORDERED.

DARRYL G. WARNER, Claimant
Richard Springer, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-03034
May 14, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

Claimant seeks Board review of Referee Menashe's order that granted him an award of 80% loss of the right leg, being an increase over the 60% loss awarded by the Determination Order dated February 25, 1980. The issues are extent of disability, including claimant's argument that he is permanently and totally disabled, and whether the Referee erroneously refused to admit Exhibit 99 offered by the claimant in admitted (albeit allegedly inadvertent) violation of the 10-day rule stated in OAR 436-83-400 (3).

I

We affirm and adopt the portion of the Referee's order rejecting claimant's argument he is entitled to an award for permanent total disability. We affirm and adopt the portion of the Referee's order rating the extent of claimant's permanent partial disability with the following additional comments.

The Referee's determination of 80% loss of the leg is consistent with three rules in OAR 436, Division 65.

"Knee ankylosis represents a minimum of 50% loss of the leg, if in the position of function (10°). This allowance increases proportionally to 53% loss of the leg for ankylosis in full extension (0°), or to 80% loss of the leg for ankylosis in flexion to 40°. Knee ankylosis in flexion beyond 40° represents 90% loss of the leg." OAR 436-65-550(1)(c).

"Lower extremity shortening is rated on the leg radical, whether above or below the knee in origin. For shortening in excess of one and a half inches, 20% loss of the leg is allowed, or a proportion thereof for shortening less than one and a half inches." OAR 436-65-555(4).

"For marked knee joint instability, 30% loss of the leg is allowed, or a proportion thereof for instability less than marked." OAR 436-65-555(5).

While the medical reports do not contain all of the details needed for application of these rules, from the available information it would appear that claimant's loss due to ankylosis is at least 50%, his loss due to shortening is 20% and his loss due to instability is about 10%.

II

Claimant's attorney had the medical report offered as Exhibit 99 in his possession not later than sometime in April of 1981. A copy was transmitted to the Hearings Division as a proposed exhibit in August of 1981; no copy was furnished to the carrier. This case proceeded to hearing in October of 1981. The carrier objected to introduction of Exhibit 99 on the ground that it had not previously been furnished a copy. The Referee sustained that objection.

OAR 436-83-400(3) provides in part that "not less than ten days prior to the hearing, each party shall file with the assigned Referee and provide all other parties with legible copies of all medical reports and other documentary evidence upon which the party will rely." Claimant admits that the carrier was not furnished a copy of Exhibit 99 ten days prior to the hearing. Claimant argues that OAR 436-83-400(3) can be ignored with no consequence because ORS 656.283(6) states the Referee "is not bound by . . . technical or formal rules of procedure, and may conduct the hearing in any manner that will achieve substantial justice."

ORS 656.726(5) authorizes the Board to adopt rules of practice and procedure. While the Referees may not be bound by "technical or formal" rules of procedure, we believe they are bound by the Board's rules, which include the ten-day rule stated in OAR 436-83-400(3).

The Legislature has directed that the Board's rules "may provide for informal prehearing conferences in order to expedite claim adjudication, amicably dispose of controversies, if possible, narrow issues and simplify the method of proof at hearings." ORS 656.726(5). The ten-day rule in OAR 436-83-400(3) expresses the Board's judgment that full prehearing disclosure of evidence expedites adjudication, promotes settlement and simplifies the presentation of evidence at the hearings.

Claimant argues we should now promote "substantial justice," ORS 656.283(6), by remanding to the Referee for introduction of Exhibit 99. Substantial justice can be an elusive concept. This Board receives over 1,000 hearing requests a month. It strains the present resources of this Board to schedule that many hearings reasonably promptly without unreasonable delays and an embarrassing backlog. Every time the Board remands a case for further action at the hearing level it slows down the processing of cases awaiting hearing and increases the delay the thousands of claimants awaiting hearing must experience. Substantial justice for one claimant can thus create substantial injustice for other claimants awaiting hearing. We therefore decline to remand this case for further proceedings.

We have previously upheld, even complimented Referees for enforcing OAR 436-83-400(3). Millie Thomas, 34 Van Natta 40, 41 (1982):

"The Board concludes that the Referee in no way abused his discretion in refusing to admit proposed Exhibit 16. Rather, exclusion of Dr. Thomas' March 10, 1981 report was eminently proper and appropriate under the facts and circumstances of this case. The Board commends the Referee for enforcing a simple, unambiguous rule which is designed to effectuate the entire hearing process."

The same comments are applicable here.

ORDER

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

JUDITH BERKLAND-HORN, Claimant
Michael Strooband, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-7606
May 18, 1982
Order on Review

Reviewed by Board Members Lewis and Barnes.

The SAIF Corporation seeks Board review of Referee Foster's order which set aside SAIF's denial of compensability of surgery on claimant's right big toe, and awarded \$900 attorney fees. The sole issue is compensability of the surgery. We affirm.

Claimant was employed as a maintenance worker with the City of Roseburg in April, 1980 when an 11-13 pound "Men Working" sign fell, point down, on the joint of her right toe, slicing through her boot and causing a subungual hematoma. X-rays taken at that time showed no fracture, but did reveal a boney deposit described as "accessory ossicle deposited between the phalanges of the right great toe." Claimant incurred little or no time loss at that time. Notwithstanding conservative treatment, claimant's injured toe continued to bother her, becoming swollen and sore, and she experienced shooting pains in the toe.

X-rays also revealed the existence of similar boney deposits on claimant's left big toe. Prior to the 1980 injury, claimant had experienced swollen feet, particularly during hot weather, and discomfort from standing all day. However, she characterized the discomfort as being normal tired feet from working and standing on her feet all day. Claimant had never sought medical care for either foot or toe pain, and did not know that she had an abnormality of her toes.

When the right toe condition failed to respond to conservative treatment, including partial removal of the right big toenail to relieve pressure, claimant elected surgical removal of the boney deposits in both big toes in July, 1981. Claimant does not assert that SAIF is liable for that portion of the surgery attributable to removal of the boney deposits on her left toe.

SAIF contends that this case falls within the holdings of Gibson v. SAIF, 288 Or 45 (1979), Cooper v. SAIF, 54 Or App 659 (1981) and Johnson v. SAIF, 54 Or App 620 (1981). These three cases are all post-Weller v. Union Carbide, 288 Or 27 (1979), holding in various contexts that, with respect to pre-existing conditions, experiencing symptoms alone is not compensable and that there must be a pathological change in the condition. However, in all three cases, the court noted that the claimant's treating physician or expert witnesses were either unable to say that the work activity caused or worsened the underlying condition or affirmatively said there was not a causal or aggravational relationship. By contrast, claimant's treating physician in this case stated:

"I think her basic problem is a pre-existing difficulty with aggravation due to an on-the-job injury with apparent definite worsening due to this.

"It is my impression the patient had pre-existing angulation and deformity and extra ossicles of both toes. The patient, however, seemed to get along reasonably well with her problem until she had the injury where the sign post fell on her toe, causing increased pain and discomfort. This could occur, with or without the pre-existing problem, but in view of the fact that she had abnormal articulation in this area, the injury is more aggravating than it would be normally."

Claimant's treating physician also stated:

"It is my opinion that the deformity was pre-existing in both the left and right great toe. However, the patient states emphatically that the degree of difference in the pain was markedly increased in respect to the injury. This, to me, is subjective evidence that the patient had a material worsening in the right great toe."

The only medical evidence indicating noncompensability was a report furnished by SAIF's orthopedic consultant, Dr. Norton, who opined that there was no causal relationship between the injury sustained and the condition surgically corrected. However, Dr. Norton apparently misunderstood the location of the boney deposits and/or the site of the injury. His report indicates that he thought the sign fell on the tip of claimant's toe whereas claimant

testified that the sign hit the joint of the toe. Dr. Norton also indicated that he thought the surgery was to the proximal end of the proximal phalanx whereas in fact the boney deposits were removed from the joint at the distal end of the proximal phalanx.

Claimant testified that prior to the injury she experienced occasional tired, swollen feet attributable to working while standing all day, but that she considered the discomfort to be "normal tired feet" and never sought medical care for any foot condition. Claimant further testified as follows:

"Q. Okay. After the injury in April of '80, how would you describe how your right toe felt on any kind of a regular basis?

"A. It was some days hard to continue my work.

"Q. Is that because of the shooting pains that you described?

"A. Yes. And when the hot weather started, the swelling increased causing more discomfort. That's when I decided I had to have something done. I could not bear it for eight hours and continue my job.

"Q. Was there an increase in symptoms with respect to the right toe -- after the injury as compared with before the injury?

"A. Yes, considerable.

* * * *

"Q. All right. You said the swelling increased and you were referring to your right toe. Was there an increase in swelling in the left toe, too?

"A. Not to my knowledge."

The Referee specifically found the claimant to be a very credible witness. Previous removal of part of the toenail had failed to relieve all the pressure in the right toe experienced by claimant.

Based on all this evidence we conclude that claimant sustained a compensable worsening of an underlying pre-existing condition as a result of an industrial injury, and we find that the surgery was medically necessary. It follows that the surgery was a compensable consequence of the original industrial injury. See Rebecca Hackett, 34 Van Natta 460, WCB Case No. 80-04498 (April 14, 1982).

ORDER

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

Claimant's attorney is allowed \$300 as and for a reasonable attorney's fee for his services on behalf of claimant before the Board for successfully defending a reversal of a denied claim. This fee is to be paid by SAIF in addition to any compensation and attorney fees awarded by the Referee.

FRANK R. GONZALES, Claimant
Brian Welch, Claimant's Attorney
Scott Kelley, Defense Attorney

WCB 81-01630
May 18, 1982
Order on Reconsideration

The Board issued its Order on Review in the above entitled matter on April 21, 1982. On April 28, 1982 we received a Motion for Reconsideration from the employer. On April 30, 1982 the Board issued an order abating the Order on Review to allow time to consider the motion.

Now, having considered the arguments of counsel, the Board has determined that the Order on Review dated April 21, 1982 should be and hereby is readopted and republished.

IT IS SO ORDERED.

DILLARD GRAVES, Claimant
Steven Yates, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-09411
May 18, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

The SAIF Corporation seeks Board review of that portion of Referee Peterson's order which ordered it to promptly reinstate claimant's compensation for temporary total disability retroactively to the date that it was unilaterally terminated and to pay amounts past due in a lump sum and to continue to provide benefits of compensation in accordance with law. We reverse in part and affirm in part.

Claimant, age 35, injured his low back in July, 1980 while employed as a timber faller. A myelogram was performed in September, 1980 and the diagnosis was herniated nucleus pulposus L4-5. Subsequently claimant underwent a laminectomy and discectomy.

On December 23, 1980 claimant was in a supermarket and was struck by a grocery cart and injured. Claimant testified at the hearing he did not fall but the contemporaneous history given to the physicians was that he did fall. The Referee found claimant was not credible.

SAIF, which had originally accepted claimant's claim for his July, 1980 injury, then denied any further responsibility on the ground that the December, 1980 grocery store incident was an intervening injury for which it was not responsible.

Claimant was first seen by Dr. Bond on November 24, 1980. Claimant continued to treat with Dr. Bond, a chiropractor, and the chart notes for November and December indicate that claimant was progressing satisfactorily. By December 15, 1980 Dr. Bond reported that claimant could walk straight, could forward flex to 70° and was able to split wood swinging a heavy ax over his head. On November 24, 1980, shortly after claimant's myelogram and laminectomy, x-rays of claimant's back were taken and they revealed a minor interspace narrowing at L4-5. The x-rays were otherwise normal.

Following claimant's supermarket fall, he experienced a dramatic change in symptoms. Claimant indicated that his left leg "throbs like a toothache," that he had pain in the lower lumbar area and that he was unable to bear weight on his left leg. This contrasts to his fully ambulatory status prior to the fall. In his deposition, Dr. Bond related that he thought that he had claimant medically stationary before the December fall considering claimant's progress prior to that incident, and that "it was apparent to me at that time that he had another injury and that it was up to me to notify SAIF." With regard to his examination of the claimant on December 29, 1980, after the supermarket fall, Dr. Bond testified:

"A. My examination at that time--and I think I have already mentioned this--showed that he had severe left lumbar area pain with burning of his low back. And his left leg was throbbing like a toothache, quoting him. These would indicate--especially the left leg throbbing like a toothache would certainly indicate some degree of neurological impairment. And since this was a relatively marked change compared to what he had the previous time I had seen him, ten days before, since an accident had intervened at that time, I had to obviously feel that this was due to the accident."

Dr. Bond further testified:

". . . But there's no question according to the chain of events, that whatever was going on was aggravated materially by the accident.

"Q. By his industrial accident and surgical recovery or the accident at the supermarket?

"A. Obviously, the accident at the supermarket. . ."

In his letter to SAIF of February 25, 1981, Dr. Stainsby indicated that claimant's February 16, 1981 myelogram showed a defect at L4-5, but that that was not fully explanatory of his symptoms. Dr. Stainsby stated that there was a possibility of a posteriorly herniated disc at L4-5 and suggested a reexploration at L4-5.

The Referee found that Dr. Bond's deposition was arguably supportive of each side's position on the effect of the December, 1980 incident, but that when read in context of the medical records, that the better interpretation was that the fall worsened the symptoms of the claimant's condition, but did not worsen the condition itself. The Referee concluded that: "The most reasonable conclusion is that there was a temporary worsening of symptoms from the original injury, probably caused by a persistent residual disc problem. . ." We disagree.

There are several factors which lead us to the conclusion that the claimant has not sustained his burden of proof in establishing that his original injury remained a material contributing cause of his worsened condition following his off-the-job injury. Grable v. Weyerhaeuser, 291 Or 387 (1981). The first factor is the Referee's and our finding of claimant's lack of credibility. Therefore, any history given by the claimant to any of the examining physicians is suspect. The second factor is the discrepancy between the November 24, 1980 x-ray and the February 16, 1981 myelogram. There was only minor interspace narrowing found on the November x-ray, whereas the myelogram, taken after the December fall, revealed a defect at L4-5. Dr. Bond fails to explain this discrepancy. The third and most telling factor is claimant's dramatic change in symptomatology following the December incident. Just before the supermarket fall claimant was cutting wood; just after that fall claimant was bedridden.

With regard to the question of claimant's condition being the result of a residual disc problem from his original injury, we are not persuaded by the opinions of Drs. Bond and Stainsby. Dr. Bond, in his deposition, stated that claimant's condition could be the result of a residual disc problem uncorrected by the previous laminectomy. However, Dr. Bond has not explained the discrepancy in the x-ray and the February myelogram. Dr. Stainsby, in his letter of February 25, 1981 also speculates that a residual disc problem exists. Dr. Stainsby's opinion, however, seems to be based in part on the belief that claimant had failed to improve following his laminectomy. Dr. Stainsby was obviously unaware that claimant had actually improved to the point of being able to engage in fairly strenuous physical activities and was nearly ready to return to work before the December incident.

To summarize, we find that claimant's lack of credibility, a myelogram taken subsequent to the December incident which revealed a spinal defect, an x-ray taken before the incident which was basically normal, and a dramatic change in symptoms following the December incident lead us to conclude that claimant's condition was significantly worsened as a result of his December fall, and that he has failed to establish that his original injury was a material contributing cause of the worsening.

ORDER

The Referee's order dated July 21, 1981 is reversed in part and affirmed in part.

That portion that disapproved the SAIF Corporation's January 22, 1981 denial and awarded claimant's attorney a fee of \$1,100 for services in overcoming the denial is reversed. SAIF's January 22, 1981 denial is reinstated and affirmed. The balance of the Referee's order is affirmed including that portion which ordered SAIF to pay claimant's temporary total disability compensation from the date it was unilaterally terminated until the date of the January 22, 1981 denial.

LINDA MOSS, Claimant
Richard A. Sly, Claimant's Attorney
Stephen R. Frank, Defense Attorney

WCB 80-04993
May 18, 1982
Order on Reconsideration

The Board issued its Order on Review in the above entitled matter on April 30, 1982 where we held that claimant had not shown good cause for late filing of her request for hearing from a denial.

On May 4, 1982 claimant moved for reconsideration requesting a remand back to the Referee for consideration of all "possible evidence relative to Mr. Ruben's capacity to function during the period in question".

Having reconsidered, our order dated April 30, 1982 is readopted and republished.

IT IS SO ORDERED.

EDITH N. STEVENS, Claimant
Phillip Muir, Claimant's Attorney
Janet Metcalf, Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-01062
May 18, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

The claimant has requested Board review of Referee Leahy's order which found the employer not to be responsible for payment of an exploratory laparotomy which was performed on claimant on February 4, 1980. Thereby, the Referee approved a denial issued by the SAIF Corporation on December 3, 1980 which denied responsibility for the exploratory laparotomy and any resulting disability.

On August 31, 1979 the claimant was injured while working for a manufacturer of windows and glass patio doors. The claimant was injured while she was attempting to place a bundle of 25 or 30 aluminum window jambs into a bin. The bin was placed higher than claimant could reach easily. Claimant was on her toes, trying to push the bundle of window jambs into the bin, when the bundle hit a two-by-four in the bin causing the bundle to rebound into her stomach which knocked her to the floor. The claimant experienced immediate and considerable pain, but after resting for an hour to an hour and a half, she returned to work.

Over the ensuing months, the claimant suffered abdominal pain, dizziness, nausea, diarrhea and weight loss. Finally, in December, 1979 her symptoms became so bad she sought medical treatment complaining of pain and tenderness in her mid-abdomen. Dr. Jones scheduled an oral cholecystogram and upper and lower gastrointestinal tract x-rays on December 11, 1979. He did not give a diagnosis.

Based on Dr. Jones' initial report, which did not include a diagnosis, claimant's claim was accepted by SAIF. Claimant's physicians then sought to determine the precise medical cause of claimant's distress. A series of diagnostic tests followed:

On December 17, 1979 the cholecystogram and upper and lower gastrointestinal tract x-rays were made.

On December 20, 1979 a barium enema (for the colon) was carried out.

On January 15, 1980 claimant saw Dr. Schneider for throbbing pain and tightness in the abdomen, cold sweats, nausea and vomiting. The doctor could not decide what caused the abdominal pain.

On January 25, 1980 claimant was hospitalized by Dr. Grumvald for treatment of severe upper abdominal pain and weight loss of 20 to 25 pounds within the previous three to four months. He wanted her tested for pancreatic or gastric cancer, liver tumor, cholelithiasis (gallstones), cholangitis (inflammation of the bile duct) and chronic pancreatitis (inflammation of the pancreas). She had upper abdominal ultrasound diagnostic tests which were recorded as normal. She had a liver and spleen scan which noted some abnormalities in the left lobe of the liver. She also had an angiogram which showed some straightening encasement of the internal part of the splenic artery around the tail of the pancreas.

While still hospitalized, claimant was referred to Dr. Heap, who performed the exploratory laparotomy on February 4, 1980. The preoperative diagnosis was either pseudocyst of the pancreas, pancreatic carcinoma (cancer) or pancreatitis.

Dr. Heap reported to SAIF on May 9, 1980:

"As far as your questions go, there certainly was a causal relationship between the surgery and the injury in which she was hit in the stomach in August, 1979 in that it was one of the reasons we considered a partial transection of the pancreas in our differential diagnosis prior to laparotomy."

SAIF denied responsibility for the surgery for the reason that the exploratory surgery was performed solely for the reason of verifying the possible diagnosis of cancer, and that there was no relation between cancer and claimant's compensable injury.

We find that although cancer was one diagnosis of claimant's abdominal condition, it was only one of several diagnoses that were considered preoperatively. Dr. Heap has specifically included other diagnoses that could have been caused by the blow to claimant's abdomen, specifically, a possible partial rupture of the pancreas. Therefore, we find that the exploratory laparotomy was performed as part of a diagnostic procedure related to and stemming from claimant's compensable abdominal injury she suffered on August 31, 1979. See Brooks v. D & R Timber, 55 Or App 688 (1982).

ORDER

The Referee's order dated September 22, 1981 is reversed. The denial of the SAIF Corporation dated December 3, 1980 is set aside and claimant's claim for medical services is remanded for acceptance and the payment of compensation.

Claimant's attorneys are awarded attorneys' fees for prevailing on the denied claim for medical services. Claimant's attorney is awarded \$800 for his services at the hearing, and claimant's attorney is awarded \$900 for her services on Board review.

JIMMY EARL THURMAN, Claimant
Garry Kahn, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 79-09705
May 18, 1982
Order on Review

Reviewed by Board Members Lewis and Barnes.

The SAIF Corporation seeks Board review of Referee Gemmell's order which set aside SAIF's denial and remanded the claim for acceptance, and awarded claimant's counsel \$8,500 in attorney fees. SAIF contends the claim is not compensable but apparently does not contest the amount of the attorney fee should the claim be found compensable. Claimant's counsel submitted an affidavit indicating the amount of time spent on this case, and the Referee made a finding that extraordinary efforts were expended by claimant's counsel in this case.

Thus, the sole issue on review is compensability. SAIF contends that claimant's injuries did not arise out of or in the course of and scope of his employment. SAIF's counsel has done a commendable job marshalling the evidence supporting a finding that the claim is not compensable. Nevertheless, considering the record as a whole, the evidence preponderates in favor of the claimant. We affirm and adopt the well written and well reasoned order of the Referee.

Considering the amount of attorney fees already awarded and the fact that claimant's brief before the Board, albeit also well written, is by and large an edited version of claimant's written argument submitted before the Referee, we award \$200 in attorney's fees to claimant's counsel for successfully defending the Referee's order.

ORDER

The Referee's order dated October 9, 1981 is affirmed. Claimant's attorney is awarded \$200 for services rendered on Board review, payable by the SAIF Corporation.

JAMES H. BRAZILLE, Claimant
Evohl Malagon, Claimant's Attorney
Paul Roess, Defense Attorney

WCB 81-06841
May 19, 1982
Order of Dismissal

On March 12, 1982 the Referee entered an Order of Dismissal, dismissing the case pending before the Referee based upon the claimant's failure to appear at the hearing.

On or about May 6, 1982 claimant requested Board review of that order.

SAIF immediately filed a Motion to Dismiss claimant's request for review as not being timely. No response has been filed by claimant.

Based upon the foregoing, it appears that claimant's request for Board review is not timely.

ORDER

Claimant's request for review is dismissed as untimely.

SAMUEL E. GALLINO, Claimant
Todd Westmoreland, Claimant's Attorney
Ridgway K. Foley, Jr., Defense Attorney

WCB 81-03006 & 80-01822
May 19, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

The employer seeks Board review of Referee St. Martin's order which granted the employer's motion to dismiss WCB Case No. 81-03006 and granted claimant's motion to withdraw his request for hearing in WCB Case No. 80-01822 with leave to refile. The employer challenges only the latter aspect of the Referee's order, contending the dismissal in WCB Case No. 80-01822 should have been with prejudice rather than without prejudice.

The sole issue stated in the request for hearing in WCB Case No. 80-01822 was extent of disability. That case was a challenge to a Determination Order dated December 28, 1979 and/or a Determinatin Order dated April 15, 1981. The question of whether dismissal of a request for hearing on either or both of those Determination Orders should have been dismissed with or without prejudice is now moot because: (1) under ORS 656.319(2) the time within which to request a hearing has passed; and (3) Board records reflect there has been no subsequent hearing request.

ORDER

The employer's request for Board review is dismissed as moot.

ANN HURTIENNE, Claimant
James Parsons, Claimant's Attorney
George Goodman, Defense Attorney

WCB 81-05841
May 19, 1982
Order of Dismissal

On or about November 13, 1981 claimant, by and through her attorney, timely requested review of the Referee's order.

Claimant's attorney thereafter advised the Board by letter of February 15, 1982 that he was formally requesting that he be permitted to withdraw from the case, indicating that he was leaving the state. By copy of his letter, and by additional correspondence, he had advised claimant of his actions. Counsel wrote: "Unless you hear from me in the future, it must be assumed that Ms. Hurtienne does not wish to continue her appeal."

Claimant has not to date communicated with the Board, nor has the Board been contacted by substitute counsel in the claimant's behalf.

The carrier has moved for dismissal of claimant's request for review for want of prosecution.

Based on the foregoing, it appears to the Board that claimant has abandoned her request for review, and that, therefore, it should be dismissed.

ORDER

Claimant's request for review is dismissed.

WILLIAM RYDER, Claimant
Liana Colombo, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-11518
May 19, 1982
Order on Review

Reviewed by Board Members Lewis and Barnes.

Claimant seeks Board review of Referee Daron's order which found his claim was untimely under ORS 656.807(1) and/or his request for hearing was untimely under ORS 656.319(1).

The ambiguity about whether the issue is timely claim or timely hearing request arises from the fact that there are two separate claims, two separate denials but only one hearing request:

April 22, 1980: Claimant filed his first claim.

June 19, 1980: The SAIF Corporation denied claimant's April 22, 1980 claim.

November 7, 1980: Claimant filed his second claim for the same condition, claiming time loss for a different period.

December 23, 1980: Claimant requested a hearing.

January 9, 1981: SAIF denied claimant's November 7, 1980 claim.

The Referee, without actually saying so, seems to have determined that claimant could not file successive claims for the same occupational disease. We have previously ruled to the contrary. "Nothing in the statutes, rules or case law prohibits successive claims provided all are timely filed, meaning within 180 days of when the worker was medically informed of the existence of an occupational disease or became disabled." Gloria Douglas, 32 Van Natta 139, 140 (1981); see ORS 656.807(1).

We do agree with the Referee's further analysis. The fact that claimant filed an occupational disease claim on April 22, 1980 is strong circumstantial evidence that claimant was medically informed before that date that he was suffering from an occupational disease, and thus claimant's November 7, 1980 claim was asserted beyond the 180-day limit of ORS 656.807(1).

The other timeliness problem involves the December 23, 1980 hearing request. If this was intended to be a request for hearing on the June 19, 1980 denial of claimant's first claim, it was too late under ORS 656.319(1). Alternatively, if this was intended to be a request for hearing on the January 9, 1981 denial of claimant's second claim, it was premature and thus invalid under Syphers v. K-W Logging, Inc., 51 Or App 769 (1981).

ORDER

The Referee's order dated October 21, 1981 is affirmed.

JAMES W. BOOMHOWER, Claimant	WCB 80-02766
Carlotta Sorensen, Claimant's Attorney	May 21, 1982
SAIF Corp Legal, Defense Attorney	Order on Review

Reviewed by Board Members Lewis and Barnes.

The claimant seeks Board review of Referee Peterson's order which held that the claimant failed to prove by a preponderance of the evidence that permanent disability resulted from his compensable injury.

Claimant, a journeyman cabinet maker, injured his left neck, shoulder and arm in a fall at work on July 19, 1979. Thoracic outlet syndrome was eventually diagnosed and claimant's persistent numbness, tingling and pain were relieved by resection of the left first rib on July 15, 1980.

The results of the surgery were excellent. The most recent medical report in the record pertaining to the surgery residuals was written by the surgeon, Dr. Gaiser, who stated, "He returned to work on 8-4-80 and on August 18, 1980 was seen for his final follow-up visit at which time he stated that his arm and shoulder felt fine and that all appeared to be going well."

Three and one-half weeks before the hearing on July 10, 1981, claimant returned to the manual labor aspect of cabinet making, whereas, before then he had been serving a supervisory function. He testified that, as a result, he now has pain the left shoulder and upper arm, loss of strength in his arm and fatigue. Other than claimant's testimony, there is no evidence of physical impairment supported by medical opinion. Claimant has not seen a physician for these recent complaints.

The resection of a rib does not automatically translate into a physical impairment rating pursuant to the rules found in OAR 436-65-600, et seq., and the American Medical Association's Guides to the Evaluation of Permanent Impairment. There are some surgeries that are assumed to always produce permanent impairment, but claimant's left first rib resection does not fall into that category. He needed to produce some objective medical evidence

relating his recent complaints to his compensable injury and showing the extent of the impairment. Also, since there was evidence in the record that the claimant might have other medical problems (bilateral carpal tunnel syndrome and a C-6 disc problem) which could be the origin of his present complaints, we need medical evidence to determine the actual cause of his present complaints. There is no such evidence in the record.

ORDER

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

ROY A. FISHER, Claimant
Larry Bruun, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-02641
May 21, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

The SAIF Corporation seeks Board review of Referee Fink's order which set aside its partial denial of responsibility for claimant's ulnar nerve condition and surgery.

This claim started as a back strain. On November 13, 1979 while working as a pipefitter, claimant felt a sudden pain in the lower cervical/upper thoracic area when he attempted to move a piece of angle iron that weighed over 100 pounds. There was some radiating pain into claimant's left arm. The original treatment focused on the possibility of spinal nerve root irritation. However, two separate myelograms were both negative. The final diagnosis was upper back/neck strain or sprain.

On May 30, 1980 claimant underwent left carpal tunnel release surgery. SAIF accepted responsibility for this treatment and any resulting disability. There is thus no issue before us about the carpal tunnel surgery. We note, however, that the previously suggested causes of carpal tunnel syndrome, see Robert Sanchez, 32 Van Natta 80 (1981), do not include a back strain.

On April 30, 1981 claimant underwent a transposition of the left ulnar nerve at the left elbow. SAIF denied responsibility for this surgery by letter dated August 11, 1981.

In setting aside SAIF's partial denial, the Referee relied on the opinion of Dr. Mason, claimant's treating physician and surgeon, to the effect that claimant's left ulnar nerve condition was work connected. "Work connected" is an often-used shorthand expression in workers compensation, but as with all abbreviated expressions it can lead to analysis that is abbreviated to the point of being erroneous.

What SAIF actually denied, and thus what was actually ripe for hearing, was that claimant's ulnar nerve surgery was "a direct result of your original injury occurring on or about November 13, 1979." Dr. Mason never offered an opinion inconsistent with SAIF's denial. His May 19, 1981 report states: "I think that this problem is related to his work, which requires constant repetitive movement of the elbow." Dr. Mason's July 27, 1981 report, although less clear, seems to also rely on the chronic microtrauma theory of causation.

The Referee also relied on his finding that claimant experienced constant left arm symptoms consistent with an ulnar nerve problem from his original back-strain injury on November 13, 1979 until the ulnar transposition surgery on April 30, 1981. The contradiction is obvious. Either the ulnar nerve condition was caused by and arose from the back injury, constant symptoms being some circumstantial evidence to support such a conclusion; or the ulnar nerve condition was caused by chronic microtrauma, Dr. Mason's opinion being direct evidence to support such a conclusion. Only in a line of analysis abbreviated to the point of being fallacious can these two disparate lines of evidence be merged into a general finding that claimant's ulnar nerve condition was "work connected."

We find:

(1) Claimant's November 13, 1979 back strain injury did not cause or aggravate his ulnar palsy because so far as we know - and there is nothing to the contrary in this record - it is anatomically and physiologically impossible for a back strain to cause or aggravate ulnar palsy.

(2) It is impossible to believe that claimant suffered constant left arm symptoms as found by the Referee when the first documentation in the medical evidence is a chart note dated about eleven months after the accident that refers to the palsy symptoms as "relatively recent."

(3) Dr. Mason's chronic microtrauma theory, if persuasive, would make claimant's ulnar palsy condition compensable as an occupational disease. However, no occupational disease claim has been made or denied and thus no such issue is before us.

(4) Alternatively, the chronic microtrauma theory is not persuasive. Drs. Norton and Nathan cogently point out that claimant's diabetic condition was most probably the major cause of his ulnar palsy problem. Moreover, as Dr. Norton points out, the chronic microtrauma theory would be stronger if the palsy arose on the same side as claimant's dominant hand; the palsy was on the left; claimant is right-handed.

Claimant's request for hearing also raised an extent-of-disability issue. The Referee did not reach that issue because he set aside the partial denial. This case will be remanded for a ruling on that issue.

ORDER

The Referee's order dated October 26, 1981 is reversed. The SAIF Corporation's denial dated August 21, 1981 is reinstated and affirmed. This case is remanded to the Referee for further proceedings in accordance with this order.

DOROTHEA M. FOY, Claimant
Cynthia Barrett, Claimant's Attorney
Darryl Klein, Defense Attorney

WCB 81-01011
May 21, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

Claimant seeks Board review of Referee Menashe's order which found claimant was entitled to more temporary disability benefits than that awarded by the November 7, 1980 Determination Order, but which also found that claimant suffered no permanent disability. Claimant asserts that she does suffer some permanent disability as a result of her compensable injury. The employer/carrier cross requested review claiming that claimant was not entitled to the additional temporary disability awarded by the Referee.

I

The Determination Order awarded temporary total disability only up to the time claimant was released from the Callahan Center on August 27, 1980. Claimant's treating doctor, Dr. Campbell, did not find the claimant medically stationary until October 22, 1980. Claimant had been doing light work as a restaurant hostess since October 1, 1980. On that basis the Referee awarded temporary total disability compensation from August 28, 1980 through September 30, 1980 and temporary partial disability from October 1, 1980 to October 22, 1980.

We agree with and affirm the Referee on the award of additional temporary disability, giving deference to the treating doctor's determination of the date claimant's condition was medically stationary.

II

Claimant had spontaneously occurring low back pain about January, 1974. In May, 1974 she was sitting in a vehicle which was rear-ended by another vehicle. Thereafter, she had considerable left leg and low back complaints. This eventually led to a laminotomy and partial diskectomy at L5-S1 on the left which had been compressing the left S1 nerve root causing her left leg and low back complaints. During the operation, considerable scarring around the S1 nerve root on the left was noted. The diagnosis was one of pre-existing degenerative disc disease which was aggravated by the vehicle accident. Dr. Campbell was the surgeon and is still her treating orthopedist.

Claimant saw Dr. Campbell on an infrequent basis over the ensuing years for check ups and occasional low back pain. Although the medical chart notes admitted as evidence are largely illegible, from what we can read it does not appear that claimant complained of right-sided low back and leg problems.

Claimant was employed throughout this time and was able to do fairly active work for direct mail service companies. The job involved lifting loads of mail and bending and stretching to operate the mail processing machines. She also maintained the machines and kept them running.

On May 1, 1979 claimant was loading mail bags weighing 20 to 25 pounds each onto a rack when the rack fell on her right leg. At the time the rack had four bags on it. Claimant attempted to keep the bags from falling on her with her right arm and was stretched forward then backwards by the weight of the bags and rack. She immediately noticed right knee and ankle pain, then her lower back pain began to increase to the point where she could no longer work as of the first of July, 1979. At that time she had severe lower back pain radiating into the entire right leg.

Claimant was unable to work until October, 1980 due to her low back and right leg complaints. She convalesced during that time with back exercises, a back brace, pain medication, limited activity and rest.

As of the hearing on November 3, 1981 claimant continued to experience right sciatic nerve pain with ankle pain and cramping behind the right knee. She also gets low back pain. She testified to considerable activity and lifting restrictions she now has that were not present before the May 1, 1979 accident. A Callahan Center evaluation of August 29, 1980 limited claimant to light to medium modified work with limitations on climbing, stooping, bending, twisting and occasional lifting up to 30 pounds and frequent lifting up to 20 pounds. Claimant has had to turn down offers as a cocktail and restaurant waitress where she is now a hostess because of the carrying required.

To a non-medically trained person it would appear from the record that up to the May 1, 1979 incident claimant did not have right-sided complaints, but now has persistent right-sided complaints, leading to the conclusion that the accident either caused a new injury to her low right back and leg, or at least permanently worsened and aggravated her disc disease on the right side.

But, like the Referee, we feel we must yield to Dr. Campbell's opinion that the continuing permanent residuals are due only to scarring around her nerve roots caused by her degenerative disc disease. Although the 1974 laminotomy only revealed scarring on the left S1 nerve root, Dr. Campbell's most recent report of September 18, 1981 referred to scarring of the nerve roots - apparently including the right side now. In that same report, he also specifically stated that the injury neither worsened nor accelerated the disease process. Since Dr. Campbell is the surgeon and treating doctor and there is no contrary medical opinion in the record upon which we could base a different result, we agree with the Referee that claimant has not shown by a preponderance of the evidence that she is entitled to permanent disability compensation.

ORDER

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

JACQUELYN HENDRICKSON, Claimant
David Dorman, Claimant's Attorney
James Larson, Defense Attorney

WCB 81-03517
May 21, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

The SAIF Corporation seeks Board review of Referee Daron's order which set aside its partial denial of responsibility for claimant's low back condition, awarded claimant temporary total disability benefits and awarded claimant's attorney a fee for prevailing on the partial denial. SAIF argues that both the temporary total disability benefits and attorney fee awarded are unwarranted.

Claimant sustained a compensable injury when she fell at work in August of 1980. Treatment initially focused on her left hip and leg.

Claimant was released to return to work on September 8, 1980 and did so. Subsequently she either quit or was terminated because of a dispute with her boss. Over the following three months claimant: (1) applied for (and apparently received, although the record is unclear) unemployment benefits; (2) worked for a brief period, apparently about three weeks, at a cafe; and (3) did not seek any medical care.

Claimant returned to her doctor on December 26, 1980 complaining of back pain. A series of referrals to other doctors and diagnostic procedures ultimately led to a diagnosis of a ruptured disc which all doctors relate to claimant's August, 1980 fall. Upon receiving reports about claimant's disc problem, SAIF paid interim compensation from February 4, 1981 until it issued its partial denial on March 26, 1981.

Although SAIF no longer defends its partial denial on Board review, we note that part of the Referee's rationale for setting it aside was: "Uncontroverted medical evidence causes the evidence to preponderate in claimant's favor. Neathamer v. SAIF, 16 Or App 402 (1974)." This portion of the Referee's analysis is incorrect under a subsequent Board order. Edwin Bolliger, 33 Van Natta 559 (1981).

SAIF contends the Referee erred in awarding time loss between September 8 and December 26, 1980. During this interval claimant sought no medical attention, worked briefly at two different jobs and applied for unemployment benefits. No doctor has ever verified inability to work during this period and, indeed, any such verification would fly in the face of the fact that claimant did work during this period. We agree with SAIF.

SAIF also contends that the Referee's award of a \$1,500 attorney fee is excessive. In Clara Peoples, 31 Van Natta 134 (1981), we recognized the normal range of attorney fees for prevailing on denied claims was \$800 to \$1,200. While the circumstances of individual cases can justify more or less in fees, here the efforts expended and results obtained are not notably more or less than the norm in cases involving denied claims. We agree with SAIF on this point also.

ORDER

The Referee's order dated November 17, 1981 is modified. Claimant is not entitled to temporary total disability compensation between September 8, 1980 and December 26, 1980. In lieu of the attorney fee awarded by the Referee, claimant's attorney is awarded a fee of \$1,000 for services at the hearing, payable by SAIF. The balance of the Referee's order is affirmed.

ALLEN D. JACKSON, Claimant
Lyle G. Velure, Claimant's Attorney
Brian Pocock, Defense Attorney

WCB 81-00683
May 21, 1982
Order on Review

Reviewed by Board Members Lewis and Barnes.

Claimant seeks Board review of Referee Johnson's order that remanded his claim for acceptance and assessed a penalty of 10% of temporary total disability benefits, if any, due between December 10 and 17, 1980. Claimant states the issue to be whether the Referee "should have proceeded to adjudicate a particular period of temporary total disability entitlement."

Claimant has misread the Referee's order. It is asserted by claimant that the Referee adjudicated the period of time loss to be paid to claimant in the following portion of the Order:

"IT IS FURTHER ORDERED that Industrial Indemnity Insurance Services Inc. pay to claimant as additional compensation, by way of penalty, an amount equal to 10 percent of any temporary total disability benefits considered due and owing to claimant under this Opinion and Order from December 10, 1980 to December 17, 1980, inclusive, the medical authorization for time loss benefits."

There appears to be something left out of the last clause of this sentence. However, the immediately preceding paragraph of the order sheds some light on the ambiguity.

"IT IS FURTHER ORDERED that claimant's claim for his disabling low back condition be and is remanded to Roseburg Lumber Co. and Industrial Indemnity Insurance Services Inc. to be accepted as a compensable claim and for the payment of compensation and benefits to which the claimant may be entitled as provided by the workers' compensation laws."

The Referee merely set out a particular period on which to base a penalty. As correctly pointed out by the carrier, the Referee's conclusion as to the period on which to base the penalty has nothing whatever to do with the overall entitlement to time loss.

Claimant asserts in his reply brief that he is entitled to a penalty for the carrier's failure to pay time loss for the period of time after the denial. However, no authority or argument is offered in support of this assertion.

ORDER

The Referee's Order dated September 25, 1981 is affirmed.

VALERIE JOHNSON, Claimant
Hayes P. Lavis, Claimant's Attorney
Jerry McCallister, Defense Attorney

WCB 80-07074
May 21, 1982
Order on Review

Reviewed by Board Members Lewis and Barnes.

Claimant seeks Board review of Referee St. Martin's order which granted her compensation for 15% loss of use of her right hand. Claimant contends that the award is inadequate. Claimant also asks that a medical report submitted in violation of the ten-day rule stated in OAR 436-83-400(3) be nevertheless admitted into evidence.

The Board affirms and adopts the order of the Referee with the additional observation that the Referee's evidentiary ruling was fully consistent with Millie Thomas, 34 Van Natta 40 (1982).

ORDER

The Referee's order dated October 30, 1981 is affirmed.

BILLY JOE JONES, Claimant
Bruce Bottini, Claimant's Attorney
Ridgway Foley, Defense Attorney

WCB 81-06159
May 21, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

The employer requests Board review of Referee Fink's order which found claimant to be entitled to temporary total disability benefits from June 13 to July 22, 1981, denied the employer's request for a setoff of temporary total disability benefits paid from February 18 to March 16, 1981 and allowed claimant's attorney an employer paid fee of \$1,000 but refused to assess a penalty against the employer for its unilateral termination of temporary total disability benefits following claimant's completion of his program of vocational rehabilitation.

The employer has raised only a single issue for review by the Board. Does ORS 656.268(5) and related administrative rules require the issuance of a new Determination Order after a medically stationary claimant completes a program of vocational rehabilitation, before termination of temporary total disability benefits can take place? Or, instead, may the employer or carrier terminate benefits in such a situation unilaterally once it receives notification of completion of the rehabilitation program?

The facts are undisputed. Claimant suffered a compensable injury in 1977 to his low back. A program of vocational rehabilitation was subsequently authorized in the field of auto mechanics. That training program began on March 16, 1981 and ended on June 13, 1981. Although counsel for the claimant argues to the contrary, the Referee found that the claimant was medically stationary upon termination of the rehabilitation program. We agree. Following completion of the rehabilitation program, the employer unilaterally terminated claimant's temporary total disability compensation benefits on June 13, 1981 without waiting for the matter to be redetermined. The Determination Order issued on July 22, 1981.

The Referee found that ORS 656.268(5), OAR 436-61-410 and OAR 436-61-420 required the temporary total disability benefits be continued until redetermination of the claim by the Evaluation Division. The employer argues that the statute and rules are reflective of an intent that temporary total disability benefit payments be made only while a medically stationary claimant is actively engaged in an authorized training program, and that to hold otherwise would penalize the employer since OAR 436-61-150(2) allows the employer no reimbursement from the Rehabilitation Reserve for any time loss paid beyond the completion date of the rehabilitation program.

The law in effect at the date of claimant's injury, ORS 656.268(4) (1977), provided:

"If, after the determination made pursuant to subsection (3) of this section, the director authorizes a program of vocational rehabilitation for an injured worker, any permanent disability payments due under the determination shall be suspended, and the worker shall receive temporary disability compensation while he is enrolled in the authorized vocational rehabilitation program. When the worker ceases to be enrolled and actively engaged in an authorized vocational rehabilitation program, the Evaluation Division shall redetermine the claim pursuant to subsection (3) of this section unless the worker's condition is not medically stationary." (Emphasis supplied.)

The subsections of ORS 656.268 have been since renumbered, but the operative language of this subsection remains the same, appearing now as ORS 656.268(5).

OAR 436-61-410 provides:

"(1) Upon receipt of notice from the insurer or the Division that the worker has completed or is otherwise not enrolled and actively engaged in an authorized training program, the Compliance Division shall refer the Department claim file to the Evaluation Division for determination pursuant to ORS 656.268, if the worker's condition is medically stationary.

"(2) Workers injured after December 31, 1973, are entitled to temporary disability compensation while enrolled and actively engaged in an authorized training program." (Emphasis supplied.)

Subsection (5) of that rule requires that employer or carrier resume any suspended permanent disability award payments pending issuance of a Determination Order unless the claimant is not medically stationary. Also, seemingly applicable, but somewhat ambiguous is OAR 436-61-420(1):

"Subject to 61-410(2), the insurer shall pay temporary disability compensation to a worker who is enrolled and actively engaged in an authorized training program, and payments will continue until termination of compensation is authorized by the insurer or the Department, as provided in ORS 656.268." (Emphasis supplied.)

We agree with the Referee's conclusion that temporary total disability benefits must continue to be provided for a medically stationary claimant who has been redetermined pursuant to ORS 656.268. That statute is clear that the claim is required to be redetermined following completion of the rehabilitation program. The employer's argument does have a certain amount of appeal. Once a Determination Order has been issued, and a claimant is medically stationary, he receives no further temporary total disability benefits. If vocational rehabilitation is thereafter authorized, temporary total disability payments must be resumed, not because claimant is medically unstationary, but to provide for the maintenance of the worker while he is engaged in the rehabilitation process. See Charles C. Tackett, 31 Van Natta 61 (1981). Since a worker is being paid temporary total disability benefits only for the purpose of vocational rehabilitation, it is seemingly unfair to require continuation of those benefits beyond the termination date of the program and prior to redetermination.

We remain unconvinced by these arguments, however. The current version of ORS 656.268 requires that the redetermination be made pursuant to subsection (4), presently numbered as (5), of that statute. Subsection (4) requires the Evaluation Division to complete the redetermination within ten working days after receipt of notice of termination of the program, unless additional information is required. The version of the statute in effect at the time of the claimant's injury allowed the Evaluation Division 30 days to redetermine the claim. The requirement that the claim be redetermined serves as a stimulus to employers and carriers to submit the claim for redetermination rapidly, where delay might otherwise occur. The reduction of the time period during which the Evaluation Division has to redetermine a claim from 30 days to 10 days lends further support to this interpretation. If the employer or carrier acts with maximum alacrity, at the most it may be liable for 10 days of non-reimbursable time loss benefits.

Moreover, OAR 436-61-410(2), as noted above, provides that workers injured after December 31, 1973 are entitled to temporary total disability benefits only while actually enrolled and engaged in an authorized training program. Since a worker has no entitlement to temporary total disability benefits beyond the termination date of the program (still assuming a medically stationary worker), ORS 656.268(3) (1977), currently ORS 656.268(4), provides for a method of recovery of any temporary total disability benefits paid beyond the termination date of a program:

"Any determination under this subsection may include necessary adjustments in compensation paid or payable prior to the determination, including disallowance of permanent disability payments prematurely

made, crediting temporary disability payments against permanent disability awards and payment of temporary disability payments which were payable but not paid." (Emphasis supplied.)

The employer or carrier may, therefore, request the redetermination to provide for a setoff of excess non-entitled temporary total disability benefits, against any unpaid permanent disability award, the payment of which must be resumed following completion or termination of the program. OAR 436-61-410(5). Additionally, OAR 436-54-320 also provides authority for the employer or carrier to take an setoff. See Telphen Knickerbocker, 33 Van Natta 568 (1981).

The employer also argues that it may unilaterally terminate the contested time loss benefits, due to the fact that a previous Determination Order has issued, pursuant to ORS 656.268. We do not believe that the prior Determination Order can be used as a "bootstrap" for authority to unilaterally terminate time loss following completion of the program of vocational rehabilitation, in view of the clear language of that statute requiring the claim to be redetermined following completion of the program.

We note that the Referee allowed claimant's attorney an employer paid fee of \$1,000. In view of the fact that this case did not involve a denied claim, we question the propriety of an employer paid fee. Since counsel for the employer has raised no objection, however, we will not address the issue.

ORDER

The Referee's order dated August 3, 1981 is affirmed. Claimant's attorney is allowed an attorney fee of \$550 for his services on Board review, payable by the employer.

EDWIN L. MUSTOE, Claimant
Bernard Jolles, Claimant's Attorney
William McDaniel, Defense Attorney

WCB 80-09999
May 21, 1982
Order on Review

Reviewed by Board Members Lewis and Barnes.

Claimant seeks Board review of Referee Daron's order upholding the denial of compensation issued by the self-insured employer. The issue is timeliness of the claim.

For purposes of the timeliness issue, we accept claimant's testimony as true: In October, 1978 claimant sustained an injury to his shoulder while operating a "charger" in the employer's plant. He sustained no time loss and did not seek medical care at that time. Claimant continued working. In December of 1978, in the course of an annual medical examination, claimant mentioned the "trouble" he was experiencing with his shoulder. Claimant's physician diagnosed the condition as bursitis or tendinitis. Flare-ups of shoulder pain increased in frequency over a two year period, culminating in October of 1980 when claimant experienced severe pain while working on the green chain.

The 1980 incident caused claimant to seek medical attention. An arthrogram confirmed the existence of a massive rotator cuff tear. Surgical intervention was required to correct the condition.

On October 24, 1980 claimant filed a Form 801 alleging an injury occurring "approximately two years ago," i.e., a reference back to the October, 1978 at-work incident. For reasons not reflected in the record, this case was not litigated on the basis of a compensable injury in 1980. Rather, the claim was made, the denial was issued and the case was litigated all on the basis of an injury in October of 1978. Indeed, at the outset of the hearing claimant's attorney agreed that "the only issue" was whether claimant had sustained a compensable injury in the "fall of 1978."

The first mention of occupational disease by anybody was a gratuitous discussion of this concept by the Referee in his order. Because the Referee injected that issue, on Board review the parties now argue at length about the compensability of claimant's condition on the theory that it may be an occupational disease. If the issue were properly before us, we would rule that the objectively determined trauma to muscle tissue (rotator cuff tear) was more likely the product of an injury than the consequence of a disease. More importantly, however, we do not think that any issue of occupational disease is properly before us. The claim was made, the denial was issued and the case was litigated on the basis of a compensable injury. The parties have the primary responsibility to frame the issues and an issue does not become ripe for decision just because a Referee volunteers a discussion of it in an order.

The issue framed by the parties is, to repeat, the compensability of an injury in 1978, not 1980. On this issue, we affirm and adopt that portion of the Referee's order that concludes that claimant's 1980 claim for his alleged 1978 injury was not timely.

ORDER

The Referee's order dated August 21, 1981 is affirmed.

RICKY RICH, Claimant
Roger Wallingford, Claimant's Attorney
George Goodman, Defense Attorney
Thomas McDermott, Defense Attorney

WCB 81-01304
May 21, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

The employer, Northwest Consolidated Drapery Service, insured by EBI, requests Board review of Referee St. Martin's order which affirmed the December 23, 1980 denial issued by Western Farmer's Association and its insurer, Argonaut, and found claimant's claim to be compensable and the responsibility of Northwest Consolidated Drapery Service, thereby disapproving the denial of February 2, 1981 and allowed claimant's attorney an employer paid fee of \$1,200.

The only issue raised by the employer for review by the Board is the compensability of claimant's right wrist condition. The employer contends that the claimant has failed to establish a worsening of his condition under the rule of Weller v. Union Carbide, 288 Or 27 (1979).

The Board adopts the Referee's statement of the facts as its own.

We agree with the Referee that the medical evidence seems to indicate that the claimant is actually suffering from two conditions, a minus ulna, a congenital condition which has not been shown to have worsened, and some form of distal radio-ulnar strain which results in pain and swelling with prolonged repetitive use of the wrist. The employer's Weller argument would appear to be directed more toward the claimant's underlying "minus ulna" condition than toward his distal radio-ulnar strain. We agree with the Referee that there is an interplay between these two conditions which claimant's physicians do not yet adequately understand. In view of that fact, we agree that the evidence when taken as a whole indicates that claimant has suffered a worsening of his condition.

ORDER

The Referee's order dated September 24, 1981 is affirmed. Claimant's attorney is awarded \$200 as and for a reasonable attorney's fee, payable by the employer.

MARK L. SIDE, Claimant
Merrill Schneider, Claimant's Attorney
George Goodman, Defense Attorney

WCB 81-01240
May 21, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

The employer and claimant seek Board review of Referee Seifert's order which granted claimant compensation for 50% loss of the left leg. The employer contends the Determination Order of January 30, 1981 which granted claimant no compensation for permanent disability should be affirmed. Claimant contends his claim was prematurely closed as of October 14, 1980 or, in the alternative, it should be reopened as of August 12, 1981. He also contends the carrier should have paid temporary total disability until January 30, 1981, the date of the Determination Order, and their failure to do so should result in the assessment of penalties.

The extent of disability issue is especially obscure because claimant suffered left knee injuries in 1977, March of 1980 and November of 1980. The employer argues that only the March, 1980 injury is here in issue and that claimant's left knee impairment actually relates to the 1977 injury or November, 1980 injury. We are not persuaded that the impairment relates to the earlier 1977 injury because claimant was able to work at relatively strenuous jobs for about two years after recovering from that injury and resulting surgery. And although the matter is far from clear, we conclude the November, 1980 left knee injury was a compensable consequence of the March, 1980 left knee injury. Permanent disability from both 1980 injuries is thus to be rated at this time. Subject to this clarification, we affirm and adopt those portions of the Referee's order that awarded claimant compensation for 50% loss of the left leg.

We affirm and adopt those portions of the Referee's order that found claimant was medically stationary on October 14, 1980 and that the January 30, 1981 Determination Order properly closed the claim and terminated claimant's time loss benefits effective October 14, 1980. Dr. Achterman's subsequent suggestion in August of 1981 that claimant use a knee brace or consider surgery does not change this conclusion. Brace treatment would be covered under ORS 656.245. If claimant undergoes surgery, his claim should be reopened at that time.

Finally, we agree with claimant that the employer should not have unilaterally terminated temporary total disability benefits on October 14, 1980, but rather was required to continue paying time loss until the January 30, 1981 Determination Order was issued. The employer argues it was proper to terminate time loss on the earlier date because claimant was released to return to regular work. We rather strongly disagree with the employer's interpretation of claimant's testimony. Claim closure and termination of temporary total disability were not here based, we find, on a release to return to regular work but rather on the fact that claimant was medically stationary.

The law in this area is primarily statutory and the statutes are, for once, quite clear. ORS 656.268(2) states:

"If the attending physician has not approved the worker's return to the worker's regular employment, the insurer or self-insured employer must continue to make temporary total disability payments until termination is authorized following examination of the medical reports submitted to the Evaluation Division under this section."

A limited exception stated in ORS 656.325(5) only serves to underscore the general rule of a continuing duty to pay temporary total disability. ORS 656.325(5) provides:

"Notwithstanding ORS 656.268, an insurer or self-insured employer shall cease making payments pursuant to ORS 656.210 and shall commence making payment of such amounts as are due pursuant to ORS 656.212 when an injured worker refuses wage earning employment prior to claim determination and the worker's attending physician, after being notified by the employer of the specific duties to be performed by the injured worker, agrees that the injured worker is capable of performing the employment offered."

In upholding the unilateral termination of temporary total disability benefits on October 14, 1980 the Referee relied on Jackson v. SAIF, 7 Or App 109 (1971). Indeed, Jackson is often cited for the proposition that temporary total disability benefits can be terminated when a worker is medically stationary. That is not, however, exactly what Jackson says. Jackson states: "Temporary disability payments ordinarily continue until the workman returns to regular work, is released by his doctor to return to regular work, or there has been a determination that the workman's condition is medically stationary under ORS 656.268." 7 Or App at 115 (emphasis supplied). "A determination . . . under ORS 656.268" means a written Determination Order issued by the Evaluation Division. John C. May, 34 Van Natta 114 (1982). Jackson is thus consistent with the plain meaning of ORS 656.268(2) -- when claim closure is on the basis that the claimant is medically stationary, temporary total disability must continue to be paid until a Determination Order is issued.

The employer did not comply with that elementary duty in this case and we thus turn to the question of a penalty. We could assess a penalty of up to 25% of the temporary total disability compensation due between October 14, 1980 and January 30, 1981. ORS 656.262(9). But we conclude there is an even better way in this and other similar cases to promote statutory compliance. Ordinarily when an employer continues paying temporary total disability during the interim between a worker's medically stationary date and the issuance of a Determination Order, the employer is

entitled to setoff the overpayment of temporary total disability against any permanent disability awarded. In this case, for example, had the employer paid time loss between October 14, and January 30, it would have been entitled to setoff this three-and-one-half months of overpayment against the Referee's award of 50% loss of a leg. See Telphen Knickerbocker, 33 Van Natta 568 (1981). But the employer did not pay time loss for that period. If the employer were now ordered to pay that amount plus the maximum penalty of 25% of that amount and at that same time allowed a setoff, the employer would still be ahead of the game despite its statutory violation. In this situation we conclude that a penalty under ORS 656.262(9) is insufficient and unwarranted, favoring instead the following rule: When an employer has illegally terminated temporary total disability payments and a subsequent Determination Order or litigation order awards or increases permanent disability, the employer will be ordered to pay all time loss due and will be prohibited from taking a setoff of that time loss against the worker's permanent disability award.

ORDER

The Referee's order dated September 23, 1981 is modified. Claimant is awarded compensation for temporary total disability from October 14, 1980 to January 30, 1981. The employer is prohibited from taking a setoff of this award of increased temporary total disability against claimant's award of permanent partial disability. Claimant's attorney is allowed a reasonable attorney's fee of 25% of the increased compensation awarded by this order, not to exceed \$500. Claimant's attorney is also allowed a reasonable attorney's fee of \$250 pursuant to ORS 656.382(2), payable by the employer in addition to and not out of claimant's award of compensation. In all other respects the Referee's order is affirmed.

ELIZABETH TUNING, Claimant
Daniel Dziuba, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-01848
May 21, 1982
Order on Review

Reviewed by Board Members Lewis and Barnes.

Claimant seeks Board review of Referee Leahy's order which affirmed the SAIF Corporation's February 13, 1981 partial denial and affirmed the February 27, 1981 Determination Order.

It is even less clear than usual what is being claimed and what is being denied. SAIF's position seems to be that it accepts responsibility for that portion of claimant's right leg condition diagnosed as "medical collateral ligament strain," but denies responsibility for that portion of claimant's right leg condition diagnosed as "degenerative joint disease" and all medical treatment on or after December 12, 1980. Claimant's position seems to be that her entire right leg condition is compensable, either on an accidental injury theory or on an occupational disease theory.

Perplexingly, claimant denies any identifiable trauma or accidental injury, yet her treating doctor has stated in various reports that claimant "twisted her knee and had immediate pain" and claimant "twisted and hit the knee." The alternative occupational disease approach fails under the test of SAIF v. Gygi, 55 Or App 570 (1982). We agree with the Referee that claimant has not proven entitlement to any of the relief she requested.

ORDER

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

DONALD WISCHNOFSKE, Claimant
Marvin Garland, Claimant's Attorney
Ronald Atwood, Defense Attorney

WCB 80-00424
May 21, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

The employer has requested and the claimant has cross-requested Board review of Referee Ail's order which affirmed the employer's December 17, 1979 denial of claimant's claim, ordered that the claimant be paid temporary total disability benefits from March 13, 1979 until December 17, 1979 plus a 10% penalty on all such benefits due from October 10, 1979 until the date of denial and ordered the employer to pay claimant's attorney \$200 for unreasonable resistance to the payment of compensation.

Following the issuance of the Referee's order on May 30, 1981, the employer filed a Motion for Reconsideration of that order. On July 5, 1981 Referee Ail issued an order suspending his May 30 order. On July 31, 1981 Referee Gemmell issued an order denying the motion and reinstating Referee Ail's May 30 order. On July 23, 1981 the Board received the employer's motion requesting suspension of that portion of Referee Ail's order which ordered temporary total disability benefits to be paid from March 13, 1979 until September 26, 1979, the date of the employer's first notice of the claim. On August 10, 1981 the Board issued an Interim Order suspending the payment of those benefits pending full review by the Board on all issues.

The employer raises only a single issue for review - the propriety of that portion of the Referee's order allowing interim compensation benefits from March 13, 1979, the date of the disability, until September 26, 1979, the date of the employer's first notice of the claim. The employer contends that since the claim was denied and that denial was upheld by the Referee, that interim compensation is owed not from the date of the disability but only from the date of notice of the claim. The employer, to its credit, acknowledges its responsibility to pay interim compensation from the date of notice until the date of its denial, December 17, 1979 and its liability for the penalty assessed by the Referee for its failure to pay interim compensation benefits. The claimant appeals the Referee's affirmance of the employer's denial.

We adopt as our own the Referee's statement of the facts. With regard to the issue raised by the claimant, the Referee upheld the employer's denial based on claimant's lack of credibility. We affirm and adopt those portions of the Referee's order.

As we stated in our Interim Order, it would appear that the Referee took two positions regarding the issue of interim compensation, first stating:

"Statute requires commencement of payment of interim compensation no later than the 14th day after notice. The employer failed to do so. Claimant was entitled to interim benefits until the denial was issued."
(Emphasis added.)

but then ordering:

". . . that claimant be paid temporary total disability benefits from March 13, 1979 [the date of disability] until the date of denial . . ."

The employer argues that Jones v. Emanuel Hospital, 280 Or 147 (1977), Silsby v. SAIF, 39 Or App 555 (1979) and Kosanke v. SAIF, 41 Or App 17 (1979), stand for the proposition that interim compensation must be paid within 14 days of receipt of notice or knowledge of the claim, until denial of the claim, but that compensation need not be paid from the date of disability if the denial of the claim is ultimately upheld.

We reiterate the analysis and conclusion contained in our Interim Order and add the following additional comments.

In Albert Nelson, WCB Case No. 80-09749, 34 Van Natta 573 (April 30, 1982), the Referee, based on Silsby, had ordered SAIF to pay interim compensation from the date of disability rather than from the date of notice of a medically verified inability to work. The Board, in reversing the Referee on the compensability issue, also reversed that portion of his order requiring SAIF to pay interim compensation from the date of disability, stating:

"Since we have found the claimant's aggravation claim to be noncompensable, we reverse that portion of the Referee's order. Kosanke v SAIF, 41 Or App 17 (1979), held that if a claim for aggravation is not allowed, all claimant is entitled to under ORS 656.273(6), is payment from 14 days after notice, and not from the date of disability."

It could be argued as a point of distinction that Silsby, Kosanke and Albert Nelson all involved claims for aggravation under ORS 656.273, whereas the current case involves a claim in the first instance under ORS 656.262. We find nothing in statutory or case law to support such a distinction. ORS 656.273(6) provides that a claim for aggravation be processed in the same manner as a claim in the first instance under ORS 656.262. ORS 656.273(6) is procedural. That is, it relates only to when interim compensation payments must be made, not what period of time the payments must cover. Silsby, 39 Or App at 562. Since that is the case, the court in Kosanke found that, in the case of an aggravation claim held to be noncompensable, the period of time that payment should cover ran from notice of inability to work, rather than from the actual date of disability. The only distinguishing feature between the processing of a claim in the first instance and a claim for aggravation relates to the type of notice. Since that has been held to be merely procedural in the case of an aggravation claim, it would be inconsistent to hold otherwise in the case of a claim in the first instance. See also, Gilroy v. General Distributors, 35 Or App 361 (1978), ordering payment of interim compensation from date of disability on a new injury claim held to be compensable.

ORDER

The Referee's order dated May 30, 1981 is modified. Claimant is entitled to compensation for temporary total disability from September 26, 1979 through December 17, 1979, rather than from March 13, 1979 through December 17, 1979.

The remainder of the Referee's order is affirmed.

STEVEN J. BAUMAN, Claimant
Gerald Doblle, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-04870
May 25, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

Claimant and the SAIF Corporation seek Board review of Referee Mongrain's order which affirmed the November 26, 1980 denial of claimant's claim, found SAIF responsible for treatment and surgery rendered by Dr. Groth from February 4, 1980 through May 22, 1980, assessed a penalty equal to 15% of those medical bills and granted claimant's attorney a fee of \$1,000. Claimant primarily argues that the backup denial should be set aside. SAIF argues it should not be responsible for any medical treatment or a penalty. We reverse in part.

This somewhat confusing situation can best be explained chronologically:

1977: Claimant filed a claim for a right shoulder condition which SAIF accepted as nondisabling. Claimant missed no time and continued to work as a tool and die maker.

December, 1978: Claimant quit working for reasons unrelated to his shoulder condition.

February, 1980: Claimant's shoulder condition had worsened even though he had not been working. He consulted Dr. Groth who sent the following letter to SAIF:

"Mr. Bauman is in need of further treatment on his right shoulder and I, therefore, request that this claim be reopened."

Apparently enclosed with that letter was a narrative report that concluded:

"He is having a significant amount of problems. He cannot sleep with this beyond 2:00 AM. I feel it would be worthwhile to do an arthrogram of the shoulder to determine the extent of the problem here and if there is a small tear to repair his rotator cuff and do a decompression of the acromial ligament."

A SAIF representative responded:

"Thank you for your letter of February 5, 1980 and your narrative report of February 4, 1980.

"The State Accident Insurance Fund is responsible for treatment to the right shoulder from the injury of October 10, 1977 and unless there is time loss and/or impairment involved, it is not necessary that we reopen the claim to pay for the necessary treatment.

"Please keep us advised as to whether or not the claimant is disabled from working in order that we may pay benefits promptly."

April, 1980: Believing that SAIF had authorized it, Dr. Groth proceeded with surgery.

On May 22, 1980 SAIF denied claim reopening and denied responsibility for the medical services rendered by Dr. Groth. On November 26, 1980 SAIF issued a backup denial of claimant's 1977 claim.

We affirm and adopt those portions of the Referee's order that held: (1) under appellate court decisions, SAIF had the authority to issue a backup denial; and (2) sustained the backup denial. As for the first point, we agree with the points in claimant's brief about the potential unfairness of cases like Frazure v. Agripac, Inc., 290 Or 99 (1980), and Saxton v. Lamb-Weston, 49 Or App 887 (1980), but feel we are bound by those decisions. As for the second point, claimant argues that Weller v. Union Carbide, 288 Or 27 (1979), should not be applied retroactively to a claim filed in 1977. Claimant suggests Weller would not be part of a doctor's vocabulary in 1977. We only note that Weller seems to say it was only restating existing law, not changing the law; and, in any event, most of the medical reports in this record were generated after the Weller decision.

We agree with the Referee's conclusion that SAIF is responsible for the medical services rendered by Dr. Groth before May 22, 1980. This is not the usual denial of medical services situation where a causal link between a compensable injury and disputed medical services must be proven; rather, the question here is how best to deal with an unfortunate miscommunication. We find that Dr. Groth could have reasonably interpreted the letter from SAIF quoted above as authorization to proceed with surgery despite the fact that no such message was intended; in other words, a miscommunication or misunderstanding. Under these (unique, we hope) circumstances in which medical services were rendered in reasonable reliance on apparent authorization from SAIF while the underlying claim was in accepted status, we think it only equitable that SAIF pay for those medical services.

We reverse the Referee's award of a penalty. Dr. Groth reasonably thought SAIF had authorized surgery. SAIF officials did not think they had authorized surgery. The fact that Dr. Groth's interpretation of the situation was reasonable does not make SAIF's interpretation of the situation unreasonable. In any miscommunication/misunderstanding context, it is possible - almost by definition - for both parties' interpretations to be reasonable. We think that best describes this situation and, therefore, conclude that no penalty is warranted.

ORDER

The Referee's order dated October 20, 1981 is affirmed in part and reversed in part. That portion of the Referee's order requiring SAIF to pay a penalty of 15% of the cost of medical services rendered by Dr. Groth is reversed. The balance of the Referee's order is affirmed.

ROBERT DeGRAFF, Claimant
Rolf Olson, Claimant's Attorney
Roger Warren, Defense Attorney
SAIF Corp Legal, Defense Attorney

WCB 78-07405 & 78-09173
May 25, 1982
Order on Remand

The Employers' Mutual of Wausau appealed the Board's Order on Review dated July 1, 1980, which order declared Employers' Disputed Claim Settlement entered into with the claimant, after the issuance of a 307 order, invalid and found claimant had sustained a new industrial injury for which Employers' was responsible; the Court of Appeals issued its order on May 18, 1981, affirming the Board on the issue of the Disputed Claim Settlement and reversing the Board's finding of a new injury, finding that claimant had suffered an aggravation of his 1975 industrial injury for which SAIF was responsible. A petition to the Supreme Court was denied on July 28, 1981. The Court of Appeals issued its Judgment and Mandate on August 13, 1981 remanding the claim for further proceedings pursuant to its order.

Now, therefore, the Disputed Claim Settlement entered into between Employers' and the claimant is hereby vacated and set aside; claimant's claim for an aggravation of his 1975 injury is remanded to SAIF for acceptance and payment of benefits according to law until closure is authorized pursuant to ORS 656.268; the Employers' Mutual of Wausau is to be reimbursed by SAIF for monies expended on claimant's claim for which it was not responsible.

IT IS SO ORDERED.

JACK R. HADAWAY, Claimant
Samuel Imperati, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-05835
May 25, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

Claimant seeks Board review of Referee Leahy's order which upheld the SAIF Corporation's denial of his aggravation claim.

The Board affirms and adopts the Referee's order, with the following additional comments.

Claimant argued that in the event that the denial of the aggravation claim was upheld, then the Board should make a finding that claimant and SAIF entered into a valid and binding settlement agreement when a stipulation was reduced to writing but was not signed by the parties or their attorneys and was not approved by a Referee or the Board.

Counsel had apparently agreed upon the principal substantive provisions of a stipulation, resolving claimant's aggravation claim with an additional award of permanent partial disability to claimant and an attorney's fee to claimant's attorney. In reducing the agreement to writing, a disagreement arose concerning the proper wording of the stipulation and the mention of claimant's spondylolysis. Claimant argues that there exists an oral agreement between the parties which is enforceable pursuant to common law principles of contract law.

This Board has previously held that there is no settlement of a case unless and until a stipulation or 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 disagreement over the terms of the settlement." Phyllis J. Moore, 33 Van Natta 703 (1981); Minnie K. Carter, 33 Van Natta 574 (1981). Accordingly, there is no final stipulation or binding agreement to enforce in this case.

ORDER

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

LESLIE A. McCREERY, Claimant	WCB 81-03231
Allen Scott, Claimant's Attorney	May 25, 1982
SAIF Corp Legal, Defense Attorney	Order on Review

Reviewed by Board Members Lewis and Barnes.

The SAIF Corporation seeks Board review of Referee Leahy's order which ordered it to pay temporary total disability benefits from May 28, 1980 to November 3, 1980 plus a 25% penalty thereon.

The rationale of the Referee's order was probably inconsistent with the Board's subsequent decision in Telphen Knickerbocker, 33 Van Natta 568 (1981). The result of the Referee's order, however, was generally consistent with Mark L. Side, WCB Case No. 81-01240, 34 Van Natta 661 (May 21, 1982).

While claimant's claim was in open status, SAIF unilaterally stopped paying temporary total disability benefits on May 28, 1980, the date the claimant was declared medically stationary. We infer from the record that benefits were terminated at that time solely because claimant had been declared medically stationary; however, SAIF now defends its action on the ground that it was taking a setoff against a prior overpayment of time loss benefits. SAIF's current defense is unpersuasive. Time loss payments on an open claim must continue until the claim is closed pursuant to ORS 656.268 and the question of carrier entitlement to a setoff for overpayment is to be addressed at that time. Mark L. Side, supra.

ORDER

The Referee's order dated September 25, 1981 is affirmed. Claimant's attorney is awarded \$250 for services rendered on Board review, payable by the SAIF Corporation.

JAMES J. MULLIS, Claimant
Mitchell Crew, Claimant's Attorney
John Klor, Defense Attorney

WCB 81-05393
May 25, 1982
Order on Review

Reviewed by Board Members Lewis and Barnes.

The employer seeks Board review of Referee Gemmell's order which granted claimant compensation equal to 128° for 40% unscheduled disability for injury to his back. The employer contends this award is excessive. Claimant has cross requested review contending that the award is inadequate.

We agree with the employer and modify the Referee's order. Based on the same facts considered by the Referee and based on the guidelines set forth in OAR 436-65-600, et. seq., the award granted by the Referee is somewhat high. The totality of the medical evidence indicates that claimant's physical impairment is around 10%. See OAR 436-65-620. He is 54 years old with an eighth grade education. See OAR 436-65-602 and 65-603. His work experience is as a machinist and pipefitter. He was working as a pipefitter at the time of his injury which, according to the Dictionary of Occupational Titles, takes about two years of experience in order to reach proficiency. This results in an impact of +10. See OAR 436-65-604. Claimant is considered to be restricted to modified work, although he testified that if he lifts correctly he can lift just about anything. Considering his education, past experience and work limitations, he has 79% of the general labor market left open to him. See OAR 436-65-608. Combining the above factors, we conclude claimant would be more appropriately compensated with an award of 80° for 25% unscheduled disability.

ORDER

The Referee's order dated November 3, 1981 is modified.

Claimant is hereby granted compensation equal to 80° for 25% unscheduled disability for his back injury. This award is in lieu of that granted by the Referee's order. Claimant's attorney's fee should be adjusted accordingly.

JAMES D. RANSOM, Claimant
Jeffrey Mutnick, Claimant's Attorney
Jerry McCallister, Defense Attorney

WCB 80-06002 & 80-11561
May 25, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

Claimant seeks Board review of Referee Leahy's order which granted claimant an award of 32° for 10% unscheduled disability arising out of his 1978 industrial injury, affirmed SAIF's denial of aggravation of the 1978 injury and affirmed the SAIF's denial of a claim filed in November, 1980 as an occupational disease.

Claimant was employed by Coast Marine Construction. On April 21, 1978 he fell, injuring his right shoulder. The diagnosis was dislocation of the shoulder with fracture of posterior lateral aspect of the humeral head. Closed reduction surgery with staple implantation was performed by Dr. Foster on April 21, 1978. Surgery to remove the staple was performed on January 16, 1979 by Dr. Grossenbacher. Dr. McLaughlin reported May 21, 1979 that claimant had returned to work in March, 1979 and had been working "when work is available." Dr. McLaughlin released claimant for regular work.

The Coast Marine/SAIF claim was closed by a Determination Order of July 24, 1979. Claimant was hired by Hamilton Construction Company for work on a project scheduled for June 14, 1979 through September 14, 1979. Claimant left Hamilton in September upon completion of the project. In October, 1979 claimant sought medical treatment from Dr. Grossenbacher who reported claimant had quit work in September, 1979 because of discomfort in the right upper arm. Claimant complained of his right hand going to sleep. Dr. Grossenbacher reported: (1) nerve conduction studies were normal; (2) diagnosis was carpal tunnel syndrome; (3) claimant was not medically stationary and (4) claimant was unemployable at the time of the examination. In November, 1979 nerve conduction studies were repeated. The studies indicated claimant had distal median nerve compression.

On November 26, 1979 claimant requested a hearing on the April, 1978 Coast Marine/SAIF claim raising the issues of further medical care and treatment, temporary total disability, extent of permanent partial disability and penalties and attorney fees for failure to process a claim for aggravation.

On January 25, 1980 the parties entered into a stipulation which reads in part:

"IT IS HEREBY ORDERED AND ADJUDGED that claimant be paid compensation for TTD from September 8, 1979 up to and including the present and until such time in the future as his condition shall warrant, and that claimant be paid medical expenses for treatment of his condition which have been incurred up to and including the present time and all similar expenses incurred in the future until such time as his claim is closed pursuant to Oregon law."

On April 2, 1980 surgery was performed for carpal tunnel release. On June 23, 1980 SAIF issued a letter of denial which denied that the 1978 Coast Marine injury had become aggravated.

On July 21, 1980 a Determination Order was issued again closing the April, 1978 claim pursuant to the terms of the January, 1980 stipulation. The Determination Order granted time loss only.

On November 6, 1980 claimant filed an occupational disease claim against Hamilton Construction alleging the wrist condition was causally related to work activity during the summer of 1979. SAIF denied the claim on December 17, 1980.

The Referee found that claimant failed to sustain his burden of proof in his aggravation claim against Coast Marine/SAIF and Hamilton/SAIF on the basis of an occupational disease. He affirmed both denials.

We agree with the Referee that claimant has failed to establish a claim for occupational disease against Hamilton/SAIF and affirm that denial.

We disagree with the Referee on the denial of aggravation against Coast Marine/SAIF. The stipulation entered into between SAIF and claimant dated January 25, 1980 reopened claimant's claim for aggravation as of September 8, 1979 for treatment of his "condition." That "condition", based on a preponderance of the medical evidence after the April, 1978 injury and before the January, 1980 stipulation could only have referred to claimant's carpal tunnel syndrome. Therefore, that issue of compensability of that aggravation claim for that condition is now res judicata. Clinkenbeard v. SAIF, 44 Or App 583 (1980).

ORDER

The Referee's order dated October 5, 1981 is modified. The denial of aggravation dated June 23, 1980 is reversed and it is recognized that the aggravation claim has been accepted by stipulation and processed to closure. The remainder of the Referee's order is affirmed.

Claimant's attorney is awarded \$1,000 as and for a reasonable attorney's fee for prevailing on the Coast Marine/SAIF denial, for services rendered at the hearing level and on Board review, payable by SAIF.

JACK R. REEF, Claimant
Gerald Doblle, Claimant's Attorney
George Goodman, Defense Attorney

WCB 81-02391
May 25, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

Claimant seeks Board review of Referee Danner's order that upheld an order issued by the Compliance Division suspending claimant's compensation for failure to submit to medical treatment recommended by his doctors.

Claimant sustained a compensable low back injury on December 7, 1979. He was treated conservatively and remained on time loss throughout 1980. By January 22, 1981 Drs. Becker and Melgard were taking the position that either claimant should submit to a myelogram and, depending on the results, possible surgery or they had no further treatment to offer and claimant was, therefore, medically stationary. Claimant refused to submit to a myelogram or consider the possibility of surgery.

The employer had two choices at that point. It could seek an order from the Compliance Division suspending claimant's temporary total disability compensation pursuant to ORS 656.325 and OAR 436-54-286. Or, given that Drs. Becker and Melgard were saying they had no additional treatment to offer if claimant refused a myelogram and given that claimant did refuse, the claim may well have been ready to submit to the Evaluation Division for closure under ORS 656.268. The employer chose the former option, the suspension order issued and claimant requested a hearing.

At times claimant seeks to argue that neither a suspension order nor claim closure were appropriate, but rather he should have remained on time loss indefinitely. We disagree.

Alternatively, claimant seems to argue that his claim should have been closed rather than his compensation benefits suspended. Even though the doctors' statements that claimant was medically stationary were qualified (if he refuses further treatment, we have nothing more to offer), on the circumstances of this case we agree that claim closure may well have been preferable to the suspension order that was entered. However, we do not see how claimant was worse off under the terms of the suspension order than he would have been under a Determination Order. The suspension order terminated claimant's right to temporary total disability effective February 25, 1981. Had a Determination Order instead been issued, from the available information it appears that claimant's right to temporary total disability would have ended on January 22, 1981. Any error committed by following the suspension order route rather than the Determination Order route was harmless.

ORDER

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

LEROY BURKE, Claimant
Rolf Olson, Claimant's Attorney
Scott Terrall, Defense Attorney
David Horne, Defense Attorney

WCB 80-09828, 80-04543 & 80-04544
May 27, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

Claimant seeks Board review of Referee Foster's order and Order on Reconsideration. Although the Referee considered numerous issues, the only issue raised on Board review is whether claimant was paid temporary total disability at the proper rate which depends on whether claimant's overtime work should have been considered in computing his temporary total disability rate.

Calculation of temporary total disability benefits is governed by OAR 436-54-212. Particularly relevant here are subsections (3)(a) and (3)(i), which provide.

"(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 than 4 weeks use intent at time of hire as confirmed by employer and worker.

"(i) Employed with overtime: Overtime shall be considered only when worked on a regular basis. Overtime earnings shall be considered at the overtime rate rather than straight time. Example: If one day of overtime per month for a normally 40 hour a week worker, use 40 hours at regular wage and 2 hours at overtime wage; etc., to compute the weekly rate. If overtime varies in hours worked per day or week, use average as in (a). One-half day or more will be considered a full day when determining days worked per week."

Claimant testified that he worked an average of 15 to 20 hours overtime per month. Undated payroll records, which the parties appear to assume were for the six months preceding claimant's injury, suggest he worked in excess of 40 hours per week in five of those six months. This apparent overtime ranged from about 7 to about 31 hours a month, which is consistent with claimant's testimony. We regard this as overtime "worked on a regular basis" within the meaning of OAR 436-54-212(3)(i).

The employer argues, in effect, that it is impossible to apply OAR 436-54-212(3)(i) in this case because there is no evidence how many "straight time" and overtime hours claimant worked or what the "straight time" or overtime pay rate was. The employer is technically correct, but we do not think that the adversary system can or should be carried to the extreme of denying claimant all relief. Joe Meeker, 30 Van Natta 645 (1981). Information about claimant's straight time and overtime hours and pay rates is obviously in the employer's possession.

ORDER

The Referee's orders dated July 30, 1981 and October 19, 1981 are modified. This claim is remanded to the employer to recalculate claimant's temporary total disability rate in accordance with OAR 436-54-212(3)(a) and (i). Claimant's attorney is awarded a fee of \$500 to be paid by the employer because of the employer's prior refusal to calculate and pay claimant temporary total disability at the proper rate. The balance of the Referee's orders is affirmed.

PIRFIL CAM, dba
CAM CONSTRUCTION CO., Employer
JUAN ANFILOFIEFF, Claimant
Paul Lipscomb, Attorney
Keith Skelton, Attorney
SAIF Corp Legal, Defense Attorney

WCB 78-03801
May 27, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

The employer requests Board review of Referee Seifert's order which apparently affirmed the proposed and final order of the Compliance Division, issued May 4, 1978 finding the employer to be a subject noncomplying employer.

The issue of the employer's status was originally set to be heard in conjunction with WCB Case No. 78-04612, the issue in that case being whether or not the claimant, Juan Anfilofieff, sustained an injury in the course and scope of his employment with Pirfil Cam. Counsel for the employer requested that the noncomplying issue, WCB Case No. 78-03801, be severed for a separate hearing on that issue alone at a later date. There were no objections raised and the request was granted. Claimant was represented at the hearing and the SAIF Corporation defended the claim. The employer was present, was represented by counsel and testified at that hearing. The Referee at that hearing found that the claimant was a subject employee who sustained a compensable injury in the course and scope of his employment. That finding was upheld by the Board and Court of Appeals. Anfilofieff v. SAIF, 52 Or App 127 (1981).

At the hearing involving the current case, it was stipulated that the employer did not provide compensation coverage. The employer attempted to contend that he was not required to provide coverage on the grounds that the claimant was not a subject employee, but an independent contractor. The Referee found that the issue of whether or not claimant was a subject employee was barred from redetermination on the grounds of collateral estoppel. Since it was stipulated that the employer failed to provide coverage, and since claimant was previously found to be a subject employee, the Referee denied the employer all requested relief.

We agree with the Referee. Collateral estoppel may be invoked against someone who is a party, or in privity with named parties in the first action. Individuals in privity include those who exercise control over action, those whose interests are represented by a party to the proceeding and successors in interest with derivative claims. Jones v. Flannigan, 270 Or 121, 124 (1974). The employer was clearly a party to the first proceeding. He had notice, was represented by counsel and had an opportunity to be heard. Although SAIF represented his interests at the first hearing, there was no conflict between SAIF and the employer at that time. Their interests were identical. See Ferguson v. Birmingham Fire Ins., 254 Or 496 (1969). Nor could it be said that SAIF merely provided a token defense knowing that even if the claimant were found to be a subject employee that it could seek reimbursement from the employer in another action. On the contrary, SAIF battled the claim to the Court of Appeals level. Under these circumstances, there is nothing anomalous in allowing collateral estoppel to bar a redetermination of the issue of whether or not the claimant was a subject employee.

We note that the Referee allowed claimant's attorney an employer paid fee at the hearing of \$900. That would seem questionable in view of the fact that there was nothing for claimant to defend at the hearing. His claim had already been determined to be compensable and that finding, as noted above, is res judicata. His compensation could not be affected by the outcome of the hearing on the noncomplying issue. The propriety of that award, however, will forever remain a mystery since counsel for the employer has not raised the issue.

ORDER

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

JOHN GILBERT, Claimant
Douglas Hagen, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-06744
May 27, 1982
Order on Review (Remanding)

Reviewed by Board Members Barnes and Lewis.

Claimant seeks Board review of Acting Presiding Referee Wolff's order of dismissal and Presiding Referee Daughtry's Order Denying Reinstatement.

The chronology that gave rise to dismissal of claimant's request for hearing is as follows:

July 23, 1981: Request for hearing received from claimant.

July 27, 1981: Request for hearing acknowledged; claimant given 10 days to return information sheet.

August 28, 1981: Information sheet received from claimant.

September 18, 1981: Claimant ordered to show cause why his hearing request should not be dismissed as abandoned.

October 23, 1981: Order of dismissal entered by Referee Wolff, claimant not having responded to the Show Cause Order.

November 23, 1981: Claimant moves for reinstatement.

January 14, 1982: Order Denying Reinstatement issued by Referee Daughtry.

OAR 436-83-310 states:

"A request for hearing may be dismissed for want of prosecution where the party requesting the hearing occasions a delay of more than 90 days without good cause."

The Board fully supports the efforts of the Hearings Division to rely on OAR 436-83-310 as a way of keeping pending but ancient hearing requests moving toward resolution. In this case, however, we think the Hearings Division moved too far, too fast.

While exceptions may well be warranted, we believe that OAR 436-83-310 should generally only be invoked when the party requesting hearing has not communicated with the Hearings Division for more than 90 days. Claimant's last communication was received by the Hearings Division on August 28, 1981. Only 21 days passed before the Order to Show Cause issued. Only 63 additional days passed before the Order of Dismissal issued. We cannot and do not approve of claimant's failure to respond to the Order to Show Cause but, despite that dereliction, we conclude that the actions of the Hearings Division were not consistent with OAR 436-83-310 in the context of this case.

ORDER

The Referees' orders dated October 30, 1981 and January 14, 1982 are reversed and this request for hearing is remanded to the Hearings Division to be processed and set in due course.

LEROY KOCIEMBA, Claimant
Charles Tauman, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-06016
May 27, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

The SAIF Corporation requests Board review of Referee Braverman's order which found claimant's back and stomach conditions to be a compensable result of his September 24, 1965 industrial accident, found claimant to be permanently and totally disabled as of May 11, 1981, found claimant to be medically stationary with regard to all of his medical problems and assessed penalties and attorney fees against SAIF for failure to comply with OAR 436-83-460 and for its denial of claimant's back condition.

SAIF takes issue with the Referee's findings concerning claimant's back and stomach conditions. It also contends that claimant is not permanently and totally disabled. There is no contention raised that the Referee's award of penalties and attorney fees was incorrect.

Claimant, 25 years old at the time of his injury, was struck on the left leg by a large piece of pipe. The result was compound comminuted fractures of the proximal half of the left tibia involving the tibial plateaus in the knee joint and the left fibula. Claimant was treated, but in late 1965 suffered an occlusion of the arterial blood supply at the left knee. Vein grafts to the popliteal artery were then performed. Following vein grafting, it was thought by Dr. Blumberg that amputation of claimant's left lower leg would be necessary and that he would return to the labor market in July or August, 1966.

Beginning on January 10, 1967 claimant underwent at least nine operations during the course of that year. The major concern at that time was the attempted repair of a large open wound exposing the greater portion of the tibia and cortical bone. Closure of the wound was attempted by use of a tube pedicle from the lower abdomen along with skin grafts. By June of 1967 the procedure had succeeded in reducing the size of the wound to the point where eight inches of tibia were exposed. The wound was eventually covered, but a large ulcerous condition over the anterior ankle persisted. Further operations followed in 1968 including an ankle fusion. Osteomyelitis, an inflammation involving the bone and bone marrow caused by bacteria and eventually leading to necrosis of bone tissue, was noted. Claimant's condition was relatively quiescent in 1969 and investigation for vocational rehabilitation began, but the file was closed in view of the likelihood of further surgeries.

Surgery on the claimant's left leg continued in an attempt to eliminate the osteomyelitis and to fully close the wound since there was a partial rejection of the skin grafts. Dr. Meyer, in his January 18, 1971 report opined that claimant had a chronic wound that may never heal and that amputation was suggested but refused. In his May 5, 1971 report, Dr. Shlim stated that claimant's wound would likely never heal and that the useless leg would show further impairment of blood supply and would undoubtedly result in amputation in the future. Dr. Shlim's medical reports continued to express his opinion that amputation was the only solution to the claimant's difficulties. Claim closure on November 30, 1971 followed, but it was set aside by stipulated order of July 17, 1972.

Claimant's condition again went into a relative state of remission and by December, 1975 he was found to be medically stationary by Drs. Grossenbacher and Shlim. It was noted, however, that future exacerbations and remissions were expected. The Determination Order of December 18, 1975 allowed compensation for temporary total disability and 75% loss of lower leg. That order was set aside, however, and the claim remained open.

Claimant continued to suffer difficulties with his leg. Dr. Steffanoff indicated in his May 23, 1976 report that claimant had been examined by numerous surgeons and that they all advised amputation. He indicated that one final attempt to heal the leg ulcer had been authorized and that if that procedure failed, amputation was the only course left. That alternative procedure was attempted but was apparently not successful because amputation was again urged by Dr. Kimbrough in 1977. In 1978 claimant visited Minnesota and suffered a flare-up of his osteomyelitis. Against medical advice claimant left the St. Cloud Hospital after three days and returned to Dr. Kimbrough, who noted that the St. Cloud physician forcefully urged amputation in view of the chronic nature of claimant's condition and the potential for extremely dangerous future flare-ups of his osteomyelitis. Dr. Kimbrough agreed with the St. Cloud physician.

In his October 12, 1978 report Dr. Kimbrough outlined four possible courses of treatment for the claimant. Two of the proposed treatments were considered to have a zero chance of cure with the eventual result being amputation. The third choice included long term intravenous therapy with a minus 50% chance of cure. The fourth choice was amputation with a 100% chance of curing claimant's infectious process. Dr. Grossenbacher felt that the osteomyelitis was incurable without amputation. Dr. Kimbrough felt that a flare-up of that condition could be fatal for the claimant and that the bone tissue in the tibia was essentially dead.

A Determination Order issued on July 18, 1979 allowing temporary total disability benefits and an additional 5% for loss of the left leg. Claimant returned to Dr. Kimbrough with ulcer symptomatology. Dr. Kimbrough again noted that attempts to save the leg were totally unrealistic and that amputation was inevitable. A stipulated order of December 4, 1979 reopened the claim. Dr. Grossenbacher noted in his October 22, 1979 letter that claimant was suffering back difficulties related to the leg difficulty. A Determination Order of January 18, 1980 allowed additional temporary total disability benefits only. The claim was again reopened by stipulated order of March 10, 1980. Another Determination Order issued on June 19, 1981 allowing compensation for additional temporary total disability. Dr. Kimbrough's final report, dated July 27, 1981, again urged amputation as the only definitive cure with a possibility of a minus 30% chance of cure with long-term intravenous therapy. Claimant refused to consider either alternative.

The Referee concluded that all of the claimant's medical problems were stationary as of May 11, 1981 (leg, stomach and back) and found the back and stomach conditions to be related to claimant's leg problems and, therefore, compensable. Additionally, the Referee found the claimant to be permanently and totally disabled.

The Referee noted that claimant had given up most physical activities and sports and spent his life in a sedentary state. He concluded that claimant had sufficient motivation, but lacked the necessary training to permit a return to work with a marketable skill and that claimant was justified in refusing to undertake the "extreme" medical alternatives of amputation.

SAIF contends that the Referee was unjustified in taking into consideration claimant's stomach condition in awarding permanent total disability, since the medical evidence indicates that the condition is not yet stationary and may be only transitory in nature. Claimant agrees, in his brief, that the stomach condition has not been established as permanent and, therefore, should not be a consideration in determining permanent partial disability. Claimant argues additionally that the Referee did not consider that condition when finding claimant to be permanently and totally disabled and that Dr. Bookin's report of July 22, 1981 establishes compensability of claimant's stomach condition.

We do not understand SAIF to be contesting the Referee's determination of compensability of claimant's stomach condition. In any case, we agree with the Referee that it is clearly related to claimant's compensable injury. Dr. Bookin makes it clear that claimant's leg difficulty is a source of stress and chronic pain for which claimant ingests analgesics which are a material contributing cause to his ulcer disease. Dr. Bookin also points out that claimant's ulcer condition could not be considered medically stationary and that complete ulcer healing with no permanent impairment is predicted. It is, therefore, clear that the Referee erred in finding claimant's ulcer condition to be stationary. It is not clear from a reading of the Referee's order whether or not he considered the stomach condition when finding claimant to be permanently and totally disabled. The Referee stated:

"I conclude that claimant's medical problems are medically stationary within the legal definition of that term. The more difficult question is the extent of claimant's disability. Claimant has conceded that his left leg loss of function has been adequately rated at 90%. His back impairment is in the moderate range while his stomach condition appears to be transitory in nature, but not clearly defined in scope."

The Referee then went on to describe the social/vocational factors which led him to his conclusion. We infer that the Referee did consider claimant's stomach condition in making the award of permanent and total disability. We agree with both claimant and defense counsel that a temporary condition is an improper basis for an award of permanent disability since permanent loss of earning capacity is the criteria. ORS 656.214(4). Before considering the effect this error has on the award of permanent total disability, we turn to the issue of claimant's back condition.

With regard to any issue concerning compensability of claimant's back problems, we agree with the Referee. Claimant had complained of lumbar area pain for several years following his injury. Dr. Grossenbacher, in his July 23, 1981 letter, states that claim-

ant's back condition is secondary to his abnormal gait in order to compensate for his leg problem and opined that the back condition was permanent in nature. It is thus Dr. Grossenbacher's clear opinion that the back condition is related to the industrial leg injury. Additionally, Dr. Grossenbacher's report of July 29, 1981 is sufficient to establish claimant's right to an award of permanent partial un-scheduled disability under the test of Woodman v. Georgia Pacific, 289 Or 551 (1980); see also Leonard Cain, 33 Van

Natta 660 (1981), involving a very similar factual situation. We find that claimant was medically stationary with regard to his back condition as of July 23, 1981, the date of Dr. Grossenbacher's report.

We now consider the issue of extent of disability. Benefits for compensable injuries are paid as authorized and in such amounts provided for by the law in force at the time of the compensable injury. ORS 656.202(2). The law in effect at the time of claimant's injury did not provide for the payment of permanent total disability for the loss of function of a single scheduled member alone. ORS 656.206(1) (1965); compare Jones v. Compensation Department, 250 Or 177 (1968), with Hill v. SAIF, 38 Or App 13 (1979). In order for claimant to be found permanently and totally disabled, he must establish un-scheduled disability in addition to his scheduled disability, in order to allow for consideration of factors involving loss of earning capacity. Mansfield v. Coplender Bros., 10 Or App 545 (1972). Although the claimant in this case did not suffer an un-scheduled injury at the same time as his scheduled injury, Woodman has since recognized the concept of "spreading" disability from scheduled to un-scheduled portions of the body. We find no reason why that concept would be inapplicable to the present factual situation.

There are two basic reasons why we do not agree with the Referee's finding of permanent total disability in this case. Our first reason is disagreement with the Referee's interpretation of claimant's disability, on both physical and social/vocational grounds. There are two types of permanent total disability; those arising entirely from medical or physical conditions of less than total incapacity and those arising from physical conditions of less than total incapacity plus nonmedical conditions, which when combined, result in permanent total disability. Wilson v. Weyerhaeuser, 30 Or App 403 (1967).

As previously noted, claimant must establish that his combined physical difficulties as a result of his leg and back conditions, without consideration of his temporary stomach condition, establish his disability as total. An examination with regard to claimant's leg condition indicates that although he underwent numerous surgeries in an attempt to stabilize and resolve this problem, that since 1978 he has required only one hospitalization which involved an attempt of intravenous antibiotic therapy to prevent future flare-ups of claimant's osteomyelitis. Claimant's principal complaints since that time have been confined to his back and

stomach conditions. Were claimant able to legally establish permanent total disability on the basis of loss of leg alone, we would find that the evidence indicates that from a medical standpoint, claimant's leg condition has become quiescent and that medically it does not approach the point of making the claimant permanently and totally disabled.

Examining claimant's relatively stable leg condition in combination with his back difficulties, we find that from a medical standpoint, permanent total disability has not been established. The report of the Orthopaedic Consultants dated June 26, 1980 is the most comprehensive concerning claimant's combined difficulties. He was found to have a permanent disability with regard to his back in the range of mildly moderate. The objective findings are consistent with this rating. Dr. Grossenbacher diagnosed claimant's back condition as thoracic and lumbar strain secondary to his abnormal gait and musculoligamentous injury to the vertebral column. He felt that claimant did suffer some permanent disability to his back but rated it as mild or minimal. None of the claimant's treating physicians have given any indication that they felt the claimant to be permanently and totally disabled from a medical standpoint. We find that although claimant has a severe leg injury, for which he has received an award equal to 90% scheduled disability, that he has not suffered such a severe back condition as to warrant a finding of permanent and total disability from a medical standpoint.

Claimant argues that even if the medical evidence fails to establish permanent total disability, that medical disability, when combined with the non-medical factors results in permanent and total disability. We are not persuaded. With regard to employability, Dr. Grossenbacher has felt since 1975 that claimant was capable of engaging in an occupation involving welding. The report of the Orthopaedic Consultants dated June 26, 1980 is very comprehensive in that all of claimant's physical and social factors were considered in the evaluation. Their opinion was that claimant would be able to engage in employment involving welding, for which he was well motivated and that he was capable of light and sedentary employment. Dr. Kimbrough, in his July 27, 1981 letter, indicates his puzzlement at the claimant's failure to attempt training in various occupations and states, "Certainly Mr. Kociemba could work at some sort of occupation that would allow him to sit." Claimant indicated at the hearing that he was not interested in certain job fields that were suggested during vocational rehabilitation. Records from Dr. Smith at the Pain Clinic at Good Samaritan Hospital indicate that claimant was relatively satisfied with his life style and that the doctor anticipated difficulty in readjusting claimant's behavior and attitude for a return to an employment situation. Claimant is able to participate in a number of activities including metal work, welding, swimming and, surprisingly enough, water skiing. Other factors to be considered are claimant's relatively advantageous age, average mental capacity and education and a stable emotional and psychological status. We do not find the combination of physical and non-physical factors to be so severe that claimant would be unable to be employed regularly in any branch of the labor market.

The second reason for our disagreement with the Referee's finding concerning permanent total disability involves the reasonability of claimant's course of action involving recommended medical treatment. We think that the voluminous medical evidence makes

it clear that had claimant undergone the recommended course of treatment for his leg condition (amputation), that he would have been able to significantly reduce his disability and re-enter the labor market in a productive capacity. A chronological analysis of the medical evidence reveals that since 1971 claimant had been counseled by his physicians and surgeons to undergo this course of treatment, but had refused. Various alternative forms of therapy have been attempted over the past 10 years, in an effort to comport with the claimant's desire, all of which have been unsuccessful and for which claimant has continuously been paid time loss benefits. The medical reports begin in 1971 by merely suggesting amputation as a definitive solution to the claimant's difficulties. As various alternative methods of treatment failed, and claimant's osteomyelitis became more serious and potentially life-threatening, the reports grow more and more emphatic in tone. Dr. Kimbrough has opined repeatedly that attempts to save the portion of the left leg below the knee were useless and unrealistic and that an amputation is inevitable in any event. Dr. Grossenbacher is in full agreement with Dr. Kimbrough, as were the physicians the claimant was examined by in St. Cloud, Minnesota and others in Oregon.

In determining whether claimant has established entitlement to permanent total disability, claimant's refusal to undergo recommended medical treatment may be considered. Suell v. SAIF, 22 Or App 201 (1975); Clemons v. Roseburg Lumber Co., 34 Or App 135 (1978). One of the objectives of the Workers' Compensation Act is to favor restoration of the worker over compensation for permanent loss and, although a claimant may not be compelled to undergo treatment, he should not be compensated for the consequences of his refusal. Clemons, 34 Or App at 138. The court in Clemons summarized the factors to be considered in determining if the claimant's refusal is reasonable.

"The relevant inquiry is whether, if compensation were not an issue, an ordinarily prudent and reasonable person would submit to the recommended treatment. Such a determination must be based upon all relevant factors, including the worker's present physical and psychological condition, the degree of pain accompanying and following his treatment, the risks posed by the treatment and the likelihood that it would significantly reduce the worker's disability." Clemons, 34 Or App at 139.

The court went on to note that reasonableness must also take the worker's perspective into account and that it cannot be based upon medical opinions alone.

Considering all of the factors noted by the court in Clemons, we find that an ordinary, prudent person would have submitted to the recommended surgical procedure long ago. Given claimant's 16 year history of difficulties with his leg, amputation does not appear to be such an "extreme" medical alternative, but virtually the only course of action left open to the claimant. Dr. Kimbrough notes time and again that this is the only definitive solution to claimant's problems and that in any case it will be inevitable. This is bolstered by the possibilities of extremely dangerous flare-ups of claimant's osteomyelitis condition, which

can only be cured by amputation. It would not seem that the risks posed by the treatment are nearly so serious as the risks posed by refusing to undergo the procedure. Claimant's loss of function of his leg has been rated by Dr. Grossenbacher as equivalent to an amputation. The claimant's leg continues to grow bacterial organisms. He has continued drainage and substantial atrophy. He risks future flare-ups of dangerous osteomyelitis. He has suffered stomach difficulties and possible hearing difficulties that may be related to ingestion of large doses of analgesics related to his leg condition. He has undergone approximately twenty-five or more surgeries in vain attempts to salvage a limb that all medical opinions indicate is unsalvageable. Dr. Kimbrough has opined that claimant's chances of success are 100% with an amputation, that few complications are involved and this would be considerably more beneficial in view of the risks associated with keeping the leg. The chances of re-entry into the labor market seem substantially improved should he undergo the procedure since that would eliminate nearly all of the above noted difficulties. The compensation system has provided claimant with every benefit and opportunity to salvage his injured leg for the past 16 years. He now asks for permanent total disability to enable him to retain his leg since by doing so he will without a doubt suffer continued difficulties in the future at unknown and unforeseen times for the rest of his life. We find that the claimant asks too much of the compensation system and that it is now incumbent upon him to undertake the positive action necessary to reduce his disability and return as a productive member of society. As noted previously, claimant may not, of course, be required to undergo this treatment, but neither should he be compensated with permanent total disability because of his refusal to do so.

Claimant requests that if we find him not entitled to an award for permanent and total disability, that we proceed to rate the extent of his unscheduled permanent partial back disability. We prefer to defer rating a claimant's disability until he has become medically stationary with regard to all of the residuals of his industrial injury. Dr. Bookin indicated in his July 22, 1981 letter that claimant was not yet medically stationary with regard to his compensable ulcer condition. Therefore, we will abstain from rating claimant's disability. That will be the concern of the Evaluation Division once claimant becomes fully stationary from all of his compensable conditions. Gary Freier, WCB Case No. 79-07952, 34 Van Natta 543 (1982)

ORDER

The Referee's order dated September 28, 1981 is modified. Those portions finding claimant to be permanently and totally disabled as of May 11, 1981 and awarding claimant's attorney a fee of 25% of the increased compensation, not to exceed \$2,000, are reversed.

The claimant is found to be medically stationary with regard to his leg condition as of May 11, 1981, with regard to his back condition as of July 23, 1981 and to be medically unstationary with regard to his compensable stomach condition. The claim is

remanded to the SAIF Corporation for payment of medical benefits pursuant to ORS 656.245 for all of the above noted compensable conditions and for payment of time loss benefits from May 11, 1981 until closure pursuant to ORS 656.268 due to claimant's compensable stomach condition.

The remainder of the Referee's order is affirmed.

ROBERT M. PILACZYNSKI, Claimant	WCB 81-00742
Allen H. Coons, Claimant's Attorney	May 27, 1982
SAIF Corp Legal, Defense Attorney	Order on Review

Reviewed by Board Members Lewis and Barnes.

The SAIF Corporation seeks Board review of Referee Shebley's order which awarded claimant 97.5° for 65% permanent partial disability of claimant's right hand in lieu of the Determination Order dated December 10, 1980 which awarded 12.1° for 55% permanent partial disability of claimant's right middle finger.

The Board affirms and adopts the Referee's order with the exception that the award shall be for 97.5° for 65% of claimant's right forearm. The record shows that although claimant's initial injury was only to his right middle finger, it has resulted in loss of function of his right hand and right forearm. Loss of grip is rated as a forearm impairment. The record shows that claimant's grip was below the tenth percentile due to the injury resulting in a 45% loss of the right arm. Pursuant to OAR 436-65-532(4) the impairment is rated in terms of the most proximate radical which, in this case, is claimant's forearm.

SAIF cites Hiroshi George Hitomi, 33 Van Natta 609 (1981), stating the Board held that a rating for loss of hand could only be found when the claimant has injuries to multiple digits and there is evidence of loss of use of the entire hand. More accurately, in Hitomi, we did not award compensation for loss of use of the hand (the area between the fingers and the wrist) because we found there was no evidence of loss of use of the entire hand, but only evidence of loss of use of the two injured digits. If there is evidence of loss of use of the hand, that loss will be compensated. There is no requirement that multiple digits be impaired or, indeed, that any digits need be impaired to compensate for loss of a hand.

In this case, there was evidence presented of loss of use of the hand separate from evidence of loss of use of the middle finger. The reason the finger loss was converted to a rating in terms of a more proximate radical was due to the rule of rating cited above.

ORDER

The claimant is awarded 97.5° for 65% permanent partial disability of claimant's right forearm. This is in lieu of the award made by the Referee in his November 9, 1981 order.

Claimant's attorney is awarded \$600 for his services on Board review.

EULA M. THOMAS, Claimant
Elliott Lynn, Claimant's Attorney
Dennis Reese, Defense Attorney

WCB 81-05391
May 27, 1982
Order on Review

Reviewed by Board Members Lewis and Barnes.

The claimant seeks Board review of Referee Neal's order which granted claimant an additional award of 80% for 25% giving her a total award of 100% unscheduled disability. Claimant contends that she is permanently and totally disabled.

The facts as recited by the Referee are adopted as our own. The medical evidence rates claimant's impairment as moderate severe. She suffers from a non-union from a prior fusion and had her last surgery for severe spinal stenosis. Claimant is 53 years of age with a fourth grade education and her entire working life has been in manual labor. Claimant also suffers from pre-existing conditions which hamper her ability to be gainfully employed.

Based on the evidence presented, in our view it would be unrealistic to say that claimant had a reasonable expectation of being able to sell her services to any employer. In our opinion it would be futile for claimant to have attempted to find employment. Morris v. Denny's, 50 Or App 533 (1981); Butcher v. SAIF, 45 Or App 313 (1980).

We conclude claimant is permanently and totally disabled.

ORDER

The Referee's order dated November 12, 1981 is modified. Claimant is hereby granted an award of permanent total disability commencing March 9, 1981. Claimant's attorney is awarded 25%, not to exceed \$1,000, of the increased compensation as and for a reasonable attorney's fee.

FRED BAER, Claimant
Carlotta Sorensen, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-06842
May 28, 1982
Order on Review

Reviewed by Board Members Lewis and Barnes.

SAIF Corporation seeks Board review of Referee Braverman's order which granted claimant compensation for 30% loss of the left leg.

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

SAIF contends that the determinations of the Evaluation Division are entitled to a presumption of "correctness" under ORS 41.360(15). We considered and rejected this contention in Michiel Harth, WCB Case No. 78-03561 (decided this date), 34 Van Natta 703 (1982).

ORDER

The Referee's order dated March 4, 1981 is affirmed. Claimant's attorney is awarded \$500 as and for a reasonable attorney's fee, payable by SAIF.

CATHERINE BAILEY, Claimant
Kenneth Peterson, Jr., Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 77-07554
May 28, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

Claimant seeks Board review of Referee Gemmell's order that upheld the SAIF Corporation's denial of her occupational disease claim for her respiratory condition.

There is no evidence in the record of the proceedings before the Referee that conceivably could support a conclusion that claimant's work environment was the major cause of her respiratory condition within the meaning of SAIF v Gygi, 55 Or App 570 (1982). Claimant does not really contend otherwise. Rather, the real issue in this case is whether the matter should be remanded to the Referee for consideration of evidence generated after claimant's current attorney assumed her representation which was after the hearing before the Referee.

The Board standards governing remands are stated in its administrative rules as interpreted in Robert Barnett, 31 Van Natta 172 (1981). Claimant has previously conceded that her motion for remand does not satisfy the Barnett standards and the Board has previously denied remand by order dated April 30, 1982.

Claimant's reply brief advises that an appeal to the Court of Appeals is certain regardless of the Board's ruling on review. If that forecast proves to be true and if the Court of Appeals concludes that motions to remand should be governed by some standard other than that articulated in the Board's rules as interpreted in Barnett, it would avoid future needless appeals if the Court of Appeals would clearly define what it regards the test for remand requests to be.

ORDER

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

CLARICE BANKS, Claimant
Noreen Saltveit, Claimant's Attorney
Lawrence Paulson, Defense Attorney
Daryll Klein, Defense Attorney

WCB 79-08983 & 79-09538
May 28, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

Argonaut Insurance Company seeks Board review of Referee Leahy's order that found it rather than United Pacific Reliance Insurance Company to be responsible for payment of compensation to claimant. The issues are whether this claim is best characterized as one for accidental injury or occupational disease, and if it is an injury claim whether the carrier on the risk at the time of injury bears responsibility in a situation in which the injury did not become disabling until after a different carrier had assumed the risk.

I

Claimant worked for the same employer at all relevant times. That employer, however, changed insurance carriers effective March 1, 1979. Before that date, United Pacific was on the risk. After that date, Argonaut assumed the risk. Because of the critical March 1, change-over date, our findings of fact which follow will highlight events before and after that date.

(There is an ambiguity in the record about whether the change-over date was actually March 1 or April 1, 1979. For purposes of this case that ambiguity is not significant; if this claim is properly viewed as an injury, it occurred before both March 1 and April 1; and the resulting disability occurred after both March 1 and April 1. We will proceed on the assumption that coverage changed on March 1, 1979.)

Claimant was employed as a production worker for a business which makes sandwiches in large quantities for retail sale. Her work activities included setting up boards on which sandwiches were made so that she and her co-workers could make sandwiches from a variety of meats, cheeses, spreads and breads. A typical day consisted of the production of 6,000 to 8,000 sandwiches. The Referee found that "claimant was one of the fastest sandwich makers at her employer's establishment." We agree with the Referee's description of claimant's work:

"Claimant's job was standing at the counter approximately waist high with stacks of bread on breadboards to her left, mustard and mayonnaise in large bowls to her right, meat, cheese and other ingredients in front of her. She would pick two pieces of bread at a time, lay them down in rows in front of her with the left hand, apply mayonnaise or mustard and then fill the sandwiches with meat and cheese as necessary. This was a fast twisting side-to-side motion with her arms and hands working very quickly. Occasionally claimant had to

stoop or bend to fetch a new breadboard full of bread from underneath her counter and put it on top of her counter to her left. Occasionally she would have to stoop to her right to fill the mustard and mayonnaise bowls from vats." Order page 3.

During December, 1978 claimant left the production line in order to replace the vacationing assistant to the General Manager. For approximately one month she performed general office work.

Claimant returned to work on the production line on January 8, 1979. On that day the employees were engaged in making "triangle" sandwiches, a task which required faster work and more awkward movements than the preparation of other kinds of sandwiches. Claimant testified that she was working as usual when she suddenly felt a pain in her left shoulder, which she described as feeling "[l]ike somebody was turning on something, off and on, like a switch or something, a shock or something like that." She remarked to one of her co-workers, who testified at an earlier hearing concerning this incident, that she "must have moved wrong or something," that it was "really bothering" her, and that she supposed it would go away and simply "take care of itself."

The pain did not go away. Claimant continuously experienced pain in the area of her left shoulder after this January 8, incident. She continued to work. She experienced greater pain when she was engaged in more strenuous activity. She often had to do lighter work or obtain help from a co-worker due to the continuing pain.

All of the above occurred before the March 1 change-over from United Pacific to Argonaut. The following occurred after that date.

Claimant finally sought medical attention at Holladay Park Hospital, apparently in late April or early May of 1979, where her left shoulder problem was diagnosed as a "charley horse." A subsequent visit on May 7, 1979 to Dr. Berselli resulted in a diagnosis of "a chronic mild fasciitis of the rhomboid muscle group." Dr. Berselli prescribed anti-inflammatory medication and told claimant to refrain from her work activity. Claimant stopped work as of May 8, 1979 and never went back.

Dr. Berselli became claimant's initial treating physician, and he saw her from May 7, 1979 through November 2, 1979. During this time, x-rays of claimant's shoulder, an arthrogram and physical examination all failed to reveal any specific cause of her continuing pain. Dr. Berselli referred claimant to Dr. Langston who examined her on September 26, 1979 and diagnosed a "musculoligamentous strain of the left supraspinatous and overlying trapezius area, by history." Dr. Langston commented that claimant "exhibited no objective evidence of disability" at the time of the examination, and that her complaints of pain were "purely subjective."

Dr. Berselli testified in a deposition that Dr. Langston's opinion confirmed his own diagnosis. When questioned as to the cause of claimant's condition, Dr. Berselli answered that

"[c]hronic stress or an acute stress, a sudden wrenching motion can do it, or conversely, chronic repetition [sic] activity lifting and so forth can do it."

After her last visit to Dr. Berselli, claimant consulted Dr. Thompson. On the basis of his examination Dr. Thompson believed that claimant might have a "partial herniated cervical disc with cervical radiculopathy resulting in the weakness of the left triceps." Dr. Thompson referred claimant to Dr. Berkeley for treatment. At the time of the hearing Dr. Berkeley continued to be claimant's treating physician. Dr. Berkeley noted that films of the cervical spine on December 4, 1979 showed "very slight narrowing at C5-6." He suspected a "possible traumatic cervical spondylopathy with a C5-6 disc lesion." This diagnosis was supported by a myelogram which was performed on February 12, 1980 and which revealed a "discrete C5-C6 lesion causing bilateral nerve root amputation." Dr. Berkeley discussed the possibility of surgery with claimant, but no definite plans for surgery had been made at the time of the hearing. Claimant had decided to await a determination of carrier responsibility prior to undergoing surgery.

At the deposition, Dr. Berselli testified that neither he nor Dr. Langsten had noted any "hard neurologic changes" in their respective examinations of claimant, but that he would defer to Dr. Berkeley's diagnosis in as much as "neurosurgeons do the anterior disk surgery, so . . . they would be considered to be the final word, you might say." Dr. Berselli indicated that "the myelogram report shows fairly minimal changes, but it would be compatible with a disk protrusion, but not absolutely diagnostic . . ." The doctor also said, "I think that if indeed she has a disk protrusion, I guess she does, it certainly could cause the symptoms that she had." Dr. Berkeley and Dr. Berselli both reported that claimant's condition was "a direct result" of her injury of January 8, 1979.

Claimant filed a report of occupational injury or disease (Form 801) on May 4, 1979, which designated the time of injury or date of diagnosis of occupational disease as January 8, 1979. Her claim was initially accepted by United Pacific, which had been her employer's compensation carrier in January; but on October 19, 1979 United Pacific notified claimant that it was denying her claim and referring it to Argonaut. The basis of this denial was United Pacific's determination that claimant's disability resulted from "a repetitive trauma and according to the law the effective claim date commences with the time you first sought medical help." Although United Pacific was the employer's insurance carrier on the date of claimant's alleged injury, Argonaut was the insurer at the time that claimant first sought medical attention for her condition.

Argonaut, in turn notified claimant on December 4, 1979 that it was denying any further benefits on the ground that her condition was the result of a January injury and that United Pacific was the responsible carrier.

Prior to issuing its denial letter, Argonaut had terminated time loss benefits as of October 4, 1979; at claimant's request a hearing was held to determine the propriety of that termination,

and Argonaut was previously ordered to continue paying temporary total disability benefits. The question of which carrier was ultimately responsible for claimant's compensation was not raised or determined in that proceeding.

II

Is this claim properly viewed as one for an accidental injury or one for an occupational disease? The Referee apparently leaned toward an occupational disease conclusion, but ultimately concluded the injury-disease distinction did not matter because the second carrier, Argonaut, was responsible under either approach. For the reasons that follow, we conclude: (1) it does matter whether this claim is for an injury or disease; and (2) it is for an injury. We discuss the latter point first.

"A 'compensable injury' is an accidental injury . . . arising out of and in the course of employment requiring medical services or resulting in disability or death; an injury is accidental if the result is an accident, whether or not due to accidental means." ORS 656.005(8)(a).

An occupational disease is defined as:

"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." ORS 656.802(1)(a).

The two crucial points of distinction between an accidental injury and an occupational disease are the element of unexpectedness and the matter of time-definiteness. An occupational disease cannot honestly be said to be unexpected, since it is recognized as an inherent hazard of continued exposure to conditions of the particular employment; moreover, occupational diseases are gradual rather than sudden in onset.

These distinctions were recognized and applied in O'Neal v. Sisters of Providence, 22 Or App 9 (1975). Claimant in that case was a maid, whose job required that she push a four-foot by four-foot loaded cart down carpeted halls. Claimant alleged that her work conditions materially contributed to leg muscle spasms, and her treating physician so opined. The Court of Appeals noted that there existed some confusion in the case for failure of the claimant, employer and Referee to clearly distinguish between a "compensable injury" and an "occupational disease." 22 Or App at 12. In applying the distinctions to the facts of the claim in O'Neal, the court found that

"[i]t could not honestly be said that it is unexpected that leg muscle spasms might develop from extensive pushing and pulling of a large, maid's cart. It also is clear that the muscle problems were gradual in

onset. We therefore conclude that claimant's disability resulted from an occupational disease rather than an accidental injury." 22 Or App at 17.

In this case, the Referee cited O'Neal as suggesting that this claim would best be labeled one for occupational disease, although, as previously noted, he never came to any firm conclusion on this point. If O'Neal were the only available analogy, there would be much to recommend the Referee's suggestion. The signals from the Court of Appeals, however, are not unmixed.

In Valtinson v SAIF, 56 Or App 184 (1982), the claimant alleged that the ordinary stress of driving a van from Portland to Grants Pass without accident or identifiable trauma caused a ruptured disc. The Court of Appeals was no longer concerned about the parties' failure to indicate whether an accidental injury or occupational disease was being claimed; the court did not even seem to care that the case had been tried and argued through the Board level on an occupational disease theory and was then argued to the court on an accidental injury theory. The court found claimant's condition compensable as an injury:

"The injury was sudden, in that it affected claimant in only a matter of hours. The evidence pointed to no instantaneous event that caused his pinched nerve. . . . We do not equate 'sudden in onset' with instantaneous." 56 Or App at 188.

Of course, the culmination of all disease processes are going to be "sudden in onset," i.e., in "a matter of hours," in the sense that there is always some discrete period of time when, through the first appearance of symptoms, a person becomes aware of the existence of the underlying disease process. This was just as true in O'Neal as it was in Valtinson.

Without clear guidance from the Court of Appeals, we turn to the same source that the court often relies upon. In discussing the component parts of the accident concept, for purposes of determining whether an injury has in fact occurred "by accident," Larson indicates that:

"The potential component parts of the accident concept, under the usual statutory language, may therefore be broken down as follows:

- "(1) Unexpectedness
 - (a) of cause
 - (b) of result

- "(2) Definite time
 - (a) of cause
 - (b) of result

"If both parts of both elements are satisfied, one has the clearest example of a typical industrial accident, in the colloquial sense: collisions, explosions, slips, falls, and the like, leading to obvious traumatic injuries.

"At the other extreme, if all elements are missing, one sees the typical occupational disease. The cause is characteristic harmful conditions of the particular industry. The result is a kind of disability which is not unexpected if work under these conditions continues for a long time. And the development is usually gradual and imperceptible over an extended period."

1B Larson, at 7-7 §37.20.

In discussing the second ingredient - definiteness of time - Larson states that "[t]he injury must be traceable, within reasonable limits, to a definite time, place and occasion or cause." Larson, supra, at 7-5., (Emphasis added.)

In Olson v. SIAC, 222 Or 407 (1960), the court was faced with determining whether the death of a worker resulting from a coronary occlusion while at work "arose out of" the worker's employment. The court analyzed the statutory provisions establishing the entitlement of a worker or the worker's beneficiaries to compensation, as well the definition of an "accidental injury." The court discussed the 1957 amendments to the Act, which included what is presently part of ORS 656.005(8)(a):

"[A]n injury is accidental if the result is an accident, whether or not due to accidental means." [Formerly ORS 656.002(19)]

Although in Olson the court was focusing on the compensability of the widow's claim for benefits - whether the decedent's injury was one "arising out of" his employment and whether the cause had to be "accidental" - the discussion of what constitutes an accident offers some guidance for present purposes. See Grable v. Weyerhaeuser Co., 291 Or 387 (1981).

"An accident may, in general, be defined as an unlooked-for mishap or an untoward event which is not expected or designed.

* * *

"[I]t is sufficient, if, looking back from the injury, it can be said the [worker] suffered an accident."

* * *

Olson, 222 Or at 411, 414.

In discussing the nature of an occupational disease, as distinguished from an industrial accident, the court in White v. SIAC, 227 Or 306 (1961), observed that:

"One who claims that he is afflicted with an occupational disease has undergone experiences substantially different from those of another workman who is the victim of an industrial accident. An occupational disease is stealthy and steals upon its victim when he is unaware of its presence and approach. Accordingly, he cannot later tell the day, month or possibly even the year when the insidious disease made its intrusion into his body. Although his weakened condition may manifest ill health its cause may be uncertain and puzzle even the most skillful of physicians. Upon the other hand, the victim of an industrial accident virtually always can tell the day and even the hour when the purported injury befell him. He does not attribute his present condition to something that crept in upon him unobserved but to an accident which he and possibly many others observed." 227 Or at 322.

In applying these distinctions to the record before us, it is apparent, although admittedly not obvious, that claimant's condition is the result of an accidental injury and not an occupational disease.

Claimant testified that prior to the alleged January 8 incident she had never suffered from any difficulty with her left shoulder. She also testified to a specific movement on January 8 to which she attributed the onset of "a very sharp pain" in her shoulder. She stated in an interview with one of the representatives of the employer that "I must have made the wrong move or something, my shoulder had started aching after that - right after." The following colloquy ensued in that interview:

"Q. Did you feel any immediate pain or was it more of a gradual onset or?

"A. It was gradually.

"Q. Now . . .

"A. Started building up.

"Q. At that point, did you go to a doctor?

"A. No, I thought that I had probably moved wrong and it would go away by itself."

At a previous hearing, in response to her attorney's question as to whether there was one specific incident when claimant felt pain in her arm, the transcript reflects that she responded, "Yes, when I went to go like this (indicating) to make my normal way to make my sandwiches."

Claimant testified at the hearing that from the initial onset of the pain until the time that she finally sought medical attention she had pain in the same place, and that the pain was of the same type, "except it was kind of a deeper pain" by the time she sought medical care. She also stated that (at the time of the hearing) she was still experiencing the same pain, although it was less due to her relative inactivity.

In a letter report dated December 6, 1979 Dr. Thompson related the history given by claimant:

"She noted the gradual onset of pain in the area of the left scapula and particular [sic] along the left scapular border. This came on rather gradually. At first she thought she had 'pulled a muscle.' She said the injury was basically due to fast movements of her arms and lifting. * * * She put up with the discomfort for some time and finally after about two or three months consulted Dr. Berselli. * * * [The pain] is present every day and any activity that involves a lot of movement of her arm increases the pain."

We find that claimant's account of the onset of her pain, which she is able to attribute to a particular movement in the course of her work activity on a particular day, and which she had never before experienced, identifies this claim as one for an accidental injury. The cause and the results can be said to have been unexpected: She worked at her place of employment for three years and never experienced any similar incident or symptoms. Claimant was able to identify the cause of her pain with reasonable certainty in terms of the date and the activity. We note that claimant experienced this onset of pain the first day she returned to relatively strenuous production work after having been reassigned for a month to relatively sedentary office work. Finally, the most persuasive diagnosis comes from Dr. Berkeley, a diagnosis of "traumatic cervical spondylopathy." (Emphasis added.)

The onset of the pain has been characterized in portions of the record as gradual. Based upon our de novo review of the record, we are of the opinion that claimant experienced pain unexpectedly and at a definite time, on account of a particular movement, and the references in the record to the gradual onset of pain are best interpreted to mean claimant's symptoms gradually increased in degree between January 8, 1979 and May 8, 1979, when claimant was advised by her physician to cease her work activity.

Along the accident - disease continuum, this claim must fall closer to the end reserved for accidental injuries.

III

We are left then with an accidental injury which neither disables a claimant nor gives rise to a need for medical services at the time of injury, with the additional wrinkle of a change of carriers between the date of the injury and the date of disability/medical services. The issue thus becomes whether the carrier on the risk at the time of injury is responsible for claimant's compensation benefits or whether responsibility instead falls upon the carrier on the risk at the time the injury became disabling, required medical services and at which time claimant formally filed a claim.

We start with the observation that it seems rather elementary and obvious to us that an insurer on the risk at the time of a covered injury bears responsibility for that injury. However, United Pacific, the insurer that was on the risk at the time of claimant's January, 1979 injury, offers two arguments for shifting responsibility to Argonaut, the insurer on the risk four months later at the time of claimant's disability.

Before considering United Pacific's specific arguments, we note an issue that seems to be lurking in the background of both. When an alleged injury does not produce immediate disability or need for medical attention, it may well be that no injury in fact occurred. The greater the temporal gap between an alleged injury and the onset of disability or initiation of medical treatment, the stronger the circumstantial evidence that there was no real injury or that the condition in question would more properly be classified as a disease. But this analysis is factual; and despite the four month delay in this case between claimant's injury and her seeking medical care, we are satisfied as stated above that an injury occurred. The factual inference that may be drawn from a delayed onset of disability is thus neither dispositive here factually nor relevant to the carrier responsibility policy question presented here.

In attempting to shift responsibility from itself to Argonaut, United Pacific first relies on the last injurious exposure rule. For purposes of occupational diseases, this rule provides that if the conditions of the worker's last employment, in a successive employer situation, were such that they could have caused or contributed to the disease over some indefinite period of time, then the last employer is responsible to the worker for all compensation. Inkley v Forest Fiber Products Co., 288 Or 337 (1980). The last injurious exposure rule has also been invoked in cases involving successive injuries in different employments. See Grable v Weyerhaeuser Co., 291 Or 387 (1981). In both of these situations, the responsibility question arises either from a disease, the origin of which is impossible to pin-point, or from a series of separate accidental injuries. No party has here cited nor have we found any authority to the effect that a gradually developing disability which results from a single precipitating incident that is determined to be an accidental injury is the responsibility of any employer or carrier other than the employer/carrier on the risk at the time of the injury.

Furthermore, the rationale of the last injurious exposure rule does not support its extension to the present situation. The Supreme Court discussed the policy questions involved in the adoption of the last injurious exposure rule in Inkley:

". . . occupational disease, unlike accidental injury disability, typically shows a long history of injurious exposure without actual disability. Because the date of actual contraction of an occupational disease, such as asbestosis, is not susceptible to positive demonstration, most, if not all, states specify the date of disability rather than the date the disease was actually contracted for fixing the relative rights and liabilities of the workman and the employer. See generally, Larsen, supra. §95.21. Oregon law is in accord. ORS 656.807(1). The merit of this approach lies in its definiteness." 288 Or at 343-344.

The court noted a similar policy consideration behind the last injurious exposure rule in Grable -- "to free the worker from the burden of assigning or allocating responsibility when it is difficult or impossible to determine which injury caused the condition giving rise to the claim for benefits." 291 Or at 402. However, this concern about workers being uncertain about where to file a claim does not compel the worker to file against the most recent employer or carrier; the worker has the option of filing against an earlier employer or carrier in a series of employers or carriers. Bracke v. Baz'r, Inc., 41 Or App 627 (1981).

Uncertainty about the origin of a disease or which a series of injuries is the primary cause of a current condition can lead to uncertainty about where to file a workers compensation claim. The last injurious exposure rule is an effort to minimize that possible uncertainty. We do not think the same risk of uncertainty can arise in the situation in this case -- an injury followed by the onset of disability four months later. Claimant worked for the same employer throughout the relevant period. A worker satisfies his or her obligations merely by filing a claim with his or her employer. See ORS 656.262(3). Claimant did so in this case. That claimant's claim may have produced some uncertainty between two carriers about which was responsible does not invoke the claimant-uncertainty rationale cited by the court in Inkley and Grable.

Moreover, the ultimate merit of the last injurious exposure approach "lies in its definiteness." Inkley, 288 Or at 344. We think that the definiteness goal here points toward making the carrier on the risk at the time of the injury responsible. Given the time-certain element of the definition of an accidental injury, as discussed above, little could be more certain or definite than the date of injury. The date of disability or date of medical services is only more definite, relatively speaking, compared to the date a disease began; assuming a true injury, date of disability is not more definite, relatively speaking, compared to the date of injury.

For all these reasons, we do not find the last injurious exposure rule provides any justification for shifting responsibility from the carrier on the risk when a single precipitating event produced what, under the law of workers compensation, is properly regarded as an injury claim.

United Pacific's second line of argument is based on ORS 656.005(8)(a), which provides in part:

"A 'compensable injury' is an accidental injury, or accidental injury to prosthetic appliances, arising out of and in the course of employment requiring medical services or resulting in disability or death; an injury is accidental if the result is an accident, whether or not due to accidental means."

Relying on the fact that claimant first became disabled and first required medical services after it ceased to provide the employer's workers compensation coverage, United Pacific argues there was no compensable injury during its coverage.

We first note that although the statute defines "compensable" injury, the real thrust of the definition is the concept of an "accidental" injury. Second, we think ORS 656.005(8)(a) should be interpreted together with ORS 656.202(2) which refers to "benefits for injuries" being governed "by the law in force at the time of the injury giving rise to the right to compensation occurred." (Emphasis added.) This latter statute contains some recognition, we think, of the possibility -- illustrated by this case -- that the date of injury and the date of those events giving rise to the right to compensation, i.e., disability or medical services, will not necessarily be the same.

Under the construction urged by United Pacific, the date of a compensable injury is the date that evidence of compensability comes into existence. Carried to its logical conclusion, United Pacific's suggested construction could result in responsibility for payment for long term compensable medical care and disability shifting every time an employer changed insurance companies. The workers compensation system has not previously known this level of instability; there is no reason to create it now.

In summary, we conclude that claimant sustained an accidental injury at work on January 8, 1979 and the carrier on the risk on that date bears responsibility for all compensable consequences of that injury notwithstanding the intervening change in insurance coverage between the date of injury and the date of disability.

ORDER

The Referee's order dated June 16, 1980 is reversed. The denial of responsibility issued by Argonaut Insurance Company is reinstated and affirmed. The denial of responsibility issued by United Pacific Insurance Company is set aside and claimant's claim is remanded to United Pacific for acceptance and payment of compensation in accordance with law. United Pacific shall reimburse Argonaut for all claim costs incurred pursuant to the Referee's order. Claimant's counsel is awarded reasonable attorney fees of \$850 for services rendered at the hearing and \$450 for services rendered on Board review, payable by United Pacific.

STEVE CHAMBERS, Claimant
Larry Bruun, Claimant's Attorney
Keith Skelton, Defense Attorney

WCB 80-08882
May 28, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

The employer seeks Board review of Referee Baker's order which granted claimant a total award of 160° for 50% unscheduled disability.

The facts as recited by the Referee are adopted as our own. We concur with the employer that the award granted is excessive. The last Determination Order granted claimant an award of 80° for 25% unscheduled disability. We conclude this award adequately compensates claimant for his loss of wage earning capacity using the guidelines in OAR 436-65-600, et seq.

The employer contends that the determinations of the Evaluation Division are entitled to a presumption of "correctness" under ORS 41.360(15). We considered and rejected this contention in Michiel Harth, WCB Case No. 78-03561 (decided this date), 34 Van Natta 703 (1982).

ORDER

The Referee's order dated June 29, 1981 is modified. Claimant is hereby granted an award of 80° for 25% unscheduled disability, and this award is in lieu of all prior awards.

Claimant's attorney's fee is adjusted accordingly.

EDWARD L. CULWELL, Claimant
Evohl Malagon, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-04538
May 28, 1982
Order on Review

Reviewed by Board Members Lewis and Barnes.

SAIF Corporation has requested Board review of Referee Foster's order reopening claimant's claim as of March 10, 1981 for payment of temporary total disability compensation and all other benefits due claimant; assessing a 15% penalty on all temporary disability compensation due claimant from March 10, 1981 until September 3, 1981, the date SAIF reopened the claim and commenced payment of temporary disability compensation; set aside a May 6, 1981 Determination Order as it relates to the payment of permanent disability; and allowed claimant's attorney a \$1,000 carrier-paid attorney's fee for SAIF's "failure to reopen [claimant's] claim on aggravation pursuant to Dr. Smith's report of June 3, 1981."

SAIF has requested review of those portions of the order which assessed a penalty and allowed claimant's attorney a \$1,000 attorney's fee, payable in addition to claimant's award of compensation. We modify the Referee's order.

Although no review has been requested of that portion of the order reopening the claim as of March 10, 1981, a discussion of this aspect of the claim is pertinent to consideration of the penalty issue.

Claimant's contention before the Referee was that the Determination Order was premature, and that he was never, in fact, medically stationary. The Referee found that claimant was not medically stationary as of April 14, 1981, the date of termination of temporary disability compensation pursuant to the Determination Order, in light of medical information developed after issuance of the Determination Order. He also found that the information available to the Evaluation Division indicated that he was stationary as of that date. The Referee could "find no fault" with the Determination Order in that regard: he upheld the award of temporary total and temporary partial disability granted by the Determination Order, and ordered claim reopening as of March 10, 1981, the date claimant terminated employment for medical reasons, as subsequently verified by two physicians' reports.

Although we agree with the order reopening the claim as of March 10, 1981, it was improper to impose a penalty calculated on the time loss due from March 10, 1981. The Referee found that SAIF had notice that claimant was requesting reopening and payment of temporary disability compensation upon receipt of Dr. Smith's June 3, 1981 report, which appears to have been received on June 8, 1981. It is improper to penalize a carrier for inaction prior to the time it receives notification of a claim for benefits.

We find, as did the Referee, that SAIF had an obligation to process this claim for compensation upon receipt of Dr. Smith's June 3, 1981 letter report. SAIF had an obligation to commence payment of interim time loss benefits pending a decision to accept or deny the application for reopening/aggravation. Under the facts and circumstances of this case, we find SAIF's obligation was to commence payment of interim time loss payments on or before June 22, 1981, which was 14 days from receipt of Dr. Smith's report. See Jones v. Emanuel Hospital, 28 Or 147 (1977); Silsby v. SAIF, 39 Or App 555, 562 (1979).

SAIF delayed reopening until September 3, 1981, a delay of 72 days. We find this delay to have been unreasonable, Zelda M. Bahler, 33 Van Natta 478 (1981), warranting imposition of the maximum penalty, calculated upon the temporary disability compensation due from June 22 to September 2, 1981, inclusive.

The Referee's allowance of an attorney's fee was for "failure to reopen [the] claim on aggravation pursuant to Dr. Smith's report of June 3, 1981 . . ." SAIF did eventually reopen this claim, although at a rather late date. Counsel was successful in obtaining additional temporary disability compensation in behalf of his client. He is entitled to receive a percentage of this increased compensation as an attorney's fee. OAR 438-47-030.

Counsel is also entitled to receive a carrier-paid attorney's fee pursuant to ORS 656.382(1), but a \$1,000 fee allowed pursuant to that statute is rarely, if ever, justified. Accordingly, we

ORDER

The Referee's order dated November 13, 1981 is modified. SAIF is ordered to pay 25% of the temporary disability compensation due claimant for the period June 22, 1981 to and including September 2, 1981, as and for a penalty.

The Referee's allowance of a \$1,000 carrier-paid attorney's fee is vacated. In lieu thereof, claimant's attorney is allowed as and for a reasonable attorney's fee a sum equal to 25% of the additional temporary disability awarded by the Referee's order, not to exceed \$750, payable out of and not in addition to claimant's award of compensation. Counsel is allowed an additional attorney's fee in the amount of \$200, payable by the carrier.

JEFFRY DAVIS, Claimant
Phil Ringle, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-07657 & 80-10422
May 28, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

SAIF Corporation seeks Board review of that portion of Referee Ail's order which awarded claimant compensation equal to 160° for 50% unscheduled disability for injury to his low back. SAIF contends that the award is excessive. We agree and therefore modify the Referee's order.

The Board adopts the facts as set forth in the Referee's order, but those facts lead us to a different conclusion. Dr. Pasquesi found claimant's impairment due to the injury to be 35%. Claimant is 29 years old (-4 value; OAR 436-65-602) with an eleventh grade education and a two-year degree in audio visual video technology (0 value, OAR 436-65-603). He was working as a welder at the time of his injury (SVP of 7; impact of +10; OAR 436-65-604). Claimant is restricted to light work as a result of this injury (+10 value; OAR 436-65-605). Although claimant's impairment is significant, he is young with a good education and background in a skilled type of work. A consideration of his education, background and limitations reveals he has at least 40% of the general labor market still open to him (OAR 436-65-608). A consideration of the above factors in light of OAR 436-65-600, et seq, indicates that claimant's plus factors are adequately balanced by his minus factors. We conclude that a more appropriate award would be 112° for 35% unscheduled disability.

SAIF Corporation contends that the determinations of the Evaluation Division are entitled to a presumption of "correctness" under ORS 41.360(15). We considered and rejected this contention in Michiel Harth WCB Case No. 78-03561 (decided this date), 34 Van Natta 703 (1982).

ORDER

The Referee's order dated January 7, 1981 is modified. Claimant is hereby granted compensation equal to 112° for 35% unscheduled disability for injury to his low back. This award is in lieu of that granted by the Referee's order.

KIMBERLY GLAHN, Claimant
Jack Ofelt, Claimant's Attorney
Frank Vizzini, Defense Attorney

WCB 82-00491
May 28, 1982
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.

MICHIEL M. HARTH, Claimant
Robert Martin, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 78-3561
May 28, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

The SAIF Corporation seeks Board review of Referee Leahy's order which granted claimant an increased award of compensation for a total of 76.8% for 40% loss of the right arm. SAIF contends the 15% disability awarded by the contested Determination Order should be reinstated and affirmed.

SAIF initially raises an issue concerning the burden of proof. SAIF contends that, in every proceeding and at every level where the issue is extent of disability, the claimant is challenging the "correctness" of a Determination Order by the Evaluation Division. Based on this premise, SAIF argues that ORS 41.360(15) is applicable and binding. ORS 41.360(15) provides:

"All presumptions other than conclusive presumptions are satisfactory, unless overcome. They are disputable presumptions and may be controverted by other evidence, direct or indirect, but unless so overcome, the jury is bound to find according to the presumption. The following are of that kind:

* * *

"(15) Official duty has been regularly performed."

Relying on the doctrine that a presumption can be a form of substantive evidence, SAIF contends that he who would challenge a Determination Order must come forward with sufficient contrary evidence to overcome the presumption. SAIF contends that sufficient evidence to overcome a presumption of "correctness" would be evidence that the Evaluation Division failed to consider all of the relevant evidence or incorrectly applied the rules used for rating disability.

It is important to precisely identify the issue involved. It has long been and remains the rule that the party requesting a hearing has the burden of proof. John Byers, 1 Van Natta 25 (1967). But the burden of proof or burden of persuasion as those terms have previously been used assumes the hearing process starts with a blank slate. SAIF's present argument is that the hearing process should start with something other than a blank slate when a claimant is requesting a larger award than granted by a Determination Order; specifically, that the hearing process should start with a "presumption" of "correctness" as some evidence already on the side defending the award granted by the Determination Order. In the context of a claimant requesting a hearing on extent of disability, we thus understand SAIF's argument not to be an effort to shift the existing burden of proof, but rather an effort to increase the existing burden of proof.

SAIF relies on Dimitroff v. SIAC, 209 Or 316 (1957), in which an extent of disability issue was the subject of a circuit court jury trial. The circuit court refused to instruct the jury to the effect that ORS 41.360(15) establishes a disputable presumption of regular performance of official duty in favor of the disability award subject to circuit court review. The Supreme Court held that the circuit court had erred in failing to so instruct the jury. 209 Or at 341. Subsequently, after the statutes were amended to eliminate circuit court jury trials in workers compensation cases, the Supreme Court refused to reconsider Dimitroff on the ground that the required content of jury instructions in such cases was a moot point. Jentzen v. State Compensation Department, 254 Or 65 (1969).

Although the issue here arises in a context other than jury instructions, the question remains of whether Dimitroff compels use of the ORS 41.360(15) presumption in the present administrative process for resolution of workers compensation disputes. We conclude that it does not.

The central point in the Dimitroff court's finding that ORS 41.360(15) was applicable when workers compensation cases were tried to circuit court juries de novo was stated as follows:

"Appeals from awards of the Industrial Accident Commission to the circuit courts authorize trials de novo before a jury in which the parties are not limited to the record made before the Commission. The result is that the decision of an experienced commission, based upon technical and medical knowledge, is reviewed by laymen having normally no experience in the

difficult process of determining the extent of disability or the need of medical treatment, and having no familiarity with the administrative procedure or the terminology employed therein. We therefore find it to be of peculiar importance that the jury in the exercise of its independent function should at least be informed by an instruction that there is a disputable presumption in favor of the decision of the commission." 209 Or at 340.

In other words, a jury instruction concerning the presumption was deemed necessary due to the fact that a lay jury was enpaneled to review a determination made by an agency with a considerable degree of expertise. Compare Dimitroff with Garcia v. Dept. of Motor Vehicles, 253 Or 505, 510 (1969), which expresses a contrary theory, possibly on the basis that the agency decision there subject to de novo jury trial did not involve similar administrative expertise.

Since Dimitroff there have been substantial changes in workers compensation procedures. The Evaluation Division makes the initial decision regarding disability. ORS 656.268. Any party dissatisfied can request a hearing, ORS 656.283, which is held before a Referee who presides over nothing but workers compensation hearings. Any party dissatisfied with the Referee's decision can request review by the three-member Board, ORS 656.295, which decides about a hundred workers compensation cases every month. In short, the procedural scheme in effect at the time of Dimitroff in which a decision by experts was reviewed de novo by a lay jury has been replaced by a very different structure in which all levels of review involve considerable expertise. The Evaluation Division has expertise in rating disability, the Referees have expertise in rating disability, as does this Board. We thus conclude that the rationale relied on in Dimitroff for the applicability of the ORS 41.360(15) presumption has no relevance to the current procedural scheme.

Furthermore, SAIF's argument that the determinations of the Evaluation Division are entitled to a presumption of "correctness" under ORS 41.360(15) must be rejected for another reason. The statute speaks only in terms of "regular performance" of official duty. The Oregon Tax Court in Sproul v. Commission, 1 OTR 31 (1963), discussed the distinction at length:

"The statutory language of the presumption of official rectitude is far more limited in scope and presumes the performance of formal official acts in a regular and proper manner, not the accuracy of the official in matters of judgment." 1 OTR at 48.

The Tax Court stated that the decision of the State Tax Commission being reviewed was not presumed "correct" as a matter of exercise of judgment, but only that it was presumed the Commission followed proper procedures in the process of exercising its judgment. In J.R. Widmer, Inc. v. Dep't of Revenue, 261 Or 371 (1972), the Supreme Court apparently ratified the Sproul interpretation. In a context in which the Supreme Court's review of a taxation issue was de novo, the Court stated there was no presumption of the correctness of the assessor's valuation despite the presumption that the assessor's action was regularly performed.

We agree with the Tax Court's interpretation of ORS 41.360(15), and find it equally applicable to workers compensation proceedings. We will presume and expect the Referees to presume that the Evaluation Division performed its official duty in a regular and procedurally correct manner. We will presume that the Referees performed their official duty in a regular and procedurally correct manner. We decline to presume or to require the

Referees to presume that the Evaluation Division made a substantively correct determination in the sense that SAIF here argues for, i.e., an increased burden of proof on the party challenging that determination. The Board likewise cannot presume that the Referee's decisions are substantively correct.

Implicit in SAIF's argument about a presumption of "correctness" is its belief that the Department's rules governing the rating of disability, OAR 436, Part 65, are binding at all levels of the de novo appeals and review process. We cannot comment on what standards the Court of Appeals does or should use for rating disability, but we agree with SAIF's position about the binding effect of OAR 436, Part 65, at the Referee and Board level. This does not mean that OAR 436, Part 65, necessarily contains the complete or absolute answer for all cases. See Charles Hanscom, 34 Van Natta 34 (1982). It does mean that to the extent relevant, OAR 436, Part 65, is binding. However, we fail to see what this has to do with SAIF's presumption argument.

We turn to the question of the extent of claimant's disability in the present case. As previously stated, the contested Determination Order awarded 15% right arm disability and the Referee awarded 40% right arm disability.

Claimant sustained a compensable injury to his right arm on July 22, 1976. Open reduction internal fixation was done shortly after the injury. In December, 1976 it became necessary to perform a repeat internal fixation and bone graft. On October 12, 1977 Dr. Zimmerman found claimant medically stationary with no further medical treatment indicated except the possibility that the plate in claimant's arm would need to be removed at a later date. Dr. Zimmerman indicated claimant was lacking 15° of extension and he was unable to turn his hand palm-up more than 50% of normal. Claimant also had some weakness and pain when attempting to use his right wrist. The doctor felt that claimant could do any job that did not require him to pronate and supinate his hand repeatedly or to lift and carry heavy objects with his right arm. He felt claimant should return to work as soon as possible.

In July, 1979 Dr. Zimmerman indicated claimant was working full time and the bone was adequately healed. He felt it was time to remove the plate and screw from claimant's arm, which was done on July 6, 1979. After a period of recuperation, claimant was again released for work on September 5, 1979. Dr. Zimmerman reported that the July surgery did make the bone more vulnerable to fracture for several weeks before claimant would recover to preoperative status.

On September 14, 1979, over two months after the surgery, claimant got a 200-volt shock while at work. As a result of this, claimant received a stress fracture through one of the screw holes of his radius.

Some confusion resulted in this case when Dr. Zimmerman indicated on November 26, 1980 that the "overwhelming majority of this disability is due to his original accident of June [sic] 22, 1976." The sole issue before us is claimant's extent of disability resulting from the July 22, 1976 injury. When claimant sustained the electrical shock on September 14, 1979 he sustained a new, indepen-

dent, intervening injury which was properly processed by claimant's new employer. When this new injury claim is submitted for closure, claimant's disability will be considered at that time. It is only proper for us now to consider claimant's disability up to the date of the intervening injury. Based on the medical evidence cited above, we are persuaded that claimant's permanent disability prior to September 14, 1979 was no greater than that awarded by the Determination Order.

ORDER

The orders of the Referee dated December 16, 1980 and December 24, 1980 are reversed. The May 2, 1978 Determination Order is reinstated and affirmed.

KAREN K. KEPHART, Claimant	WCB 81-00587
Michael Strooband, Claimant's Attorney	May 28, 1982
Ridgway Foley, Jr., Defense Attorney	Order on Review

Reviewed by Board Members Barnes and Lewis.

The SAIF Corporation seeks Board review of Referee Wolff's order that awarded claimant 16 2/3% permanent partial right forearm disability on account of her right carpal tunnel condition. The compensability of claimant's right carpal tunnel syndrome was established in an earlier proceeding, WCB Case No. 79-05963. The only issue in this case is the extent, if any, of claimant's permanent disability. We find that claimant has not established that she suffers any permanent disability as a result of her condition and therefore reverse.

Four months after he performed carpal tunnel release surgery, claimant's treating physician, Dr. McHolick, opined that claimant had made a complete recovery without any permanent disability. The only vaguely contrary medical evidence is in two forms. First, Dr. Podemski reported on July 13, 1981 that claimant "may well have either a recurrence or mild continuation of her carpal tunnel related complaints." However, Dr. Podemski goes on to state in the same report: "I do not feel that her impairment should be permanent." Second, Dr. McHolick has suggested the possibility that claimant has epicondylitis in her right elbow. However, claimant has neither asserted nor offered evidence that her possible right elbow condition is part of this carpal tunnel (wrist) claim.

Without any foundation in the medical evidence, we assume the Referee's award of permanent disability was based on claimant's testimony which the Referee found to be credible. We treat credibility findings somewhat differently depending upon the basis therefor.

"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 . . . the Board is in a superior position to make that judgment."
Richard A. Castner, 33 Van Natta 662, 663 (1981).

Based on our review of the transcript, we do not share the Referee's confidence in claimant's credibility.

On direct examination, claimant testified she was having trouble lifting with her right hand:

"Q. All right. Is there a weight that you feel is too heavy for you to pick up with your right hand, that you don't trust it?

A. Yes, but I couldn't tell you what it is.

Q. Give us an example of something.

A. Oh, say 15 pounds. I can't --

Q. Can you pick up that much weight? Or are you saying you --

A. Not with that hand, no."

On cross-examination claimant revealed that she is an avid bowler. At the time of the prior hearing on the compensability issue, she was bowling once a week and her average score was about 120 points. At the time of the present hearing, she was in three different leagues and bowled two games a night, three nights a week. Claimant uses a 14 pound ball and bowls with her right hand. Her average score has improved to about 140 points.

On redirect, claimant's attorney unsuccessfully, we find, attempted to rehabilitate the claimant's testimony:

"Q. Have you noticed your ability to -- In terms of accuracy or in terms of being able to continue bowling now, as compared to some other time before you had this condition --

A. No. That's just something I struggle along with anyway. And I enjoy bowling a lot."

We find that claimant has failed to show any permanent loss of use or function in her right forearm.

ORDER

The Referee's order dated November 13, 1981 is reversed and the August 26, 1980 Determination Order is reinstated and affirmed.

DANIEL R. LARSON, Claimant
Daniel Dziuba, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-02974
May 28, 1982
Order on Review

Reviewed by Board Members Lewis and Barnes.

Claimant seeks Board review of Referee James' orders which: (1) Affirmed the November 14, 1980 Determination Order in the face of claimant's challenge that it was premature; (2) remanded claimant's claim to the SAIF Corporation for medical care and temporary total disability from December 24, 1980 through March 16, 1981; and (3) stated that if claimant desired vocational rehabilitation he should apply to the Department's Field Services Division.

Claimant argues that the Referee's order contains an inconsistency: "It invites the claimant to apply for vocational rehabilitation and seems to imply that he might be eligible for such services. On the other hand, the [Referee's order] affirmed the Determination Order that awarded no permanent partial disability."

A complete answer to this argument could be that neither claimant's request for hearing nor the opening statements of counsel at the hearing indicates that extent of permanent disability is an issue. However, we think the better answer is as follows. Reading the Referee's original order together with his order on reconsideration, it is implicit that the Referee intended that claimant's claim be subject to further closure by Determination Order issued by the Evaluation Division; that the Referee's award of temporary total disability from December 24, 1980 to March 16, 1981 was in the nature of an interim order pending future determination of claimant's entitlement to temporary and permanent disability by the contemplated Determination Order to reclose claimant's claim; and that, therefore, there is no internal inconsistency in the Referee's action. We affirm the Referee's order based on the above understanding of it.

ORDER

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

HAROLD METLER, Claimant
Rolf Olson, Claimant's Attorney
Brian Pocock, Defense Attorney

WCB 79-02728 & 79-06944
May 28, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

Claimant seeks Board review of Referee Gemmell's order that awarded him 10% unscheduled permanent partial disability resulting from two injuries in 1978, upheld the employer's denial of a subsequent aggravation claim for further medical care and temporary total disability benefits and concluded that, because claimant had requested a hearing on the extent of his disability before making his aggravation claim, the employer had no duty to accept or deny that aggravation claim.

We affirm and adopt the Referee's well reasoned and well written order on all issues except the procedural question of whether an employer/carrier has any duty to accept or deny an aggravation claim perfected while a request for hearing is pending.

Claimant injured his back in separate accidents in July and September, 1978. Both claims were closed by a single Determination Order in May, 1979. Claimant requested a hearing regarding that Determination Order in September, 1979. Subsequently, claimant came under the care of Dr. Thompson for back pain. Dr. Thompson hospitalized claimant for conservative treatment in late October/early November, 1979. Dr. Thompson submitted reports dated October 4, 1979, October 9, 1979 and November 15, 1979 which stated claimant's continued medical treatment and associated time loss were causally linked to his 1978 industrial injuries.

Relying on two Court of Appeals decisions, the Referee concluded that Dr. Thompson's reports were "not a new claim"; that "the carrier had no obligation to respond"; and that even though the carrier did issue a denial, claimant was not required to request a hearing on that denial, but rather could litigate its propriety in connection with his pending request for hearing on extent of disability.

We disagree on every point. We will first state our conclusions and then our reasons. Our conclusions are:

(1) After a claim is closed by a Determination Order, any subsequent indication of a need for further medical treatment or medical authorization for time loss submitted to the employer/carrier is a claim within the meaning of ORS 656.005(7), regardless of whether there is or is not a pending request for hearing on the Determination Order or on any other issue;

(2) An employer/carrier has the same obligation to respond to such an aggravation claim as it does to any initial claim, that is, the duty to initiate payment of interim compensation within 14 days if time loss is medically authorized and the duty to accept or deny within 60 days or otherwise risk liability for penalties and attorney fees;

(3) Just as an employer/carrier must comply with its statutory duty to accept or deny within 60 days, the claimant must comply with his statutory duty to request a hearing within 60 days (or with good cause for delay, within 180 days) if the carrier denies the aggravation claim. If a claimant already has a request for hearing pending on other issues, the claimant need only file a supplemental request for hearing identifying the additional issue (denial or partial denial) to be decided in the pending proceeding.

The Referee's contrary conclusions were based on Vandehey v Pumilite Glass and Building Co., 35 Or App 187 (1978), and Smith v Amalagamated Sugar Co., 25 Or App 243 (1976). In these cases the claimant had a request for hearing pending when he subsequently needed additional medical treatment and/or temporary total disability compensation arguably causally linked to the prior compensable injury. In these cases, especially Vandehey, the court appears to have held that the workers request for additional medical treatment and/or temporary total disability compensation was not a claim that triggered anybody's duty to do anything. Such an apparent holding is, in our opinion, inconsistent with Cavins v SAIF, 272 Or 162 (1975), and ORS 656.005(7) which defines a claim as "a written request for compensation from a subject worker or someone on the worker's behalf." Such an apparent holding is also, in our opinion, inconsistent with a recent amendment to ORS 656.245 adopted by Oregon Laws 1981, Chapter 535, section 31. That amendment added a new subsection (2) to ORS 656.245 which states:

"When the time for submitting a claim under ORS 656.273 has expired, any claim for medical services referred to in this section shall be submitted to the insurer or self-insured employer. If the claim for medical services is denied, the worker may submit to the board a request for hearing pursuant to ORS 656.283."

The apparent holding of Vandehey and Smith is also inconsistent with ORS 656.273(1) and (2) which define an aggravation claim as including the need for additional medical services and ORS 656.273(6) which requires aggravation claims to be processed the same as any other claim. Finally, such an apparent holding is inconsistent with the tenor of the Supreme Court's subsequent opinion in Ohlig v FMC Rail & Marine Equip't Divn., 291 Or 486 (1981).

Given the post-Vandehey amendment to ORS 656.245 and the post-Vandehey decision of the Supreme Court in Ohlig, we conclude that the continuing vitality of Vandehey has to be regarded as an open question.

And that question should be approached with some understanding of the inner workings of this agency and the realities of claims processing. Since the present basic statutory framework for resolving workers compensation disputes was enacted in 1965, the statute has consistently referred to resolution of hearing

requests "expeditiously"; this mandate now appears in ORS 656.283(3). The Court of Appeals has expressly relied upon the statutory concept of expeditious hearings in deciding workers compensation issues. Minor v Delta Truck Lines, 43 Or App 29 (1979). Unfortunately, however, the reality of the situation cannot be known simply by reading a statute. For about the last ten years hearing requests have increased at the rate of about 15-20% a year and after this geometric increase now average about 1,000 a month. During the same period neither the resources available to this agency nor, frankly, the efficiency of this agency has increased at the same pace. As a consequence there is now a backlog of about 10,000 cases awaiting hearing and the average delay from hearing request to hearing date is about 12 months.

Suppose a worker filed a request for hearing this month seeking to contest the amount of disability awarded by a Determination Order. Suppose that next month there is an indication that the worker needs to have his claim reopened for further medical care and temporary total disability benefits because he or she is unable to work. The theory that the carrier need do nothing in response to that information because the question of claim reopening can be taken up at the time of the hearing is seriously misguided for at least three reasons. First, if the carrier had to respond to the aggravation claim just as it had to respond to the initial claim, i.e., accept or deny within 60 days, then some such claims would be accepted and there would be nothing to be resolved at a hearing. This would free agency resources to devote to hearings where there was a dispute to be resolved. Second, if the aggravation claim were accepted, the claim reopened and the claimant not medically stationary, it would be inappropriate to rate disability

until the claimant again became medically stationary and the claim was again closed. Gary Freier, WCB Case No. 79-07952, 34 Van Natta 543 (April 30, 1982). In other words, claim reopening could moot the original request for hearing on extent of disability freeing even more agency resources to devote to hearings where the issues were ripe for decision. Third, and probably most important, there is the present-need issue. Throughout the workers compensation statute the concept is expressed that a worker who claims present need is entitled to a prompt response: Interim compensation must be initiated within 14 days; claims must be accepted or denied within 60 days. When a worker claims he needs medical services or time loss payments now, it is a bit insensitive to say that issue will be addressed at the time of a hearing that may not be held for a year or more.

For all of these reasons, we arrive at the conclusions stated above. Because of the importance of those conclusions, they bear repeating:

(1) After a claim is closed by a Determination Order, any subsequent indication of a need for further medical treatment or medical authorization for time loss submitted to the employer/carrier is a claim within the meaning of ORS 656.005(7), regardless of whether there is or is not a pending request for a hearing on the Determination Order or on any other issue;

(2) An employer/carrier has the same obligation to respond to such an aggravation claim as it does to any initial claim, that is, the duty to initiate payment of interim compensation within 14 days if time loss is medically authorized and the duty to accept or deny within 60 days or otherwise risk liability for penalties and attorney fees;

(3) Just as an employer/carrier must comply with its statutory duty to accept or deny within 60 days, the claimant must comply with his statutory duty to request a hearing within 60 days (or with good cause for delay, within 180 days) if the carrier denies the aggravation claim. If the claimant already has a request for hearing pending on other issues, the claimant need only file a supplemental request for hearing identifying the additional issue (denial or partial denial) to be decided in the pending proceeding.

Applying these rules in this case, we find as follows:

(1) Dr. Thompson's reports dated October 4, October 9, and November 15, 1979 were cumulatively a claim for aggravation. While the first two of these reports, read individually, might not contain sufficient information to amount to an aggravation claim, all three reports read together are clearly an aggravation claim.

(2) The fact that claimant had requested a hearing in September of 1979 to contest the award of the Determination Order issued in May of 1979 does not change the fact that claimant perfected an aggravation claim by submission of Dr. Thompson's 1979 reports.

(3) Upon effective notice of Dr. Thompson's position, which included verification of inability to work, the employer was under a duty to pay interim compensation within 14 days and to accept or deny within 60 days notwithstanding the fact that there was a pending hearing request. On the effective notice issue we confront an ambiguity in the record. Dr. Thompson's October 4 and November 15, 1979 reports are date stamped received by the employer on December 20, 1979. Dr. Thompson's October 9, 1979 report was sent to claimant's attorney; there is no indication of when it came to the employer's attention.

(4) The employer denied the aggravation claim on December 28, 1979.

(5) Because of the uncertainty about when the employer had notice of claimant's aggravation claim, it is impossible to conclude that the employer failed to pay interim compensation within 14 days or failed to deny within 60 days. If the date of notice of the aggravation claim had been established and the employer had violated these guidelines, it would be subject to an assessment of a penalty and attorney's fee under the rules set out above.

ORDER

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

WINSTON NELSON, Claimant
Rolf Olson, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-09365
May 28, 1982
Order on Review

Reviewed by Board Members Lewis and Barnes.

SAIF Corporation seeks Board review of Referee Howell's order which granted claimant an award of permanent total disability.

We affirm and adopt the conclusions reached by the Referee.

The SAIF contends that the determinations of the Evaluation Division are entitled to a presumption of "correctness" under ORS 41.360(15). We considered and rejected this contention in Michiel Harth, WCB Case No. 78-03561 (decided this date), 34 Van Natta 703 (1982).

ORDER

The Referee's order dated July 17, 1981 is affirmed. Claimant's attorney is awarded \$500 as and for a reasonable attorney's fee, payable by SAIF.

HUBERT J. PITNER, Claimant
Donald Wilson, Claimant's Attorney
Katherine O'Neil, Defense Attorney

WCB 81-01211
May 28, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

Claimant seeks Board review of Referee James' order which affirmed the denial issued by EBI Companies on January 27, 1981. Claimant asks that the denial be reversed and also that penalties be assessed against EBI for their unreasonable denial.

We accept the facts as recited by the Referee in his order. The following findings are most pertinent to the disposition of this case.

1. Claimant has an underlying cervical spondylosis which was not caused by work activity. Whether it was symptomatic prior to September, 1979 has not been established.

2. Claimant had a heart attack in 1976 which significantly restricted his off-the-job activities.

3. In his job as chief x-ray technician at Tuality Community Hospital, claimant performed a significant amount of physical activities in addition to his administrative duties. This was especially true in 1979 when his department was being remodeled.

4. Dr. Nash, who performed neck surgery on claimant on December 20, 1979, indicated that multiple trauma suffered on-the-job was responsible for his condition. Dr. Zivin, the employer's doctor, does not refute this.

The Referee determined claimant's claim was not compensable because non-work activities contributed to his condition. He based this on James v. SAIF, 290 Or 343 (1981). The Court of Appeals has since interpreted James as not requiring that work activity be the sole cause, and instead established a major cause test. SAIF v. Gygi, 55 Or App 570 (1982).

In arguing that his physical activities at work were the major cause of his neck condition, claimant relies particularly on the evidence that after his 1976 heart attack he significantly restricted his off-the-job physical activities. It seems strange that a heart attack patient would seriously limit off-work activities while continuing, even increasing the level of physically demanding activity at work, but that is the preponderance of the lay and medical evidence. We find claimant has sustained his burden of proof under Gygi.

Given the unsettled state of the law at the time EBI's denial was issued, compare James with Gygi, claimant's argument that EBI's denial was unreasonable is not persuasive.

ORDER

The Referee's order dated September 29, 1981 is reversed.

Claimant's claim for neck, right shoulder and right arm conditions is remanded to the carrier for acceptance and payment of compensation to which claimant is entitled commencing December 18, 1979 and until closed pursuant to ORS 656.268.

Claimant's attorney is awarded as a reasonable attorney's fee a sum equal to \$1,200 for his services both at the hearing and on Board review.

JESSIE E. TAYLOR, Claimant
John DeWenter, Claimant's Attorney
Keith Skelton, Defense Attorney

WCB 81-07049
May 28, 1982
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.

IRIS F. SCHULER, Claimant
Liana Columbo, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-08449
May 28, 1982
Order on Review (Remanding)

Reviewed by Board Members Barnes and Lewis.

The SAIF Corporation seeks Board review of Referee Shebley's order that set aside the August 26, 1980 Determination Order as premature and set aside SAIF's January 15, 1981 partial denial.

This claim started as one for colitis and related gastrointestinal problems. SAIF accepted it on that basis and processed it to closure by the disputed August 26, 1980 Determination Order. Along the way claimant received some psychiatric treatment, first from Dr. Sisler, later from Dr. Achord.

SAIF's partial denial took the position that it was no longer responsible for future gastrointestinal treatment or for psychiatric treatment. The present focus is only on the psychiatric component.

SAIF argues that claimant has not proven her work as a school teacher was the major cause of her psychological condition. See SAIF v. Gygi, 55 Or App 570 (1982). Claimant argues: "Psychiatric care and treatment have been for the colitis and gastrointestinal problems, they are not the basis of the claim."

We are unable to tell from the present record whether claimant's analysis of the situation is correct. Dr. Sisler described his treatment as psychotherapy for claimant's "emotional, personality and psychophysiological disorders; and this will be long-term therapy designed to bring behavioral and emotional modifications in her response to stress." More recently Dr. Achord described his treatment as "a program of continued supportive psychotherapy" that claimant "will require weekly . . . for the foreseeable future." It is not clear to us from these reports and the others in the record exactly what the psychiatrists have treated or are treating. Claimant may well be correct that the psychiatric treatment is for her accepted gastrointestinal condition and, therefore, not to be separately analyzed under the Gygi test, but that is not yet established on this record.

We, therefore, conclude it is appropriate to remand this case to the Referee to offer both parties an opportunity to present additional evidence on the nature of claimant's psychological treatment and the connection between that treatment and claimant's gastrointestinal condition.

ORDER

The Referee's order dated October 1, 1981 is vacated and this case is remanded to the Referee for further proceedings consistent with this order.

RAY E. WELDON, Claimant
Larry Bruun, Claimant's Attorney
Keith Skelton, Defense Attorney

WCB 80-08493
May 28, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

The employer seeks Board review of Referee Baker's order which granted claimant a total award of 128° for 40% unscheduled disability. The employer contends that the award is excessive.

The facts as recited by the Referee are adopted as our own. We concur with the employer's contention that the award granted by the Referee is excessive. Considering claimant's objective physical findings, surgery and disabling pain, we find he has a 10% impairment rating. Claimant is 47 years old (+4 value; OAR 436-65-602) with a ninth grade education and an AA degree in Accounting Technology and Business. He went to school for this degree for a year and a half (-7 value; OAR 436-65-603). His injury occurred while working as an edge printer operator (SVP-3; Impact +3; OAR 436-65-604). He is restricted to light work where his previous experience was in medium-type work (+5 value; OAR 436-65-605). His mental capacity and emotional and psychological findings are in the average range and do not affect the rating one way or the other (OAR 436-65-606 and 607). Combining claimant's education, his work background and his limitations, we find he has at least 17% of the labor market still open to him (0 value; OAR 436-65-608). After combining these factors based on the guidelines cited above, we conclude that claimant would be properly compensated by an award of 64° for 20% unscheduled disability.

The employer contends that the determinations of the Evaluation Division are entitled to a presumption of "correctness" under ORS 41.360(15). We considered and rejected this contention in Michiel Harth, WCB Case No. 78-03561 (decided this date), 34 Van Natta 703 (1982).

ORDER

The Referee's order dated July 21, 1981 is modified.

Claimant is hereby granted an award of 64° for 20% unscheduled disability. This award is in lieu of all prior awards.

Claimant's attorney's fee should be adjusted accordingly.

CHESTER L. WING, Claimant
Larry Voth, Claimant's Attorney
Daryll Klein, Defense Attorney

WCB 80-03506
May 28, 1982
Order on Review

Reviewed by Board Members Lewis and Barnes.

Claimant seeks Board review of Referee Mongrain's order which upheld the carrier's denial of his aggravation claim. Claimant contends his disability in March 1980 is related to his 1977 industrial injury.

The facts of this case are simple and basically uncontroverted. Claimant sustained a compensable back strain on February 21, 1977. He was off work for approximately two months, did light duty for a short time and then returned to his regular job. It was discovered at the time of that 1977 injury that claimant had an underlying degenerative arthritic condition which had previously been asymptomatic. After the injury, he improved somewhat but suffered from episodes of increased pain in the back and left leg when engaging in vigorous activity at work. His back pain has never subsided completely. In March 1980 claimant saw Dr. Su with chronic back pain and pain in the left arm and leg. Dr. Su indicated claimant's condition was due to the 1977 injury, he should not work and requested claim reopening on claimant's behalf. The carrier denied the claim for reopening on April 8, 1980.

The Referee found, and we agree, that claimant's overall condition was worse in 1980 than in 1977. The issue is whether claimant's current condition is related to his 1977 injury or is merely a natural progression of his underlying degenerative arthritis.

"The issue in cases involving the range of compensable consequences flowing from a primary injury is nearly exclusively the medical issue of causal connection between the primary injury and the subsequent medical complications." Christensen v. SAIF, 27 Or App 595, 599 (1976). We have three medical opinions in this case. Dr. Su saw claimant at the time of the original injury and

in March of 1980. He was unable to express an opinion as to whether claimant's condition was the result of a natural progression of the underlying condition or related to the 1977 injury. Dr. Rusch, an orthopedist, saw claimant initially in April 1980. He became claimant's treating physician, seeing him 15 to 20 times. He determined claimant's condition was not due to a natural progression of his underlying disease but rather felt that claimant's condition was the product of the 1977 injury as aggravated by "multiple incidents" at work since that injury. Dr. Berselli, also an orthopedist, saw claimant for approximately five minutes on June 30, 1980. He reviewed the 1980 x-rays taken by Dr. Rusch. Based on this examination, Dr. Berselli concluded claimant's back pain was due to his underlying disease. However, the doctor offered no explanation. In his chart note of June 30 he indicates claimant has a chronic lumbar strain superimposed on the preexisting condition; however, he fails to mention this in his narrative report to the carrier.

The Referee was persuaded by the medical opinion of Dr. Berselli and upheld the carrier's denial. We disagree. We are more persuaded by the detailed explanation offered by, and therefore the conclusion reached by, claimant's treating physician, Dr. Rusch. The evidence is borderline at best one way or the other. Nevertheless, we are satisfied that claimant has shown by a preponderance of the evidence that his present condition is related to the 1977 industrial injury.

Claimant also raises an issue concerning penalties for failure to pay interim compensation. Claimant's aggravation claim was submitted by Dr. Su on March 7, 1980. It stated claimant's condition was related to the injury, indicated he would not be able to work and asked that the claim be reopened. It appears that the carrier received the claim on March 10 and failed to take any action until the denial of April 8, 1980. We conclude claimant is entitled to a penalty on the temporary total disability compensation due from March 7, 1980 through April 8, 1980.

ORDER

The Referee's order dated November 5, 1981 is reversed. The carrier's denial of April 8, 1980 is set aside, and claimant's aggravation claim is remanded to it for acceptance and payment of compensation to which claimant is entitled commencing March 7, 1980 and until closure pursuant to ORS 656.268. Claimant is entitled to a penalty equal to 20% of the compensation for temporary total disability due him from March 7, 1980 through April 8, 1980.

Claimant's attorney is granted as a reasonable attorney's fee a sum equal to \$1,300 for his services both at the hearing and Board levels and because of the carrier's failure to pay interim compensation, the fee to be paid by the carrier in addition to compensation.

EDWIN C. EVENSIZER, Claimant
Charles Maier, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-10727 & 81-01047
June 15, 1982
Order of Abatement

The Board issued its Order on Review in the above entitled case on June 4, 1982. Claimant has requested we reconsider our order. To allow us time to give this case proper consideration, we hereby abate our June 4, 1982 Order on Review and direct the SAIF Corporation to submit a response to claimant's request for reconsideration within 10 days.

IT IS SO ORDERED.

EDWIN C. EVENSIZER, Claimant
Charles Maier, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-10727 & 81-01047
June 4, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

The SAIF Corporation seeks Board review of those portions of Referee Peterson's order which (1) found that claimant's 1978 claim was timely filed; (2) ordered SAIF to accept the 1978 claim and process it as a non-disabling claim for purposes of paying certain medical bills; and (3) ordered SAIF to accept claimant's 1980 injury claim and process it as a disabling claim. The Referee's order also awarded attorney fees to claimant's counsel for prevailing on denied claims and imposed penalties for delay in paying interim compensation and issuing a denial for the 1980 claim. SAIF contends that neither claim is compensable and presumably would ask for a reversal of any attorney fees awarded based upon either claim. SAIF does not contest the imposition of penalties.

We affirm on the issue of compensability of the 1980 claim but reverse on the issue of compensability of the 1978 claim. In light of this disposition, it is unnecessary to decide whether the 1978 claim should be barred for lack of timely notice.

Claimant, now age 39, was employed as a psychiatric aide for the Oregon State Hospital at the time of separate incidents in 1978 and in 1980. In both incidents, in the course of restraining a violent patient, claimant fell and injured his right knee. In both instances, claimant filed a written accident report with the employer. Claimant did not seek medical care or sustain any time loss at the time of the 1978 incident. Claimant sought immediate medical care and incurred time loss after the 1980 incident.

In August of 1980, some two years after the 1978 fall but before the 1980 fall, claimant sought medical attention from Dr. Poulson because his right knee was painful. Dr. Poulson was claimant's treating physician for previous neck and low back injuries claimant sustained in an unrelated automobile accident some years earlier. Dr. Poulson had an arthrogram done. The arthrogram appeared to show a torn miniscus. Dr. Poulson recommended surgery.

Claimant sought a second opinion from Dr. Mayhall. After discussing the matter with Dr. Mayhall, claimant decided to stay with Dr. Mayhall as his treating physician and elected physical therapy in the form of leg exercises to correct the knee condition. Claimant testified to the results of the physical therapy as follows:

"Q. Did the physical therapy help your condition?

A. Yes.

Q. Can you tell exactly how it improved your condition?

A. To the point where I was--between that time when I started the physical therapy and within a week to ten days, I noticed a big improvement in it. I wasn't having any pain with it, and I was able to work all the time, and was very happy with it.

* * *

Q. Would it be fair to say that your condition went back to status quo as to what it was prior to August of 1980?

A. Oh, yes."

After examining claimant's knee following the November 12, 1980 injury, Dr. Mayhall recommended surgery. On December 4, 1980, an arthroscopy was performed revealing no damage to the meniscus but confirming one of Dr. Mayhall's pre-operative diagnoses of patellar compression syndrome. A "lateral release" surgical procedure was performed to correct the patellar defect.

Since approximately age 19, claimant has been aware that he has arthritis of the right hip. This condition has apparently caused a shortening of claimant's right leg, resulting in claimant walking with a limp. SAIF denied responsibility for the knee condition both before and after the 1980 incident.

Based on our review of the evidence, there can be little doubt that Dr. Mayhall's surgery on claimant's knee in 1980 was a compensable consequence of the 1980 injury. It was partially diagnostic exploratory surgery inasmuch as the doctor was not sure precisely what was wrong with claimant's knee. Moreover, regardless whether the incident is viewed as a completely new injury or an aggravation of a pre-existing condition, the 1980 incident caused pathological changes in claimant's knee, ultimately requiring surgery. It may well be, as Dr. Norton reported, that claimant's bio-mechanical abnormalities were a significant causative factor to the development of claimant's patellar compression syndrome. However, claimant need only show that the injury was a material contributing cause, or simply, "required" medical services or resulted in disability. Weller v. Union Carbide, 288 Or 27, at 36 (1979). As Dr. Mayhall reported:

"Mr. Evensizer had other problems for which I treated him including pain in the back as well as pain in his hip. An exhaustive survey of his past history, x-rays and consultation by Dr. Charles May turned up the possible diagnosis of anklylosing spondylosis. There is no denying the fact that Mr. Evensizer may have an underlying condition concerning the spine and hip and has x-ray evidence to support this. In

addition, it is possible that his pre-existing injuries to the knee as well as his underlying condition could cause some problems with the knee. However, I would like to point out again, that Mr. Evensizer was able to work and we were working with his knee with physical therapy and exercise until the accident on 11/12/80. Thus, it is my opinion that in all probability, it was the accident of 11/12/80 that caused him to have the necessity for surgical intervention."

"It is . . . possible that his chronic short right extremity with abnormal mechanics to the right hip could cause referred knee pain and certainly this is one of the diagnostic possibilities. However, the fact that his hip has had degenerative changes for some 12 years, prior to the development of his pain syndrome would tend to make me think that this is less likely. It is my impression that even though this patient might have had pre-existing biomechanic abnormalities that the injury that he described probably resulted in the pain syndrome that he experienced."

The 1978 injury presents a more difficult situation. When claimant consulted Dr. Poulson approximately two years after the incident, claimant did not specifically attribute the pain he was experiencing in 1980 to the incident in 1978. Had claimant sought medical care at that time, or had claimant experienced continuous pain from the time of the 1978 injury until he sought medical care in 1980, we might be convinced of its compensability. However, claimant testified as follows:

"Q. Did you continue to have some symptoms though in your right knee?

A. Intermittent. It seemed like it got worse as time went by.

Q. Now, when you say 'intermittent,' can you tell us what you mean by that?

A. It would give me problems, be painful to walk on; oh, every two or three months, it would bother me for a day or two, but nothing so disabling that I couldn't go to work."

It is possible that claimant's 1978 injury continued to be a material contributing cause to the knee condition as it existed in August, 1980 when claimant sought medical care. However, it is equally possible under this record that the 1978 injury resolved itself within a short time, and that the subsequent condition was

the result of claimant's "bio-mechanical abnormalities." Since the claimant has the burden on proof, we find in favor of SAIF on this issue. It follows that claimant is not entitled to an award of attorney fees on the 1978 claim. It also follows that it is unnecessary to decide whether notice of the 1978 injury was given timely.

ORDER

The Referee's order dated October 30, 1981 is modified. SAIF's denial of October 31, 1980 is reinstated and affirmed, and that portion of the Referee's order in WCB Case No. 80-10727 requiring SAIF to accept the 1978 claim and awarding \$400 in attorney's fee is reversed.

The remainder of the Referee's order relating to WCB Case No. 81-01047 is affirmed.

JOANNE FELLNER, Claimant	WCB 81-10282
Richardson, Murphy et al, Claimant's Attorneys	June 4, 1982
SAIF Corp Legal, Defense Attorney	Order Denying Remand

On or about April 13, 1982, claimant filed a timely request for review. Thereafter, claimant moved the Board for an order remanding this claim to the Referee for further evidence taking, alleging that a physician's report which was not available prior to or at the time of hearing should be considered by the Referee.

Aside from the fact that this physician's report was written to SAIF Corporation five days after the Referee's order issued (which was three months after the hearing), claimant has not indicated in her motion why, in the exercise of due diligence, this evidence could not have been obtained prior to the time the record of the proceeding before the Referee was closed. Accordingly, claimant's motion must be denied. Robert A. Barnett, 31 Van Natta 172 (1981).

ORDER

Claimant's motion to remand is denied.

VINCENT JAGIELSKI, Claimant	WCB 79-05262 & 80-06471
Donald Wilson, Claimant's Attorney	June 4, 1982
Dennis R. VavRosky, Defense Attorney	Supplemental Order
Ridgway K. Foley, Jr., Defense Attorney	

The Board issued its Order on Review herein on May 10, 1982 affirming and adopting the Referee's order on a request for review by the employer, Dillingham Marine and Manufacturing.

Claimant's attorney thereafter petitioned the Board for an allowance of an attorney's fee pursuant to ORS 656.382(2). Counsel's application will be allowed. See OAR 438-47-090(1).

ORDER

The employer, Dillingham Marine and Manufacturing, is ordered to pay to claimant's attorney a reasonable attorney's fee in the amount of \$100 for services rendered on Board review.

DIANE LIKENS, Claimant
Brian Welch, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-02647
June 4, 1982
Order on Remand

On review of the Board's order dated May 4, 1981 the Court of Appeals affirmed in part and reversed in part and remanded this claim to the Board.

The court determined that claimant was entitled to interim compensation under the Supreme Court's holding in Jones v. Emanuel Hospital, 280 Or 147 (1977), and that Jones "did not condition that recovery of interim compensation on a claimant's proof of entitlement." 56 Or App at 501 (1982). It is difficult to reconcile this statement with the Supreme Court's opinion in Bell v. Hartman, 289 Or 447 (1980), or the Court of Appeals subsequent decision in Langston v. K-Mart, 56 Or App 709 (1982).

It is even more difficult to reconcile the court's result in this case with its result in Evelyn LaBella, 30 Van Natta 738 (1981), affirmed without opinion, 54 Or App 779 (1981). In LaBella the Board stated:

"The duty to pay interim compensation 'no later than the 14th day after the subject employer has notice or knowledge of the claim' within the meaning of ORS 656.262(4) only applies if the employer has effective notice or knowledge that the worker is, by reason of the alleged industrial injury or disease, unable to work. For most claimants, this presents no problem; they are working when they are injured and are unable to return to work due to the injury.

"The claimant in this case is in a different situation. She last worked for Thriftway in 1973; last worked for Tradewell in 1976; last worked for Safeway in 1977; last worked for Cruse for Foods in 1978; left all of those jobs for reasons other than medically verified inability to work; and then made claims in 1979. In this situation, all of claimant's employers were entitled to some documentation that claimant would have been working or seeking work in 1979 but for her alleged occupational disease before they were under any duty to pay interim compensation.

"Claimant did not supply any documentation. Claimant quotes selectively from Dr. Nag's June 29, 1979 report to the effect that 'she was unable to work since September of 1977.' However, the full sentence reads: "She stated that she was working as a meat wrapper and her condition became worse and she was unable to work

since September of 1977." 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." 30 Van Natta at 742-43.

The Court of Appeals affirmed. 54 Or App 779 (1981). The same line of analysis the court thus ratified in LaBella points toward the exact opposite conclusion than the court reached in this case.

Putting aside the confusion created by disparate results in LaBella and this case, it might be suggested that Jones, Bell and Langston can be reconciled into a single rule: "Interim compensation is due and payable without any proof of entitlement unless there is an issue of whether the claimant is a subject worker. This may make some sense to the appellate judiciary, but it is of little guidance to a person whose job it is to process claims. Such a person has just 14 days in which to decide whether to issue a check for interim compensation. Relatively esoteric issues like whether the claimant is a subject worker simply do not arise within two weeks. That kind of issue is born in the Legal Department, not the Claims Department, and the gestation period is always much longer than 14 days.

In any event, we are bound by the order of the Court of Appeals in this case.

That portion of the Board's order finding that claimant was not entitled to interim compensation is vacated, and SAIF is ordered to pay claimant interim compensation from January 7, 1980, the date of notice of claim, to March 19, 1980, the date of denial. Based upon the guidelines set forth in Zelda M. Bahler, 33 Van Natta 478 (1981), SAIF is required to pay claimant a penalty equal to 25% of the above-ordered interim compensation for unreasonably resisting the payment of temporary benefits to claimant and for unreasonably delaying denial; and a carrier-paid attorney's fee to claimant's attorney in the amount of \$150.

IT IS SO ORDERED.

RONALD MOGLIOTTI, Claimant
Dennis Henniger, Claimant's Attorney
Keith Skelton, Defense Attorney

WCB 81-10963
June 4, 1982
Order of Dismissal

The employer/insurer has requested review of the Referee's order denying the employer's motion to dismiss claimant's request for hearing. The order is not a final, appealable order and is, therefore, not reviewable by the Board at this time.

ORDER

The employer/insurer's request for review is dismissed as premature.

KAREN M. WINKLER, Claimant
Mark R. Bocci, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-4022
June 4, 1982
Order Denying Motion for Dismissal

On or about May 14, 1982, claimant filed a Request for Review of the Referee's order herein. Thereafter, SAIF Corporation moved the Board for an order dismissing claimant's Request for review on the grounds and for the reason that claimant did not serve a copy thereof on all parties within 30 days of the date of the Referee's order, which SAIF Corporation contends is a jurisdictional defect depriving the Board of jurisdiction to review the Referee's order.

For the reasons set forth in Michael J. King, 33 Van Natta 636 (1981), and Barbara Rupp, 30 Van Natta 556 (1981), the Motion is denied.

ORDER

SAIF Corporation's Motion to Dismiss claimant's Request for Review is denied.

ORVILLE L. CARLSON, Claimant
Malagon & Velure, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-07257 & 81-07256
June 8, 1982
Order Denying Motion for Dismissal

On or about May 11, 1982, SAIF Corporation filed a Request for Review of the Referee's order herein. Thereafter, claimant moved the Board for an order dismissing SAIF Corporation's Request for Review on the grounds and for the reason that SAIF Corporation did not serve a copy thereof on all parties within 30 days of the date of the Referee's order, which claimant contends is a jurisdictional defect depriving the Board of jurisdiction to review the Referee's order.

For the reasons set forth in Michael J. King, 33 Van Natta 636 (1981) and Barbara Rupp, 30 Van Natta 556 (1981) the Motion is denied.

ORDER

Claimant's Motion to Dismiss SAIF Corporation's Request for Review is denied.

ALVAH HUBBARD, Claimant WCB 81-05865
Cowling, Heysell et al, Claimant's Attorneys June 8, 1982
SAIF Corp Legal, Defense Attorney Order on Review

Reviewed by Board Members Lewis and Barnes.

Claimant seeks Board review of Referee Seifert's order that upheld the SAIF Corporation's denial of his aggravation claim.

Claimant has filed no brief. In the absence of any indication of what issues claimant wants the Board to review or what relief claimant wants the Board to grant, we perceive no defect in the Referee's order.

Claimant suffered a compensable low back injury in December of 1975. Claimant suffered another compensable low back injury in July of 1980. This is an effort to assert an aggravation claim against the 1975 injury. However, given that the 1980 injury resulted in an award of permanent disability, claimant's assertion is a legal impossibility. Henry A. Schmidt, (WCB Case No. 80-05040, 34 Van Natta 582 (April 30, 1982)).

ORDER

The Referee's order dated December 21, 1981 is affirmed.

LEROY KOCIEMBA, Claimant WCB 81-06016
Charles Tauman, Claimant's Attorney June 8, 1982
SAIF Corp Legal, Defense Attorney Order on Reconsideration

Claimant, by and through his attorney, has requested reconsideration of that portion of the Board's Order on Review dated May 27, 1982 which failed to award claimant's attorney a carrier-paid fee for his services on Board review.

SAIF requested review from the Referee's order of September 28, 1981 and claimant's attorney successfully defended the Referee's order in all respects except the issue concerning extent of disability. Therefore, under ORS 656.382(2), claimant's attorney is not entitled to a carrier-paid fee since compensation awarded to the claimant by the Referee was disallowed by the Board. The request for an award of attorney fees on Board review is denied.

IT IS SO ORDERED.

HAROLD LOOPER, Claimant WCB 78-05162
A.E. Piazza, Claimant's Attorney June 8, 1982
Darrell Bewley, Defense Attorney Order on Remand

On review of the Board's Order dated September 4, 1981, the Court of Appeals reversed the Board's Order and reinstated the Order of the Referee dated October 28, 1980.

Now, therefore, the above-noted Board Order is vacated, and the above-noted Referee's Order is republished and affirmed.

IT IS SO ORDERED.

DEBORAH YETTER, Claimant
John Stone, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-01466
June 8, 1982
Third Party Recovery Dispute:
Order of Dismissal

Claimant's attorney has requested Board intervention in order to obtain attorney's fees and costs out of the proceeds of a third party recovery pursuant to ORS 656.593(1)(a). Under the circumstances of this case, there is an apparent lack of authority for Board intervention. Therefore, the request for relief is denied.

Claimant sustained a compensable injury in February 1979 when she was injured in an automobile accident. Claimant subsequently elected to pursue a third party claim against the owner of the other vehicle involved in the accident. Claimant retained the law firm of Pozzi, Wilson, Atchison, Kahn and O'Leary to represent her against the third party.

Claimant's attorney obtained her authority to make a policy limit settlement of her third party claim. Such a demand was subsequently made, and the automobile insurance company agreed to settle on those terms. Claimant's attorney received a draft in the amount of the policy limits, \$15,000, together with a release. Counsel forwarded the release, settlement draft and proposed settlement statement to a representative at SAIF Corporation, the involved workers compensation insurance carrier. SAIF authorized settlement for this amount.

Claimant was living in Cincinnati, Iowa, and counsel mailed the settlement documents to her at her residence. Claimant initially objected to signing the release due to the fact that SAIF appeared on the release. Counsel contacted the insurance company and obtained another release with SAIF deleted therefrom.

Claimant thereafter corresponded with her attorney indicating that she did not desire to sign the release or endorse the settlement draft. Conversation and further correspondence ensued, with claimant refusing to sign the release or endorse the draft.

In June 1981 claimant wrote to her attorney indicating that it was her desire to terminate his continued representation. Counsel advised SAIF that he no longer represented claimant and that his law firm was asserting a lien for costs and attorney fees pursuant to ORS 656.593(1)(a). Counsel also advised claimant by letter that his firm was claiming an attorney's fee against the proceeds of the third party recovery.

The statute of limitations on claimant's cause of action against the owner of the other vehicle ran in February 1981. No action was ever filed.

The settlement draft initially issued by the automobile insurance company expired in July 1981. At the request of SAIF, the company issued a second draft payable to SAIF in the same amount requesting that SAIF give a release and approval insofar as SAIF's lien was concerned.

SAIF wrote to claimant's former attorney indicating that if he and the firm would provide SAIF with a hold harmless agreement, SAIF would forward a check in the amount of his claimed attorney's fee. Counsel refused to do so, with no explanation. In his affidavit explaining the circumstances of this claim, counsel does not indicate why he and the managing partner of the firm were unwilling to sign any such agreement.

SAIF deposited the entire third party settlement proceeds in their Advance Refund Account, with the funds earmarked for distribution according to the statutory formula.

Claimant subsequently corresponded with SAIF indicating her belief that the amount which SAIF was holding in trust for her was, in fact, her money and that she wanted it. In that letter, claimant indicated that her former attorney should not be paid any fee "because he did not finish his job!"

Thereafter SAIF made a partial distribution of the portion of the recovery to which claimant was entitled. Since the claim expenditures exceeded the gross recovery, claimant's entitlement amounted to 25% of the balance of the recovery after deduction of litigation costs and a 33-1/3% attorney's fee. After it became apparent that SAIF would not release that portion of the proceeds claimed by claimant's former attorney unless and until counsel and his firm executed a hold harmless agreement, counsel requested a resolution of this dispute by the Board.

There are three express provisions for Board resolution of disputes arising in third party claims. ORS 656.587 provides for Board involvement when the worker and the paying agency are unable to agree upon a compromise of the worker's right of action against the third party. ORS 656.593(1)(d) provides for Board resolution when there is a conflict concerning what amounts may be retained by the paying agency when a balance remains after distribution pursuant to the statutory formula. Subsection (3) of that section provides for Board resolution of a conflict "as to what may be a just and proper distribution of the proceeds of a third party settlement."

The dispute in this case does not arise under any of these statutory provisions. This is not a dispute concerning the amount of the balance to be retained by the paying agency, nor is it a dispute concerning the just and proper distribution of the proceeds. All the parties involved appear to agree upon the proper distribution formula; in fact, claimant has already received her portion of the proceeds. The amount of the attorney's fee claimed by counsel is not in dispute. The only dispute concerns the steps to be taken prior to release of the funds by SAIF to claimant's former counsel. This is more in the nature of a mechanical problem, one which must be resolved between SAIF and counsel in some other forum.

If the Board had the jurisdiction or authority to resolve this dispute, it would consider SAIF's request for the protection of a hold harmless agreement as a reasonable request under all the facts and circumstances of this case.

ORDER

Counsel's request for an order "determining our rights to our attorney's fees and costs" is dismissed for lack of jurisdiction.

FRANK AYRES, Claimant
Malagon & Velure, Claimant's Attorneys
Wolf, Griffith et al, Defense Attorneys

WCB 81-07960
June 11, 1982
Order Denying Motion to Dismiss

The claimant has moved to dismiss the employer's request for review of the Referee's April 15, 1982 order, on two grounds: (1) the employer's failure to request review within 30 days of the Referee's order; and (2) the employer's failure to provide notice of its request to claimant or his attorney within the 30-day period.

The employer's request for review was mailed May 17, 1982, as indicated by the postmark on the envelope received by the Board containing the employer's request for review. ORS 656.289(3) requires that Board review be requested within 30 days of the mailing of the Referee's order. OAR 436-83-700(2) provides that the 30 days is satisfied upon mailing. Accordingly, postmark controls.

Thirty days from the Referee's order was May 15, 1982, which fell on a Saturday, therefore, the next and last calendar day for filing the request for review was May 17. The request for review was therefore mailed in a timely fashion.

Claimant's second contention has been addressed and rejected in Michael J. King, 33 Van Natta 636 (1981) and Barbara Rupp, 33 Van Natta 556 (1981).

ORDER

Claimant's motion to dismiss the employer's request for review is denied.

WYLIE H. BAKER, Claimant
Robert Gardner, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-03210
June 11, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

Claimant requests Board review of Referee Peterson's order that sustained the SAIF Corporation's denial of his occupational disease claim, contending: (1) That it was error to permit cross examination of claimant's treating physician, Dr. Rasmussen; (2) that it was error to permit SAIF's consulting physician to testify; and (3) that claimant has proven a compensable occupational disease.

On the merits, we affirm and adopt the Referee's order. On the procedural issues, we add the following comments.

A hearing originally convened on December 4, 1980. Although claimant was ready to proceed, SAIF's counsel requested a continuance so that he would have an opportunity to depose claimant's treating physician, Dr. Rasmussen. Claimant had offered as evidence a letter written by Dr. Rasmussen, a copy of which was submitted to SAIF by November 13, 1980. SAIF had not been able to depose Dr. Rasmussen between receipt of that letter and before the hearing. The Referee agreed to continue the hearing "only for the purpose of the deposition" and not to allow SAIF "to use this delay to get additional reports or additional medical examines [sic] or something." The hearing was adjourned without any testimony being taken.

We find it was proper for Referee Peterson to continue the hearing to enable SAIF to depose Dr. Rasmussen. Although it would have been preferable for SAIF to have scheduled the deposition before the December 4, 1980 hearing, we find that there could have been scheduling difficulties due to the shortness of time, the usual difficulties in scheduling any doctor for deposition and the Thanksgiving holiday in late November. We therefore agree with the Referee that substantial justice required that SAIF be allowed to cross examine Dr. Rasmussen.

The hearing did not reconvene until March 12, 1981. At that time, SAIF produced Dr. Raghani, a consulting physician specializing in pulmonary disease, for expert testimony. Claimant objected to allowing the testimony because it was outside limited reason for allowing the continuance. The Referee allowed the testimony because he felt there might have been some misunderstanding on SAIF's behalf regarding what type of additional evidence they could produce at the continued hearing.

From the transcript, it is clear that the continuance in December was only for the purpose of allowing Dr. Rasmussen's deposition, and that it was not for the purpose of allowing SAIF more time to garner medical evidence -- be it documentary or testimonial. However, because a transcript is clear now does not necessarily mean an oral exchange was clear then. Moreover, claimant was allowed to cross examine Dr. Rughani so even if his testimony was beyond the scope of the continuance, its admission was a harmless error.

ORDER

The Referee's order dated September 30, 1981 is affirmed.

ROGER BALLINGER, Claimant
Nick Chaivoe, Claimant's Attorney
Lindsay, Hart et al, Defense Attorneys
SAIF Corp Legal, Defense Attorney

WCB 80-08724 & 80-09824
June 15, 1982
Order on Reconsideration

The Board issued an order on review in the above case on November 6, 1981. That order was abated on December 2, 1981 in order to allow time to research a motion for reconsideration. Having reconsidered, we now withdraw our order on review dated November 6, 1981 and substitute the following in its stead.

Claimant sustained a compensable injury in 1975 while employed by Portland Iron and Wire then insured by Western Employer's Insurance Company's predecessor in interest. Claimant sustained a compensable injury in 1979 while employed by Western Steel Erectors insured by the SAIF Corporation. In 1980 claimant had surgery for which both Portland Iron/Western Employer's and Western Steel/SAIF have denied responsibility. As we understand the record, neither employer/carrier has denied the compensability of the 1980 surgery; rather, the issue is carrier responsibility for claimant's 1980 surgery, associated time loss and any resulting disability.

Cases like this fall into one of three categories. The first category is when the earlier injury and the later injury involved separate and distinct parts of the body. Then, when any issue of aggravation, need for medical services or responsibility for medical care or other compensation subsequently arises, the question is purely factual: Which of the two body areas previously injured have subsequently worsened or require further medical care?

The second category is when the prior injuries involved the same part of the body. In this context the issue of future responsibility is more of a policy question. We discussed this policy question in Jimmy Faulk, 34 Van Natta 109 (1982), and Henry A. Schmidt, WCB Case Nos. 80-05040 and 81-01030, 34 Van Natta 582 (April 30, 1982). In both of those cases, relying on Crosby v. General Distributors, 33 Or App 543, 545 (1978), we concluded that if the more recent injury resulted in permanent disability, then "the insurer on the risk at the time of that injury is liable for any subsequent worsening or need for medical care where the same bodily part is involved."

The third possible category of cases is illustrated by this case -- situations in which it is unclear whether the same or different body parts were involved in the prior compensable injuries. Both claimant's 1975 Portland Iron/Western Employer's injury and his 1979 Western Steel/SAIF injury involved his upper back and shoulders. The record contains somewhat different versions of the details and consequences of both of those injuries. Claimant's 1980 surgery was described as a resection of claimant's right transverse process, sixth thoracic vertebra, a partial resection of the right sixth rib posteriorly and right sixth intercostal neurolysis. Possibly because compensability of this surgery has never been disputed, only responsibility for it, there is very little information in the record about how this surgery relates specifically to either the 1975 or the 1979 injuries. About all the doctors who performed the surgery say is that claimant had continuing pain following his 1975 and 1979 injuries and the operation was intended to (and apparently did) relieve that pain.

In this situation in which the connection between current medical treatment and one or more prior compensable injuries is ambiguous, we deem the better rule governing insurer responsibility to be: The insurer on the risk at the time of the more recent injury is responsible for future medical care and other compensation unless that insurer sustains the burden of proving that the medical care, etc., involves a separate and distinct part of the body than was involved in the most recent injury. Applying that rule here, the more recent claim is the 1979 Western Steel/SAIF claim, and we find that Western Steel/SAIF did not prove that claimant's 1980 surgery involved a separate and distinct part of claimant's body than was involved in his 1979 injury.

Our analysis of Crosby in Faulk and Schmidt highlighted the fact that the most recent injury in all three cases caused permanent disability as one of the reasons the insurer on the risk at that time should be responsible for future medical care and other compensation. We concluded in Faulk: "We leave to another day the issue of whether or not the same rule would apply in a situation where a claimant suffers no additional permanent disability as a result of the [most recent] injury." 34 Van Natta at 110. The facts of the present case persuade us that the presence or absence of permanent disability resulting from the most recent injury should not be controlling in the resolution of responsibility issues that subsequently arise.

Claimant's more recent 1979 Western Steel/SAIF claim was closed by Determination Order dated May 7, 1980 that awarded no permanent disability and claimant requested a hearing on that Determination Order. At the beginning of the hearing, all parties stipulated that the question of the extent of claimant's permanent disability, if any, resulting from the 1979 Western Steel/SAIF claim would be deferred for hearing at a later time because claimant was then in an authorized program of vocational rehabilitation following the conclusion of which a new Determination Order was expected to be issued. In sum, the question of whether claimant has permanent disability resulting from the 1979 Western Steel/SAIF claim has not yet been finally resolved but instead has been expressly reserved for future decision. Thus, if the presence or absence of permanent disability resulting from the most recent injury, i.e., the 1979 Western Steel/SAIF injury, were now deemed controlling on the responsibility issue before us, then it would literally be impossible to resolve that responsibility issue.

Turning to the other issue raised on review, claimant argues that his 1979 Western Steel/SAIF claim was prematurely closed by the May 7, 1980 Determination Order. There is conflicting evidence on this point. The April 7, 1980 report of Orthopaedic Consultants opined that claimant was medically stationary. The April 24, 1980 report of Dr. Rinehart opined that claimant was not medically stationary. We find the analysis of the Orthopaedic Consultants to be more persuasive. The fact that claimant is entitled to claim reopening subsequently in 1980 for his surgery does not alter the fact that he was medically stationary earlier that year as properly found by the May 7 Determination Order.

ORDER

The Board's Order on Review dated November 6, 1981 is vacated. The Referee's order dated March 24, 1981 is reversed. The denial of responsibility for claimant's 1980 surgery and resulting temporary and permanent disability, if any, issued by Western Employer's Insurance Co. on October 17, 1980 is reinstated and affirmed. The denial of responsibility for the same compensation benefits issued by the SAIF Corporation on November 5, 1980 is set aside and claimant's claim is remanded to SAIF for processing and payment of benefits in accordance with law. SAIF shall reimburse Western Employer's Insurance Co. for all claim costs incurred in reliance on the Referee's order. Claimant's request to set aside the May 7, 1980 Determination Order as premature is denied.

LARRY CAMPUZANO, Claimant

WCB 81-11628

Olson, Hittle & Gardner, Claimant's Attorneys June 15, 1982

SAIF Corp Legal, Defense Attorney

Third Party Distribution Order

This matter is now before the Board for resolution of a dispute over the proper distribution of the proceeds of a third party recovery. ORS 656.593(1)(d).

A partial distribution has already been made pursuant to the statutory formula. Part of the balance of the third party recovery is claimed by SAIF Corporation as a reserve for reasonably-to-be-expected future expenditures for costs of this worker's claim; in particular, future expenditures for chiropractic care and permanent partial disability. For the following reasons, we find that SAIF is not entitled to retain any portion of the disputed amount, and that claimant is entitled to have the entire balance paid to him.

Claimant was compensably injured on February 7, 1980. Claimant filed a third party proceeding and eventually obtained a settlement of \$34,500. After a partial distribution of the settlement proceeds, a balance of approximately \$7,500 remained. SAIF tendered an agreement to claimant's attorney which, upon signature by claimant together with payment of the remaining balance of \$7,500, would act as a bar to claimant's receipt of any future compensation claimed on account of this compensable injury, other than benefits claimed pursuant to ORS 656.273 and 656.278.

We have held that these agreements are invalid because they are contrary to law. Robert A. Parker, 32 Van Natta 259 (1981). In Parker we concluded that such agreements are inconsistent with the requirement of ORS 656.593(1)(c) that the carrier retain the balance of a third-party recovery to the extent that it is reimbursement for its prior expenditures for compensation or a reserve for the present value of reasonably-to-be-expected future expenditures.

Claimant thereafter made application to the Board for an order requiring SAIF to pay to claimant the balance of the third party recovery. In response to claimant's application, SAIF submitted a statement of its anticipated future expenditures.

In support of its claim for future chiropractic treatments, SAIF has submitted a letter report from Dr. Ladwig, indicating that claimant would need future chiropractic treatment "to prevent further disability and retrograde organic changes of the cervical spine." There is no indication from this report what the frequency or duration of this alleged need for chiropractic treatment will be or even whether or why it would be compensable treatment. SAIF claims the sum of \$2,880 as a reasonable amount for future expenditures based upon an anticipated average of four chiropractic visits per month at \$30 per visit over the next two years.

There is no evidence submitted by SAIF in support of its assumptions. SAIF has failed to establish what the extent of future compensable chiropractic care will be, and we decline to speculate. Accordingly, SAIF has failed to establish its claim for anticipated chiropractic expenditures to a reasonable certainty. Leroy R. Schlecht, 32 Van Natta 261 (1981).

SAIF is also claiming \$4,080 out of the balance of the recovery as a sum which it believes the claimant will be likely to receive in the event that claimant requests a hearing concerning the extent of his permanent disability, if any. The March 9, 1982 Determination Order closing this claim made no permanent partial disability award. Claimant's attorney, by a letter to the Board dated June 11, 1982, has indicated a willingness and desire to stipulate that no request for hearing will be filed challenging the March 9, 1982 Determination Order. We accept claimant's stipulated waiver of his right to contest the Determination Order, and on that basis deny SAIF's claim for \$4,080 for anticipated future expenditures for an award of permanent partial disability to claimant.

It appears that SAIF has already been reimbursed for expenditures actually made; therefore, the remaining balance of this third party recovery must be paid to the worker.

ORDER

SAIF Corporation is ordered to pay to claimant the balance of his third party recovery in accordance with ORS 656.593(1).

WOODROW CATRON, SR., Claimant
Jolles, Sokol & Bernstein, Claimant's Attorneys
Cheney & Kelley, Defense Attorneys

WCB 79-09282

June 15, 1982

Order on Review

Reviewed by Board Members Lewis and Barnes.

The carrier seeks Board review of Referee Mongrain's order which set aside its denial of compensability and remanded claimant's occupational disease claim for payment of benefits. The issue in this case is whether claimant's kidney dysfunction was caused by exposure to chlorophenol chemicals used in the lumber mill in which he worked. We affirm.

Claimant testified without contradiction that he was directly exposed to wood preservatives containing pentachlorophenol (PCP) and Quinoline at his workplace. Claimant was first exposed to these chemicals in the summer of 1977 and was repeatedly exposed throughout the following months. He was sprayed and splashed with the chemicals while working as a puller on the planer chain and while working around the dip tank where the lumber was soaked in the preservatives. In the fall of 1977 he also worked on a chipper machine at the mill where he had to handle wood that had been treated with PCP.

In late November, 1977, claimant began to experience swelling in his ankles and legs. His condition became progressively worse in early December and, ultimately, was diagnosed as kidney disease. Claimant has no prior history of kidney problems.

Claimant was first treated for kidney dysfunction by Dr. Serres and Dr. Bangs. After ten days of hospitalization, his condition had not improved, so he checked himself out of the hospital and went to see Dr. Leveque, an osteopathic physician and toxicologist. Dr. Leveque referred claimant to a kidney specialist, Dr. Israelit, who once again hospitalized claimant and succeeded in bringing the problem under control.

Only one physician, Dr. Dick, has asserted that claimant's kidney condition was not due to chemical exposure at work. Dr. Dick, an internist, opined that claimant's problems resulted from a reaction to analgesic medications that claimant took for back pain in 1976 and 1977. We agree with the Referee's finding that the evidence does not support a conclusion that claimant consumed a sufficient quantity of the drugs, over a long enough period, to be consistent with the research relied upon by Dr. Dick.

Additionally, Dr. Dick was apparently under the impression that claimant had not been working near where PCP was being sprayed, and thus, that any exposure to PCP must have been very slight. The source of Dr. Dick's information is unknown. He did, however, attach a report of a study on PCP exposure at another company that used the chemical to treat wood. This study concluded that PCP exposure could impair kidney function. Begley, et al, Association Between Renal Function Tests and Pentachlorophenol Exposure, 11(1) Clinical Toxicology, pp. 97-106 (1977).

Dr. Leveque, who has been a Professor of Chemistry, Pharmacology and Toxicology for 22 years at eight different medical schools, expressed his opinion that claimant's condition was caused by exposure to PCP at work. He explained that significant exposure to the PCP solution used at the mill could result merely from inhaling the fumes or having skin contact with the chemical. One standard reference book gives the following description of PCP:

"...even more toxic than simple phenol. Should be used only when wearing goggles and protective (impervious) clothing such as rubber boots, apron, and gloves. In solutions of organic solvent, the material may be absorbed through intact skin in lethal amounts.... Toxic by all portals of entry." Gosselin, et al, Clinical Toxicology of Commercial Products, Acute Poisoning, p. 131 (4th Ed.) (1976).

No other evidence, aside from Dr. Dick's analgesic reaction theory, has been adduced to explain claimant's kidney trouble, and there is no evidence of exposure to PCP outside the workplace. Carrier's brief on review suggests an entirely new theory, that claimant's condition was the result of a streptococcal infection. There is not a shred of evidence in the record to support this conjecture. We find that claimant has met his burden of proof in establishing that work exposure to PCP was the major cause of his kidney disease. SAIF v. Gygi, 55 Or App 570 (1982).

ORDER

The Referee's order dated April 27, 1981 is affirmed. Claimant's attorney is awarded \$600 as a reasonable attorney's fee for services rendered on Board review, payable by the carrier.

RUBY M. HART, Claimant
D. Keith Swanson, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-02292
June 15, 1982
Denial of Reconsideration

The Board has received a motion for reconsideration of its Order on Review dated May 27, 1982.

Having considered the motion, it is hereby denied.

IT IS SO ORDERED.

GARY FREIER, Claimant
Alan Jack, Claimant's Attorney
Schwabe, Williamson et al, Defense Attorneys

WCB 79-07952
June 15, 1982
Order Denying Application for
Attorney's Fee

The Board issued its Order on Review herein on April 30, 1982. The employer had requested review of the Referee's order awarding claimant 30% unscheduled permanent partial disability and reopening claimant's claim for an aggravation as of August 13, 1979. On review, the Board affirmed the Referee's finding of a compensable worsening pursuant to ORS 656.273 and vacated that portion of the Referee's order awarding claimant additional permanent partial disability.

Claimant's attorney's application for an attorney's fee is pursuant to ORS 656.382(2), which provides that on a request for review by the employer, if the Board finds that "the compensation awarded to a claimant should not be disallowed or reduced," then claimant's attorney shall be allowed a reasonable attorney's fee.

In this case, the Board found that it was improper for the Referee to rate the extent of claimant's permanent disability inasmuch as his claim had been reopened. The Board set aside the Referee's award of additional permanent disability: i.e., reduced the compensation awarded claimant. Accordingly, counsel is not entitled to an attorney's fee on Board review.

ORDER

Counsel's application for an attorney's fee for services rendered on Board review is denied.

BILLY JOE JONES, Claimant
Bruce Bottini, Claimant's Attorney
Ridgway Foley, Jr., Defense Attorney

WCB 81-06159
June 15, 1982
Order on Reconsideration

The employer, by letter of June 1, 1982, requested the Board to reconsider its Order on Review issued May 21, 1982 in the above-entitled case. Specifically, the employer requests the Board to reconsider that portion of the Order which affirmed the Referee's allowance of an employer-paid attorney fee of \$1,000 and contends that the remainder of our Order on Review is in conflict with our prior decision in Charles C. Tackett, 31 Van Natta 61 (1981).

In our Order on Review, we questioned the propriety of the Referee's allowance of the employer-paid attorney fee but stated, "Since counsel for the employer has raised no objection, we will not address the issue." The employer emphatically argues that de novo review of the entire order of the Referee was requested and that review was not completed by the Board with regard to the attorney fee. We disagree. See Brooks v. D & R Timber, 55 Or App 688 (1982).

With regard to the second issue raised by the employer, we also adhere to our original analysis. The issue in Tackett concerned a claimant's receipt of both permanent partial disability and temporary total benefits while enrolled in an authorized vocational rehabilitation program. We ruled the worker was not entitled to both forms of benefits at the same time. The issue in this case concerns interpretation of that portion of ORS 656.268(4) (1977), now ORS 656.268(5), relating to redetermination of a claim following completion of vocational rehabilitation. Given the employer's assertion that it must resume paying a claimant's suspended permanent partial disability award immediately upon completion of a rehabilitation program -- an assertion that seems supported by common understanding but which has no clear support in any statute or rule -- our prior Order on Review in this case is somewhat discordant with Tackett in that it creates the possibility of simultaneous payment of permanent partial disability (resumed after completion of rehabilitation) and temporary total disability (continued until redetermination notwithstanding completion of rehabilitation). However, our interpretation of ORS 656.268(5) can lead to no other conclusion. Furthermore, despite the employer's ad hominem arguments in support of reconsideration, we continue to believe that conscientious claims processing can keep overpayments of nonreimbursable temporary total disability to a very minimal or nonexistent level, and additionally assume that such an overpayment could be setoff against a worker's permanent disability award.

ORDER

As supplemented herein, the Board's Order on Review dated May 21, 1982 is readopted and republished.

OLLIE RATER, Claimant	WCB 81-01464 & 79-06134
Brown, Burt et al, Claimant's Attorneys	June 15, 1982
Spears, Lubersky et al, Defense Attorneys	Third Party Distribution Order

This matter is before the Board on application by the employer for a determination of the proper distribution of the remaining balance of claimant's third party recovery. ORS 656.593(1)(c) and (d). A partial distribution pursuant to the statutory formula has already been made. The dispute involves the employer's claim for temporary total disability benefits paid claimant during the period August 27, 1978 through October 24, 1978.

Claimant sustained a compensable injury in January 1978. In August 1978, while claimant was still receiving temporary total disability benefits, he was injured in an automobile accident with a third party. Claimant elected to bring an action against the third party. A Determination Order issued in November 1978 granting claimant temporary total disability benefits for the period January 23, 1978 through October 24, 1978.

The employer is claiming reimbursement for the time loss benefits paid during the aforementioned period based upon an assertion that the automobile accident aggravated claimant's condition, originally arising out of the claimant's compensable injury, necessitating a need for continuing disability benefits. Claimant con-

tends that ORS 656.578 does not contemplate recovery of these benefits paid by the employer because, although the third party's negligence may have aggravated claimant's prior compensable injury, the automobile accident was not itself a compensable injury, and the third party statutes are designed to provide reimbursement only for compensation benefits paid on account of a compensable injury.

The third party recovery statutes are intended to provide for an employer's or carrier's recovery, from responsible third persons, of benefits paid to injured workers and their dependents. Ore-Ida Foods v. Indian Head, 290 Or 909, 912 (1981). Statutes must be construed as a whole with a view to effecting the overall policy which the statutes are intended to promote. Wimer v. Miller, 235 Or 25, 30 (1963). The concept underlying third party actions is the idea that the ultimate loss for wrongdoing should fall upon the wrongdoer, with a corollary being not allowing a claimant to obtain a double recovery. 2A Larson, Workmen's Compensation Law, §§71.10, 71.20 (1981).

The situation presented in this case is analogous to claims involving third party actions against a physician who has committed malpractice in the course of treating a condition arising out of a compensable injury or disease. In Donald P. Neal, 34 Van Natta 237 (1982), this Board held that the consequences of malpractice arising out of a physician's treatment of a compensable injury or disease are themselves compensable. See also Wimer v. Miller, supra. Since the consequences of malpractice are compensable, compensation carriers are entitled to reimbursement of expenditures made on account of the malpractice when the worker elects to proceed against a physician in a third party proceeding; however, reimbursement is limited to those additional expenses incurred due to the "aggravation" occasioned by the malpracticing physician. John Galanopoulos, WCB Case No. 81-04249, 34 Van Natta 615 (May 14, 1982).

Regardless of whether or not this employer was required to continue payment of temporary disability benefits to claimant subsequent to the automobile accident with the third party, the fact is that the employer did continue to make such payments. Furthermore, these payments clearly constitute an expenditure for compensation in connection with this worker's claim; as such, these payments are recoverable pursuant to ORS 656.593(1)(c). Failure to allow the employer to recover these amounts would result in a double recovery by claimant, a result which the third party statutes are intended to prevent.

ORDER

The employer shall retain from the proceeds of claimant's third party recovery the sum of \$1,882.94, as reimbursement for temporary total disability benefits paid claimant for the period August 27, 1978 through October 24, 1978. The balance of the recovery shall be paid to claimant.

RICHARD ROTH, Claimant
Rosenthal & Green, Claimant's Attorneys
John Snarskis, Defense Attorney

WCB 80-11165
June 15, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

Claimant seeks Board review of Referee Neal's orders that granted an award of 20% unscheduled partial disability in addition to the award of 10% partial disability granted by the Determination Order dated May 8, 1981. Claimant contends he is permanently and totally disabled and objects to the Referee's admission of Exhibit 32 on the ground that it violates the doctor-patient privilege.

We affirm and adopt the Referee's order with the following additional comments.

Claimant's May 12, 1980 compensable injury caused broken ribs, that have healed without permanent impairment, and a low back strain. Surgery has neither been performed nor is contemplated for claimant's low back condition. The low back injury caused, at the most, minimal permanent impairment. In addition, claimant has made no efforts to obtain work within the meaning of ORS 656.206(3). We conclude that claimant has not proven he is permanently and totally disabled.

Claimant's objection to the admission of Exhibit 32 on the ground of the doctor-patient privilege is not well taken. OAR-436-69-101(1).

ORDER

The Referee's orders dated September 21, 1981 and November 6, 1981 are affirmed.

JEANI L. TUNHEIM, Claimant
Jerome Bischoff, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-07114
June 15, 1982
Denial of Reconsideration

The Board has received a motion for reconsideration of its Order on Review dated May 25, 1982.

Having considered the motion, it is hereby denied.

IT IS SO ORDERED.

DARLA K. COVELY, Claimant
Litchfield, Macpherson et al, Claimant's Attorneys
Mitchell, Lang, et al, Defense Attorneys

WCB 79-06288
June 17, 1982
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.

EARL E. EKSTRAND, Claimant
William Blitz, Claimant's Attorney
Rankin, McMurry et al, Defense Attorneys

WCB 80-06410
June 17, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

The employer seeks Board review of Referee Danner's order that found claimant was permanently and totally disabled effective January 28, 1980.

Claimant suffered a compensable injury to his left arm on November 14, 1978 which led to repeated left ulnar nerve surgery. That claim was closed by Determination Order that awarded 96° for 50% loss of the left arm. Were claimant's left arm all that was involved, that would appear to be the appropriate disposition. However, claimant has a myriad of pre-existing physical problems.

A prior gunshot wound to claimant's right shoulder resulted in his right arm and hand being virtually useless. A prior low back injury lead to a multiple level fusion with subsequent pseudoarthrosis. Claimant developed a heart condition in the early 1970's and underwent bypass surgery in about 1974 and 1975.

Subsequent to his November, 1978 industrial injury, claimant's heart condition worsened in late 1979. He suffered an infarction in May of 1980. In January of that year he was operated on for vascular problems in both legs.

It is clear - indeed, all parties agree - that claimant is now permanently and totally disabled. The more difficult question is whether claimant's total disability is due to the consequences of his 1978 industrial injury plus preexisting problems, or instead is due to subsequent noncompensable problems, primarily the worsening of claimant's cardiac and vascular illness.

The employer argues that claimant's back condition was not permanently worsened by his November, 1978 injury. We agree, in the sense that if the issue were whether claimant was entitled to an award of unscheduled disability because of that accident, we would answer that question in the negative. But neither the employer's argument nor our conclusion is especially relevant; the question is whether claimant's preexisting, significant low back disability is a "loss, including preexisting disability" that when combined with claimant's other physical limitations points toward a conclusion of permanent total disability. ORS 656.206(1)(a).

The employer argues that claimant's total disability is primarily due to the worsening of his cardiac and vascular conditions since his 1978 left arm injury. This kind of argument presents one of the most difficult kinds of decisions that must be made within the workers compensation system: if claimant's cardiac/vascular problems had not worsened after November of 1978, would he nevertheless have been totally disabled as a result of the totality of circumstances as they existed at that time? See Bauder v. Weyerhaeuser, 51 Or App 77 (1981).

It is hard to be confident about any such past-tense assessment of disability, but we conclude that the combined effect of claimant's preexisting right arm/hand impairment, preexisting low back impairment, preexisting cardiac condition, 1978 left arm injury and relevant social/vocational factors, OAR 436-65-600 et. seq., render him unable to regularly perform work at a gainful and suitable occupation.

ORDER

The Referee's order dated October 12, 1981 is affirmed. Claimant's attorney is awarded \$700 for services rendered on Board review, payable by the employer.

RICHARD HOLZWARTH, Claimant	WCB 79-10965
Michael Brian, Claimant's Attorney	June 17, 1982
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.

BETTY J. JENSEN, Claimant	WCB 79-06217
Emmons, Kyle et al, Claimant's Attorneys	June 17, 1982
SAIF Corp Legal, Defense Attorney	Order on Review

Reviewed by Board Members Lewis and Barnes.

Claimant seeks Board review of Referee Knapp's order which upheld the SAIF Corporation's denial of responsibility for claimant's total hip replacement operations.

We affirm and adopt the Referee's order subject to one qualification. The Referee's reliance on Edwards v. SAIF, 30 Or App 21 (1977), may be inconsistent with the Board's understanding of that case. See Joe McKenzie, 31 Van Natta 101 (1981), aff'd 56 Or App 394. Despite this possible error, we agree with the Referee's conclusion.

ORDER

The Referee's order dated December 2, 1981 is affirmed.

MARY MENDENHALL, Claimant	WCB 81-08099
Allen & Vick, Claimant's Attorneys	June 17, 1982
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 carrier, 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.

JERI PUTNAM, Claimant
Malagon & Velure, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 80-04041
June 17, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

The SAIF Corporation requests Board review of Referee Menashe's order which ordered SAIF to pay for medical billings it received in July and November, 1979 from Dr. Smith, assessed a 15% penalty against SAIF on the amounts of the billings, and allowed claimant's attorney a fee of \$650.

Claimant sustained a compensable back injury on October 4, 1975. The claim was closed by Determination Order on January 17, 1979, allowing claimant 5% unscheduled permanent partial disability. A stipulation of March 23, 1979 allowed claimant additional unscheduled disability for a total award of 20%. In 1976 claimant moved to Montana, and received chiropractic treatments from Dr. Smith, who maintained a clinic in Havre, Montana. On April 4, 1979, SAIF received a bill from Dr. Smith for treatments rendered from 1976 to March 23, 1977. SAIF paid this bill in April 1979.

Dr. Smith continued to treat the claimant with ultrasound therapy approximately once a week from March 30, 1979 through July 13, 1979, and submitted a bill for these treatments to SAIF on July 19, 1979. SAIF replied on August 8, 1979 indicating that it was holding up payment pending receipt of a narrative report and authorized only one or two future chiropractic treatments per month. There was no response from Dr. Smith. In October, 1979, claimant's attorney requested Dr. Smith to supply the narrative report. Dr. Smith replied by submitting further bills for even more chiropractic treatments provided between July 17, 1979 and August 20, 1979. On May 30, 1980, Dr. Smith finally replied to claimant's attorney, relating his treatments to claimant's 1975 injury in conclusory terms, but still not furnishing a narrative explanation. On June 19, July 24, October 24, and November 13, 1980, SAIF wrote letters to Dr. Smith requesting that a narrative report be furnished. Dr. Smith failed to reply. By the date of the hearing, Dr. Smith had apparently still not replied, and SAIF had not paid the bills nor issued a formal denial.

The Referee found Dr. Smith's letter of May 30, 1979, to be sufficient to connect the 1979 treatments to the claimant's injury, and ordered the bills paid. He further found that SAIF was unreasonable in delaying payment of or failing to issue a denial of the claim, and ordered SAIF to pay a penalty of 15% of the compensation due. SAIF contends that it was entitled to defer denial or payment of the bills pending receipt of the narrative report.

Rivers vs. SAIF, 45 Or App 1105 (1980), is the only case directly dealing with the issue of out-of-state medical services. That case is of no help in the current situation since it only relates to the right of the insurer to deny responsibility for treatment by an out-of-state physician not approved by the insurer. In this case, neither Dr. Smith nor the claimant requested authorization for the treatment. SAIF, however, went ahead and paid Dr. Smith's first bill in April with no comment.

It therefore must have seemed reasonable for the claimant to assume that she could continue treating with Dr. Smith. Once it became obvious that Dr. Smith was not going to cooperate with SAIF by furnishing the requested report, SAIF had the option under Rivers of denying authorization for further treatments.

Although it is understandable that SAIF may not have wished to deny payment for the bills either out of fear that it would stimulate a request for hearing, or in the genuine belief that it might be responsible for the treatments, our understanding of Rivers is that the only difference between an out-of-state physician and an in-state physician relates to initial authorization. Other than that, the same procedures must be followed. SAIF should have either paid the bills, or denied further responsibility pending receipt of the narrative report from Dr. Smith, rather than leaving the issue in limbo.

With regard to the penalty assessed against SAIF by the Referee, we reverse. Dr. Smith was out of state, not subject to administrative sanctions and stonewalled SAIF's reasonable attempts to obtain necessary information. We do not believe that SAIF was being unreasonable in attempting to obtain information that it had a right to expect Dr. Smith to furnish. The only sanction available to SAIF was to withhold payment of Dr. Smith's bill until he cooperated with that reasonable request. There is no explanation in the record of why the claimant herself, once she became aware of the situation, did not request Dr. Smith to furnish SAIF with the necessary information. A claimant also has certain duties when a claim for compensation is made. We do not find SAIF's actions in requesting necessary information unreasonable under the present circumstances and there is no indication that claimant suffered any harm from those actions.

ORDER

The Referee's order dated October 1, 1981, is affirmed in part and reversed in part. That portion ordering SAIF to pay a penalty to claimant in the amount of 15% of medical bills is reversed. The remainder of the order is affirmed.

ROY L. WAGNER, Claimant
Hayner, Waring et al, Claimant's Attorneys
Paul Roess, Defense Attorney

WCB 81-04552
June 17, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

The SAIF Corporation seeks Board review and claimant cross requests review of Referee Johnson's order which set aside SAIF's denial of his aggravation claim and remanded the claim for acceptance and payment of benefits as required by law. SAIF contends that claimant's surgery was related to a pre-existing condition and not to the industrial injury. Claimant contends that he is entitled to penalties and attorney fees which the Referee refused to grant.

The facts as recited by the Referee are adopted as our own. On the issue of the compensability of claimant's surgery as an aggravation of his industrial injury we concur with the Referee that based on the preponderance of evidence the aggravation claim is compensable.

The claimant raises the issue of penalties and attorney fees on two grounds. (1) The failure of SAIF to timely submit Dr. Norton's report to claimant upon demand and (2) unreasonable denial of the claim. The Referee found no penalty and attorney's fee were justified on either ground.

The Board agrees with the Referee in part and disagrees in part. We too find no unreasonable denial in that, based on Dr. Norton's report, SAIF had a basis for its denial. On the question of SAIF's failure to timely submit Dr. Norton's report, we reverse. That report is dated April 15, 1981. Claimant, by his request for hearing dated May 12, 1981, made a demand on SAIF for all documentary evidence. Dr. Norton's report was not received by claimant's attorney until June 24, 1981. The hearing initially commenced on July 7, 1981. Claimant was forced to seek a postponement to strengthen his case in view of Dr. Norton's adverse opinion. The hearing did not reconvene until November 9, 1981. We find claimant was prejudiced by this delay in providing Dr. Norton's report. We find SAIF's conduct unreasonable, justifying a penalty and attorney's fee.

ORDER

The Referee's order dated December 31, 1981 is modified.

SAIF shall pay to claimant the sum of \$300 as a penalty for its unreasonable delay in providing claimant with a medical report.

Claimant's attorney is hereby granted an attorney's fee of \$500, payable by SAIF, both for services rendered on Board review and because of SAIF's failure to timely disclose.

DARLA ENGOM, Claimant
Emmons, Kyle et al, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-06678
June 21, 1982
Order Vacating Order on Review

The Board's Order on Review dated June 8, 1982 is vacated. A new Order on Review will issue in due course.

IT IS SO ORDERED.

BEVERLY J. HANNA, Claimant
Charles Colett, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-03776
June 21, 1982
Order Vacating Order on Review

The Board's Order on Review dated May 25, 1982 is vacated, and the respondent is directed to submit a brief within 20 days of the date of this order.

IT IS SO ORDERED.

WILLIAM J. DALE, Claimant
Roger Wallingford, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-04193
June 23, 1982
Order of Dismissal

Claimant has requested review of the Referee's order deferring claimant's request for hearing on the issue of extent of claimant's unscheduled permanent partial disability until such time as claimant completes the authorized program of vocational rehabilitation in which he was enrolled and participating at the time the hearing convened on December 3, 1981. SAIF has moved to dismiss claimant's request for review on the grounds that the Referee's order is an interim order not subject to review by the Board.

The Board lacks jurisdiction to review the Referee's order; accordingly, claimant's request for review must be dismissed. Larry J. Barnett, 33 Van Natta 655 (1981); Bill Painter, 33 Van Natta 704 (1981).

"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." Barnett, 33 Van Natta at 656.

ORDER

Claimant's request for review is dismissed.

KARL KATZENBERGER, Claimant
Green & Griswold, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-01960
June 23, 1982
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.

ALLAN KYTOLA, Claimant
June 23, 1982

Own Motion 82-0142M
Own Motion Determination

Claimant's May 16, 1974 compensable injury ultimately led to the issuance of a Determination Order dated February 25, 1977 that awarded him permanent total disability.

The employer reopened claimant's claim effective February 1, 1981. Curious about the basis for reopening a claim when a claimant is receiving permanent total disability benefits, the Board asked the employer's representative for an explanation. The employer's Employee Benefits Administrator responded that she was advised to reopen claimant's claim by personnel at the Workers Compensation Department. We have been unable to identify the exact source of this advice from within the Department and have been unable to surmise what the possible basis for such advice might be. In our opinion, a worker awarded permanent total disability is entitled to receive periodic disability payments and all compensable medical services; we can conceive of no situation in which "reopening" such a claim makes any sense. Nevertheless, in this case claimant's claim was reopened, and the employer now seeks some form of claim closure. Claimant's aggravation rights on his 1974 injury have expired. Thus, at the risk of compounding the error probably committed by reopening this claim, we deem closure by own motion determination to be most appropriate.

The employer also requests that the Board redetermine claimant's continued entitlement to his award of permanent total disability. We ruled in Angel B. Albarez, 33 Van Natta 598 (1981), that requests for redetermination of permanent total disability status should be submitted in the first instance to the Evaluation Division of the Workers Compensation Department and were not to be submitted to the Board under its own motion authority. There is some indication that the employer's attempt to seek redetermination through the Board, like its act of reopening this claim, was based on advice from personnel at the Workers Compensation Department. It must be frustrating when persons charged with the responsibility to administer claims, attempting to do so conscientiously, seek advice from relevant governmental officials, and receive a bewildering variety of responses. All we can say is that the Board members and administrators within the Department are aware of the problem and are taking steps to minimize it.

Claimant is granted temporary total disability from February 1, 1981 through November 16, 1981 and, needless to say, no increased award of permanent disability. In addition, the employer's request for reevaluation of claimant's permanent total disability status is referred to the Evaluation Division.

IT IS SO ORDERED.

ELMER O. NIXON, Claimant
Emmons, Kyle et al, Claimant's Attorneys
Cosgrave, Kester et al, Defense Attorneys

WCB 81-03498
June 23, 1982
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.

LORENZO T. PARRA, Claimant
Malagon & Velure, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-06394
June 23, 1982
Order on Reconsideration

Claimant has moved for reconsideration of the Board's Order on Review dated May 27, 1982.

The chronology of procedural events proceeding that order is as follows:

April 13, 1982: The Board sent the parties a copy of the transcript and advised the claimant/appellant that his brief was due May 3, 1982.

April 22, 1982: Claimant's attorney requested an extension of time until May 17, 1982 in which to file claimant's brief.

April 26, 1982: The Board granted the requested extension, advising claimant's attorney his brief was due May 17, 1982.

May 25, 1982: Not having received claimant's brief, which was then one week overdue beyond the extended due date, the Board proceeded to review this case and arrived at a conclusion about the proper disposition.

May 26, 1982: Claimant's brief received by the Board staff.

May 27, 1982: The Board's order, having been typed in final form and signed since the Board's review two days earlier, was mailed to the parties. Claimant's brief did not come to the attention of the participating Board members before the order was signed and mailed.

Claimant's Motion for Reconsideration argues that his "late filing due to the error of his attorney should have been subjected to a more appropriate sanction than the loss of his right to appeal pursuant to ORS 656.295." Claimant has lost no right to appeal. The participating Board members reviewed the record in this case in

the same manner that they would have reviewed it had timely briefs been filed, except that without briefs it was unclear what issues claimant wanted reviewed and we were mindful that the Court of Appeals has criticized us for deciding issues not raised. See Brooks v. D & R Timber, 55 Or App 688 (1982).

Claimant's Motion for Reconsideration also relies upon the dates stated in our April 13, 1982 and April 26, 1982 letters upon which it was stated this case would be docketed for Board review. Those dates were merely a forecast assuming timely briefing. Often cases are docketed at a later date than predicted because of extensions of time granted for briefs. Sometimes cases are docketed at an earlier date because of expedited briefing or waiver of briefing. We fail to see any "vested interest" claimant had in our forecast based on the assumption of timely briefing after no timely brief was submitted.

ORDER

Except as supplemented by this Order on Reconsideration, the Board's Order on Review dated May 27, 1982 is readopted and republished.

JAMES D. RANSOM, Claimant
Jeffrey Mutnick, Claimant's Attorney
Jerry McCallister, Defense Attorney

WCB 80-06002 & 80-11561
June 24, 1982
Order of Abatement

The Board issued its Order on Review in the above entitled case on May 25, 1982. Claimant, by and through his attorney, has requested we reconsider our order. To allow us time to give this case proper consideration, we hereby abate our May 25, 1982 Order on Review.

IT IS SO ORDERED.

ORVILLE L. CARLSON, Claimant
Malagon & Velure, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-07256 & 81-07257
June 25, 1982
Order on Reconsideration

Claimant has requested reconsideration of the Board's June 8, 1982 order denying his motion for dismissal of SAIF's request for review.

On reconsideration, the Board adheres to its former order.

IT IS SO ORDERED.

ROBERT DeGRAFF, Claimant
Olson, Hittle et al, Claimant's Attorneys
Roger Warren, Defense Attorney
SAIF Corp Legal, Defense Attorney

WCB 78-07405 & 78-09173
June 25, 1982
Order Abating Order on Remand

On May 25, 1982, the Board issued an Order on Remand herein. SAIF thereafter moved the Board to reconsider its order.

In order to allow the Board an opportunity to consider the issues raised in SAIF's Motion for Reconsideration, the Board's Order on Remand will be abated.

Claimant's attorney has submitted an application for an allowance of an attorney's fee, which the Board will address in its Order on Reconsideration.

ORDER

The Board's Order on Remand dated May 25, 1982 is hereby abated. Employers Mutual of Wausau shall respond to SAIF's motion to reconsider within 10 days of receipt of this order.

CLYDE M. HARGENS, Claimant
Hayner, Waring, et al, Claimant's Attorneys
Paul Roess, Defense Attorney

WCB 80-09628
June 25, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

Claimant seeks Board review of Referee Wolff's orders which upheld the SAIF Corporation's partial denial of responsibility for claimant's May 21, 1980 knee injury and resulting surgery. Claimant contends his May 21, 1980 at-home fall and resulting knee injury is a compensable consequence of his May 4, 1978 industrial right knee injury.

Numerous procedural issues have been argued, all of which arise from the following chronology:

January 29, 1981: Referee Wolff entered his first order upholding SAIF's partial denial. Claimant requested Board review.

June 25, 1981: Pursuant to claimant's motion, the Board remanded this case to the Referee for further proceedings.

September 29, 1981: After a further evidentiary hearing, Referee Wolff entered his Order on Remand (erroneously captioned Opinion and Order) in which he adhered to the conclusion reached in his prior order, i.e., affirmation of SAIF's partial denial. The Referee also discussed at some length the reasons he believed the Board's June 25, 1981 Order of Remand was erroneous.

Claimant, of course, argues that the Referee was bound by the Board's remand order. We agree. But rather than decide this case on a procedural ground, which would only protract what have already been lengthy proceedings, we deem the record now sufficient to rule on the merits of SAIF's partial denial.

Claimant's compensable May, 1978 right knee injury led to two surgical procedures. Claimant's recovery was apparently slower than usual. Claimant testified that his right knee remained weak, would "pop" and "give out" on him. Claimant testified that on May 21, 1980, while walking down some stairs at home, his right knee

"gave out" on him again and he fell forward, partially landing on his right knee. The diagnosis the same day was a contusion. In his first order, Referee Wolff stated claimant's credibility "is not in doubt." Claimant's May, 1980 fall and knee injury led to yet another operation, although there is little detail about it in the record.

The Referee has twice analyzed this case in terms of whether there is medical evidence that claimant's May, 1978 industrial right knee injury was a material cause of his May, 1980 additional right knee injury. Assuming medical evidence is essential in this relatively uncomplicated situation, we find it now present in the record.

At the time of the first hearing, the evidence included a report from Dr. Bert, one of claimant's treating doctors: "I do not feel [claimant] had give-away weakness from his industrial injury before his recent [i.e., May, 1980] accident." In subsequent reports that were the reason for the Board's June 25, 1981 Order of Remand, Dr. Bert has stated: (1) "There is apparently some confusion . . . about what we meant by give-away weakness"; (2) the doctor's prior statement that there was no give-away weakness meant only that claimant's right knee ligaments were stable, which the doctor continues to believe; (3) however, another form of give-away weakness in the area of the knee involves loose or weak quadriceps "and subjectively the patient has been complaining about this problem ever since his injury in" 1978; and (4) Dr. Bert has been unable to objectively document loose or weak quadriceps, but believes it is possible for such a condition to exist and not be subject to objective verification.

Based on claimant's testimony, previously found credible by the Referee, and Dr. Bert's reports submitted after the first hearing, we conclude that claimant has established by a preponderance of the evidence that his 1978 compensable knee injury was a material contributing cause of his additional 1980 knee injury. It follows that SAIF's partial denial should be set aside.

The remaining issue is what relief to grant. Ordinarily when a partial denial is set aside, time loss is ordered paid from the date of disability until date of claim closure, possibly meaning for purposes of this case from May of 1980 to June of 1982, a period of over two years. However, resolution of this case has been delayed due in part to an ambiguity in Dr. Bert's terminology and in part due to claimant's abbreviated preparation for the first hearing, preparation that could have included seeking clarification from Dr. Bert before rather than after that hearing.

Under these unusual circumstances we do not deem it equitable to order payment of time loss for such an extended period, which undoubtedly greatly exceeds the period of recovery and may even exceed claimant's return to work. The present record suggests that claimant received a medical release to light duty on February 2, 1981. We will order time loss paid until that date, with the

understanding that the Evaluation Division when closing this claim pursuant to ORS 656.268 shall make an independent determination of the duration of claimant's entitlement to temporary total disability compensation.

ORDER

The Referee's orders dated January 29, 1981 and September 29, 1981 are reversed. The SAIF Corporation's partial denial dated November 3, 1980 is set aside and claimant's claim for his May 21, 1980 right knee injury is remanded to SAIF for processing and the payment of benefits as provided by law, except that SAIF shall only pay claimant for temporary total disability compensation between May 21, 1980 and February 2, 1981, less time worked, unless and until otherwise ordered when this claim is closed pursuant to ORS 656.268.

Claimant's attorney is awarded \$2,000 as and for a reasonable attorney's fee for prevailing on SAIF's partial denial and for services rendered for all stages of the hearing process and on Board review, payable by the SAIF Corporation.

BETTY V. NOICE, Claimant
Malagon & Velure, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-00667
June 25, 1982
Order on Review

Reviewed by Board Members Lewis and Barnes.

The SAIF Corporation seeks Board review of Referee Mannix's order which directed it to pay claimant temporary total disability compensation from July 8, 1978 until claimant's claim was properly closed and to pay a penalty of 10% of the time loss due between July 8, 1978 and December 9, 1981, the date of the Referee's order.

This case is quite simple. In an earlier proceeding, WCB Case No. 78-05522, Referee McCullough's order dated November 21, 1980 found claimant's myocardial infarction claim to be compensable and ordered "the claim is remanded to SAIF Corporation for acceptance and payment to claimant of all benefits due her under the law." For reasons not at all clear, SAIF decided it was sufficient compliance with Referee McCullough's order to pay time loss compensation only through July 7, 1978 even though there has not yet been any form of closure of the myocardial infarction claim. Upon entry of Referee McCullough's order, SAIF had an obligation to determine the benefits to which claimant was entitled, Frank R. Gonzales, WCB Case No. 81-01630, 34 Van Natta 551 (April 21, 1981), and, absent documented nonentitlement to time loss benefits, to pay such benefits until claim closure, Mark L. Side, WCB Case No. 81-01240, 34 Van Natta 661 (May 21, 1982).

MINX E. RAVENWOOD, Claimant
Roll, Westmoreland et al, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 80-07679
June 25, 1982
Order Denying Motions to Strike
or Remand and Revising Briefing
Schedule

By letter received June 2, 1982 claimant's attorney moved to strike certain material from SAIF's brief or, alternatively, to remand to the Referee. Claimant's motions were stated as follows:

"Claimant's second motion in the alternative is a motion to strike from defendant/appellant's brief any reference to medical reports by state doctors which are appended to that brief and which were not offered in evidence at the time of the original hearing. There is no showing that the state doctors' reports (Crothers and Norton) could not have been obtained at the time of the original hearing.

"If the Board is going to deny this motion, then claimant requests that the case be remanded to the referee immediately for the taking of further evidence so that claimant may have the opportunity to rebut this new evidence admitted by the Workers' Compensation Board over claimant's objection into the record."

By letter dated June 3, 1982 the Board requested claimant's attorney to present additional information/argument:

"The Board requests that you elaborate on your motion to strike the correspondence between Drs. Norton and Crothers attached to SAIF's brief. As the Board now understands it, this correspondence is not being offered by or relied upon by SAIF as 'evidence' in the sense of tending to prove or disprove any contested issue of fact. Instead, SAIF apparently offers this material as some possible support of its position on a question of law - whether a 'licensed massage technician' provides medical services within the meaning of ORS 656.245. In other words, it would be as if SAIF had attached to its brief legislative committee minutes it regarded as relevant to a question of law before the Board or a court.

introduction of this correspondence into 'evidence', what contrary 'evidence' would you intend to offer? Please respond within 10 days."

Considerably more than 10 days having passed without any response from claimant's attorney, the motions to strike or remand are denied as abandoned.

We suspended the briefing schedule pending disposition of claimant's motions. Having ruled on the motions, the brief of claimant/respondent shall be filed within 20 days of the date of this order.

IT IS SO ORDERED.

CARL F. WEST, Claimant	WCB 80-00288
Zafiratos & Roman, Claimant's Attorneys	June 25, 1982
Schwabe, Williamson et al, Defense Attorneys	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.

TIMOTHY TREADWELL, Claimant	WCB 81-00093
Michael Williams, Claimant's Attorney	June 28, 1982
SAIF Corp Legal, Defense Attorney	Denial of Reconsideration

The Board has received a motion for reconsideration of its Order on Review dated May 28, 1982.

Having considered the motion, it is hereby denied. See Robert A. Barnett, 31 Van Natta 172 (June 25, 1981).

IT IS SO ORDERED.

WILLIAM S. GILBERT, Claimant
Coons & Hall, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 78-09362 & 79-05397
June 29, 1982
Order on Review

Reviewed by the Board en banc.

Claimant seeks Board review of Referee McCullough's order which: (1) refused to set aside a prior bona fide dispute settlement; (2) affirmed SAIF Corporation's denials of December 27, 1978, December 23, 1980 and January 26, 1981; (3) affirmed the Determination Order of December 17, 1980; and (4) ordered SAIF to pay certain medical bills and interim compensation. In oral argument before the Board, claimant waived all issues except the January 26, 1981 denial, which was a denial of his December 16, 1980 aggravation claim.

This is a companion case to WCB Case No. 81-05084 (decided today) in which the issue is the compensability of claimant's subsequent 1981 aggravation claim. Both the 1980 and 1981 aggravation claims arose from a compensable injury sustained by claimant in September, 1977, and both involved a neck and shoulder condition which ultimately required surgery in April, 1981. Referee McCullough, in the hearing in this case, and Referee Daron, in the hearing in WCB Case No. 81-05084, upheld SAIF's denials. In both hearings, the results were based in large part upon a finding that claimant was not credible.

We affirm and adopt Referee McCullough's order with the following additional comments.

The Referee denied the 1981 aggravation claim on two grounds. He concluded, first, that claimant had failed to establish a worsening of his condition since the last arrangement of compensation (a May, 1979 settlement in which claimant received a 10% unscheduled permanent partial disability award for "the neck and upper back"). He also concluded that claimant had failed to prove a causal relationship between the neck condition as it existed at the time of the hearing and the 1977 industrial accident. Claimant contends that the evidence establishes a definite worsening of claimant's condition. We find it unnecessary to decide this issue because we believe that even if there was a worsening, claimant failed to prove the necessary causal relationship between the condition and the compensable injury.

The evidence in support of a causal relationship between the 1977 incident and the neck condition as it existed in 1981 is that: (1) claimant consistently reported neck pain from the date of the injury through the surgery ultimately performed in 1981 (2) prior to the 1977 incident claimant had no problem with his neck, shoulder or headaches; and (3) claimant's last treating physician and the physician who performed the surgery suggested that there was a causal relationship between the incident and the condition requiring surgery. The physician's strongest statement of causation contained in the evidence of this case is fairly equivocal:

"It would be my final opinion that the patient has had an ongoing complaint of neck/shoulder/arm pain and headache which is consistent with a cervical herniated disc of the central type without evidence of specific radiculitis and/or radiculopathy. In addition, he has continuation of a back and lower extremity complaint which may be the result also of the treatment episode as it relates to a lumbar strain/sprain superimposed on degenerative changes in the lumbosacral level and/or possibly a central type herniation of the disc level as well."

A stronger statement of causation is found in a subsequent report submitted by the same physician in the companion case:

"It is my opinion that the lateral view x-rays obtained on 12/15/78 showed definite narrowing of the C5-6 disc interspace which could be considered at this time to possibly have been either of posttraumatic origin or conceivably early spondylotic changes pre-existing to the patient's working of 09/21/77. In any event, I believe that the patient's clinical condition has most strongly followed that of a cervical injury with either aggravation or what was previously a mild pre-existing spondylosis, thus contributing to a posttraumatic spondylopathy, or is a primary causative factor of a posttraumatic spondylopathy with progressive changes with existing and progressing to the operative date."

We are uncertain whether consolidation of cases arising from two separate hearings, albeit involving the same parties and the same injury, allows us to consider evidence from the second hearing when evaluating the Referee's decision in the first hearing. In any event, it here makes no difference because after considering the latter medical reports, we are unable to find that claimant proved a causal relationship between the condition requiring surgery in 1981 and the 1977 industrial accident.

In arriving at his conclusion concerning causation, Dr. Smith necessarily relied on claimant's description of how he was injured in 1977. Referee McCullough, citing a great deal of evidence in support thereof, specifically found that the claimant was not credible. Referee Daron in the companion case, relying in part upon Referee McCullough's analysis and in part upon his own perception of claimant's credibility also found the claimant to be not credible. Claimant's counsel seeks to undercut those findings by questioning some of the specifics of the evidence cited by Referee McCullough, e.g., whether a Dr. Holst was claimant's treating physician closest in time to the 1977 incident. Even if we disregard all other evidence with which claimant takes issue bearing

upon the credibility issue, a finding that claimant is not credible is supported by the significant inconsistencies between claimant's description of the nature of the injuries sustained by him in September, 1977 as recited by claimant during the months after the incident and the history given to Dr. Smith at the time of the aggravation claim in 1980.

Although there are some inconsistencies even in the early medical reports concerning exactly how the injuries were sustained, through April, 1978 the history was fairly consistent to the effect that claimant was lifting a tire in relation to a jeep or a bus, coughed while straining and experienced immediate pain radiating throughout the groin, abdomen, shoulders and neck, but that he was able to finish out his shift. Hospital records confirm that claimant entered the hospital the evening of the incident and was hospitalized for six days. Beginning with Orthopaedic Consultants' examination of claimant in October, 1978 certain embellishments began appearing. Claimant reported for the first time that in lifting the tire he lost his balance and fell over backwards with the tire falling on him. Later in October, 1978 claimant reported to another physician that he had been hospitalized for twelve days following the accident. In November, 1978 claimant reported for the first time that he had been struck in the head and that he passed out. In October, 1980 claimant was reporting that he was struck with a tractor tire and that he was hospitalized for six weeks. Dr. Smith, on whose opinion claimant relies, recited the following history:

"The patient related that he was changing a tire when he pulled a tire from a rack under a tire which had been lain on a rack above it, and the tire above fell, striking him on the head and across the neck, flexing him acutely across the tire rack railing and injuring his abdomen as well as causing an acute injury to his head, neck, shoulders, back area. He is not certain whether he was stunned but does not recall much excepting feeling numb and tingling all over and developed rapidly nausea and vomiting. Because of this he was taken to the local hospital where he was admitted and remained for approximately two weeks in treatment."

Claimant's counsel seeks to avoid the consequences of his client's progressively varied story concerning the nature of his September, 1977 injuries by characterizing claimant as being merely "inarticulate and a poor historian." However, the numerous transcripts now before us do not suggest that claimant is inarticulate. Claimant is a high school graduate and has substantial college level education. While neither a high school diploma, a college education, nor even a medical or law degree guarantees that a person will be articulate, in claimant's case the inconsistencies in his story simply do not appear to be the result of an inability to articulate.

Claimant has told so many variations concerning how the accident happened that we cannot know which one to believe. The version told to the hospital staff at the time of claimant's emergency hospitalization on the evening of the incident most likely is the true account. That version is substantially different from the version recited and relied upon by Dr. Smith in offering his opinion on causation. It matters not whether the lack of consistency is due to intentional misrepresentation or other cause; it only matters that because of the inconsistencies we cannot know whether Dr. Smith was given the correct history.

Claimant argues that in rendering his opinion concerning causation, Dr. Smith relied upon objective evidence in addition to claimant's history. Claimant contends that the objective evidence (x-rays and other diagnostic tests) demonstrate "the presence of a traumatically induced condition which had deteriorated to the point where surgery was required." To the contrary, the exhibits cited by claimant only confirm that claimant has degenerative changes in the cervical vertebrae; the cited exhibits make no reference whatsoever to any trauma. The truly objective evidence (x-rays, etc.) demonstrate the degree of pathology present at the time of each procedure, but does not assist in the determination of causation. That determination here rests in large part, if not entirely, on claimant's credibility.

SAIF conceded at oral argument on these companion cases that if the incident occurred as claimant described it to Dr. Smith, the aggravation claims would be compensable. However, the Referees in both hearings found, and we concur, that claimant is not credible. Therefore, we disregard those portions of the medical reports dependent on claimant's credibility. Based upon the evidence not dependent on claimant's credibility, claimant has not proved a causal relationship between his condition as it existed in 1980 and the injury of 1977.

ORDER

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

WILLIAM S. GILBERT, Claimant
Coons and Hall, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-05084
June 29, 1982
Order on Review

Reviewed by the Board en banc.

Claimant seeks Board review of Referee Daron's order which affirmed SAIF Corporation's denial of his 1981 aggravation claim, denied penalties and attorney fees and denied payment for certain medical services. Claimant requested review of the entire order, but at oral argument before the Board waived all issues except the aggravation claim.

The sole issue before the Board in this case is the compensability of claimant's 1981 aggravation claim. This is a companion case to WCB Case Nos. 79-09362 and 79-05397 (decided today) in which the main issue was the compensability of claimant's 1980 aggravation claim.

We affirm and adopt Referee Daron's order with the following additional comments.

Referee Daron denied the 1981 aggravation claim on the same two grounds relied upon by Referee McCullough in the companion cases. He concluded that claimant had failed to establish a worsening of his condition since the last arrangement of compensation and concluded that claimant had failed to prove a causal relationship between the neck condition as it existed in 1981 and the 1977 industrial accident. However, in arriving at the date of the "last arrangement of compensation," Referee Daron found the last arrangement to be Referee McCullough's order of March 20, 1981.

Claimant contends that the Referee erred in finding Referee McCullough's March 20, 1981 order to be the last arrangement of compensation. We agree. In Lewis Twist, 34 Van Natta 52, 34 Van Natta 290 (1982) we held that where an earlier hearing results in a denial of an aggravation claim on grounds other than an intervening injury, that denial cannot be construed as an "arrangement of compensation." We find the last arrangement of compensation with respect to claimant's neck and shoulder condition to be a settlement dated May 15, 1979. However, this conclusion does not improve claimant's case because we are not convinced that there has been a worsening of claimant's condition since that date and, in any event, claimant failed to prove a causal relationship between his neck and shoulder condition, as it existed in 1981, and the 1977 industrial injury.

Based on our de novo review of the evidence as more fully set forth in the companion case, we conclude, as did Referee Daron, that claimant failed to prove a compensable worsening of the injuries he sustained in 1977.

ORDER

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

DAVID L. HULBERT, Claimant
Malagon & Velure, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-06893
June 29, 1982
Order on Review

Reviewed by Board Members Lewis and Ferris.

Claimant has requested review of Referee Nichols' order of November 6, 1981.

Claimant requested a hearing seeking an order:

". . . requiring the Field Services Division to promptly pay all unpaid expenses incurred by claimant in moving his family and belongings to and from Billings, Montana, staying in Billings, Montana, while searching for a place to live, and storing his belongings, first in Billings while searching for a place to live, and second in Eugene while Bekins Moving and Storage has retained possession of his belongings pending of payment of moving and storage costs."

The employer, its insurer SAIF Corporation, and the Field Services Division were represented at the hearing by a single attorney from SAIF's Legal Division. Defense counsel contended that the Referee did not have jurisdiction to hear the matter which was the subject of claimant's request for hearing inasmuch as claimant had not exhausted his administrative remedies, specifically, those available pursuant to OAR 436-61-998, which, at the time the issue before the Referee arose, provided in pertinent part:

"(1) Any injured worker may request [Field Services] Division review concerning the provision of vocational assistance.

"(2) Any worker aggrieved by a decision of the Division may request a hearing by contacting the Hearings Division of the Workers' Compensation Board in accordance with ORS Chapter 656 and the Board's Rules of Practice and Procedure for Contested Cases under the Workers' Compensation Act."

The Referee found that she had jurisdiction to consider the issue pursuant to ORS 656.283, which allows any party to "request a hearing on any question concerning a claim."

The Referee ordered Field Services to reimburse claimant for storage costs incurred while his property was in storage in Billings, Montana and his actual housing costs while he and his family were living in Billings attempting to locate housing. The Referee further ordered Field Services to pay claimant's attorney a reasonable attorney's fee in the amount of \$250 ". . . for obtaining certain benefits for the claimant which had been denied by FSD."

On review claimant contends that the refusal of the Field Services Division to finance claimant's reasonable moving expenses to and from Montana constitutes an abuse of discretion on their part; and that the Field Services Division should be required to reimburse claimant for his expenses necessarily incurred pending authorization of requested expenditures, which authorization claimant contends was unreasonably delayed.

Both parties' briefs address at length the issue of whether or not the Referee and this Board have the authority to consider the matter raised by claimant's request for hearing, in the absence of preliminary review by the Division.

We find SAIF's jurisdictional argument colorable but not compelling. In view of 1981 amendments to ORS 656.728, the present procedures for review of vocational assistance eligibility issues are now clear. ORS 656.728(6) provides:

"If a worker is dissatisfied with a decision by the Department or by an insurer or self-insured employer regarding the eligibility of the worker to receive vocational assistance or regarding the nature or quality of the assistance the worker is receiving, the worker must first apply to the Director for review of the decision. Decisions of the Director may be reviewed pursuant to ORS 656.283." 1981 Oregon Laws Chapter 874, § 6.

The administrative rule in effect at the time that this vocational assistance issue arose was ambiguous. The procedure has now been clearly established by statutory amendment. It would be an exercise in futility to attempt to dissect OAR 436-61-998 as it existed at the time in question in an effort to determine whether the proper review procedure was followed in this case. Assuming *arguendo* that the proper review procedure was followed, we are of the opinion that the Referee awarded claimant the relief to which he was entitled under the applicable law.

An issue has arisen in the course of this review regarding certain language used by the Referee in her order. We do not at this time pass judgment upon the propriety or impropriety of the Referee's statement regarding the obligations and duties of the Field Services Division.

Claimant requested, and the Referee allowed, a reasonable attorney's fee payable by the Field Services Division for obtaining benefits for claimant which had been denied by the Field Services Division. We question the authority for such an order; however, since SAIF has not raised this issue on review, this question need not be decided.

ORDER

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

NORMAN C. JOHNSON, Claimant
Malagon & Velure, Claimant's Attorneys
Rankin, McMurry et al, Defense Attorneys

WCB 80-02886
June 29, 1982
Order on Review

Reviewed by Board Members Ferris and Barnes.

The employer seeks Board review of Referee Nichols' various orders. Over a more than eight month period the Referee entered three orders, dated March 4, 1981, June 3, 1981 and October 16, 1981. The second was a reconsideration of the first. The third was a reconsideration of the second.

Cumulatively, as best as we understand them, these orders: (1) found the Determination Order dated March 20, 1980 was not premature; (2) set aside the employer's "denial" of reopening for further psychiatric care; (3) granted claimant compensation for temporary total disability from February 7, 1980 until September 4, 1980; (4) declined to rate the extent of claimant's permanent disability and instead remanded that question to the Evaluation Division for issuance of a new Determination Order; and (5) granted claimant's attorney an employer-paid attorney fee for prevailing on the employer's "denial."

Even though the record is certainly less than clear, we affirm the Referee's conclusions.

ORDER

The Referee's orders as described above are affirmed. Claimant's attorney is awarded \$250 as and for a reasonable attorney's fee for services rendered on Board review, payable by the employer.

DIANE LIKENS, Claimant
Brian Welch, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-02647
June 29, 1982
Order on Reconsideration

On June 4, 1982 the Board issued an Order on Remand in accordance with the Court of Appeals decision in Likens v. SAIF, 56 Or App 498 (1982). Thereafter, SAIF moved the Board to reconsider its Order on Remand. The basis of SAIF's motion is that the Board's order of penalties is contrary to law and should be withdrawn.

SAIF disagrees with the Board's "finding" that SAIF was unreasonable under the circumstances of this case. However, we made no such finding. It was the Court of Appeals that found SAIF was guilty of unreasonable conduct in this case, and that it was appropriate to impose a penalty. 56 Or App at 501. As stated in the Board's Order on Remand, ". . . we are bound by the order of the Court of Appeals in this case."

ORDER

On reconsideration of the Board's Order on Remand dated June 4, 1982, the Board adheres thereto.

THOMAS W. MATTHEWS, Claimant
Roll, Westmoreland et al, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-10754
June 29, 1982
Order of Dismissal

A request for review by the employer was filed with the Workers Compensation Board on June 7, 1982. On June 4, 1982 the Referee reopened the case; therefore, the Board lacks jurisdiction in this matter and the request for review is hereby dismissed.

IT IS SO ORDERED.

SHERRYL NAUGHTON, Claimant
Robert N. Ehmann, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-02045
June 29, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

Claimant requests review and the SAIF Corporation cross requests review of Referee James' order and Order on Reconsideration that directed SAIF to pay Dr. Pfeiffer's post-April 20, 1981 bills for medical services pursuant to ORS 656.245 and granted claimant's attorney a fee payable by claimant equal to 25% of Dr. Pfeiffer's bills.

Claimant has filed no brief. SAIF, in its brief in support of its cross request, contends it should not be ordered to pay medical bills that were never submitted to it. We agree.

Dr. Pfeiffer testified:

"Q. And you have submitted your bills to SAIF?

"A. No.

* * *

"Q. Doctor, you indicated that you have not forwarded any of your bills to SAIF for payment. Who is paying them?

"A. No one yet.

"Q. Have you submitted them to anyone other than the claimant?

"A. No."

OAR 436-54-310(7) states that payment for compensable medical services shall be timely if paid within 45 days of the receipt of the medical provider's statement for services rendered. When there is no evidence that any statement has been submitted to the involved carrier, and instead undisputed evidence that no statement has been submitted, there is no denial of medical services and no basis for requesting a hearing. Cf. Syphers v. K-W Logging, 51 Or App 769 (1981).

It could be argued that the Referee's order to pay bills that had never been submitted was harmless error, if those bills have since been submitted to SAIF and paid. However, if Dr. Pfeiffer's bills have been submitted and paid, there is no valid reason for claimant to be responsible to pay his attorney 25% of the amount of those bills. If, instead, Dr. Pfeiffer's bills have been submitted and not paid, the question of carrier-paid, not claimant-paid attorney fees will be ripe for decision in connection with a timely request for hearing filed after SAIF's denial of medical services.

ORDER

The Referee's orders dated September 8, 1981 and October 2, 1981 are reversed.

MICHAEL J. PRICE, Claimant
Merrill Schneider, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Wolf, Griffith et al, Defense Attorneys

WCB 81-02728, 81-02729 & 81-08286
June 29, 1982
Order on Review

Reviewed by Board Members Lewis and Barnes.

The claimant seeks Board review and the employer cross requests review of Referee Braverman's order and amended order which found: (1) that claimant was medically stationary at the time of the 1981 claim closure; (2) upheld the SAIF Corporation's denial of claimant's subsequent aggravation; (3) set aside EBI's denial of claimant's new injury claim and remanded the claim to it for acceptance and payment of benefits as required by law; (4) granted claimant an award of 32° for 10% unscheduled disability related to the new injury claim; (5) ordered EBI to reimburse SAIF for all monies expended pursuant to the .307 order; (6) allowed an offset of temporary total disability benefits resulting from an overpayment; and (7) awarded/allowed attorney fees.

Issues raised by claimant on appeal are his entitlement to permanent partial disability for the January 31, 1979 injury, his entitlement to a greater award for the December 6, 1980 injury and whether the award of attorney fees out of the award granted by the Referee should have been as part of the gross or net award.

The employer on cross appeal contends that claimant sustained an aggravation of his 1979 injury and not a new injury and that claimant's attorney is not entitled to attorney fees in a .307 situation.

We affirm and adopt with the additional observation that we do not understand anything in the Referee's order to prohibit claimant and his attorney from agreeing on the "more equitable" attorney fee result urged in claimant's brief.

ORDEP

The Referee's order dated November 25, 1981 is affirmed.

MARVIN T. RHOADS, Claimant
SAIF Corp Legal, Defense Attorney

WCB 79-02576
June 29, 1982
Order on Review

Reviewed by Board Members Lewis and Barnes.

Claimant seeks Board review of Referee Mannix's order which set aside SAIF Corporation's denial of his aggravation claim, ordered time loss paid from February 14, 1981 through April 1, 1981 and awarded claimant an additional 10% permanent partial disability because of his worsened condition. The Referee also ordered SAIF to pay bills for medical services which it had denied, except that the Referee upheld SAIF's refusal to pay for claimant's sex therapy treatment, reasoning that any connection between claimant's industrial low back injury and subsequent sexual dysfunction was a medically complex issue and found no medical evidence linking the former with the latter.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated October 30, 1981 is affirmed.

WAYNE E. WELCH, Claimant
Olson, Hittle et al, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 80-10619
June 29, 1982
Order on Review (Remanding)

Reviewed by Board Members Ferris and Barnes.

The SAIF Corporation seeks Board review of Referee Nichols' order that set aside its partial denial of responsibility for claimant's rheumatoid arthritis condition. We reverse.

Claimant has suffered from rheumatoid arthritis in his hands and feet since 1976. He sustained a low back injury as a result of a fall from a chair on February 27, 1980. Following that injury claimant's symptoms of rheumatoid arthritis, which had previously been in remission for many months, returned.

SAIF accepted claimant's back injury claim and processed it to Determination Order dated December 9, 1980. However, SAIF denied that there was any connection between claimant's back injury and the return of rheumatoid arthritis symptoms in his hands and feet.

Four doctors have offered evidence on the causation issue. Before analyzing the areas of disagreement, we note the following areas of general agreement.

(1) The possible causes of the disease of rheumatoid arthritis are unknown.

(2) Once the disease is present, medication can alleviate and control the symptoms but there is no "cure"; the disease usually continues as a gradual degeneration in the affected joints.

(3) Patients suffering from rheumatoid arthritis tend to experience cycles of remission, flare-up, remission, flare-up, etc.

(4) Just as the original etiology of the disease is unknown, there is no medical/scientific consensus on what causes the cycles of remission and flare-up.

Of the four doctors who have offered opinions and analysis in this case, the opinion of Dr. Kenyon who treated claimant after his fall/back injury in February of 1980 is the most favorable to claimant's position. Dr. Kenyon is an internist. He observed that claimant had swollen hands and feet shortly after his fall/back injury. Dr. Kenyon categorically opines a cause and effect relationship between claimant's fall/back injury and the flare-up of his preexisting rheumatoid arthritis. As we understand Dr. Kenyon's reports and testimony, the principal basis for his conclusion is the temporal link between the back injury and the flare-up of rheumatoid arthritis symptoms.

Dr. May, a specialist in rheumatology and immunology, had treated claimant's rheumatoid arthritis between 1976 and 1979 and again became involved in claimant's treatment in 1980 after his back injury. Dr. May does not believe that the back injury contributed to the arthritis flare-up: "I do not feel it has been adequately shown that physical or emotional trauma can initiate flares of rheumatoid arthritis."

Dr. Moore, whose area of medical specialization is not identified in the record, submitted two reports. The first was fairly equivocal:

"I happen to believe that stress is clearly related to flares of rheumatoid arthritis. I will be unable to draw a relationship between trauma to the back and onset of arthritis in the peripheral joints. Thus, in my opinion, if there is a relationship of the patient's fall to the onset of arthritis, it would have to be because of the stress associated with the situation. . . . The fall off the chair may have been the trigger for what was to inevitably occur in any case."

Dr. Moore's second report, submitted after meeting with claimant's attorney "to further discuss this case", took a more unequivocal position: "I believe that the fall from the chair on February 27, 1980 was the immediate precipitating stress for this patient's flare of rheumatoid arthritis."

Finally, Dr. Rosenbaum offered a report and testified. Dr. Rosenbaum was the founder of the Rheumatology Clinic at the University of Oregon Health Science Center; was chief of that clinic until 1975; is currently a Clinical Professor of Rheumatology at the Health Science Center; and has written a text on rheumatology. Dr. Rosenbaum does not believe there is any relationship between

claimant's back injury and the return of his arthritis symptoms. Dr. Rosenbaum explained that possibly direct trauma to a diseased joint could cause an arthritis flare-up, but that a trauma to claimant's back, which was not arthritic, could not cause an arthritis flare-up in claimant's peripheral joints which were previously arthritic -- the same distinction made by Dr. Moore. On the alternative stress theory suggested by Dr. Moore, Dr. Rosenbaum testified:

"In the middle 1940's the work of Selye, demonstrating the effect of stress on animals, popularized the theory that stress was an important factor in the development of rheumatoid arthritis. This theory has, however, been long abandoned because the disease has never been produced experimentally by stress."

In weighing this medical evidence, we are not impressed by claimant's argument that we should defer to Dr. Kenyon as the treating doctor on this unusually complex question of medical causation. See Hammons v. Perini Corp., 43 Or App 299 (1979). Moreover, if "treating doctor" were here to be invoked as a talismatic phrase, see Richard L. Schonnoehl, 31 Van Natta 25 (1981), aff'd 51 Or App 998 (1981), it would make more sense to regard Dr. May, who has been more involved in the treatment of claimant's rheumatoid arthritis than has Dr. Kenyon, as the "treating doctor"; and, as noted above, Dr. May's opinion is adverse to claimant's position.

We are impressed by the relative expertise of the doctors involved. Drs. Rosenbaum and May are specialists in rheumatology. Dr. Kenyon is an internist and the nature of Dr. Moore's practice is unknown. On the level of relative expertise, the edge has to go to Drs. Rosenbaum and May.

In assessing the persuasiveness of medical opinions, we also look to the reasons given. Despite all of the discussion of the effect of trauma, no doctor, with the possible exception of Dr. Kenyon, is really saying that a trauma to claimant's back caused his worsened arthritis symptoms in his hands and feet. One of Dr. Moore's two somewhat inconsistent reports theorizes that the back injury led to "the stress associated with the situation" and that stress produced the flare-up of claimant's arthritis. We are not persuaded by Dr. Moore's theory in light of Dr. Rosenbaum's contrary testimony.

This leaves Dr. Kenyon's opinion based on temporal connection. Such "B followed A, therefore A caused B" evidence is often the most difficult to assess. In Edwards v. SAIF, 30 Or App 21 (1977), the Court of Appeals found such evidence insufficient to sustain the claimant's burden of proof. In Joe MacKenzie, 31 Van Natta 101, modified 56 Or App 394 (1982), we discussed Edwards in a context, like this one, where the issue presented was on the frontier of current medical/scientific understanding and found that temporal-connection evidence, combined with other evidence, was sufficient to carry the claimant's burden of proof. One difference between MacKenzie and this case is that, based on our discussion above, there is no additional evidence here to combine with the temporal-connection evidence.

The principal distinction, however, is that unlike MacKenzie, in this case there is an equally plausible temporal-connection theory. Claimant's rheumatoid arthritis between 1976 and 1979 was a particularly severe case which Dr. May treated with some unusually strong medication. Claimant testified that in the summer or fall of 1979 he stopped taking that medication. A recurring theme in all the medical reports and testimony, especially from Drs. Rosenbaum and Moore, is that claimant was going to have a recurrence of his rheumatoid arthritis after he stopped taking his medication. B certainly follows A, but here it is at least equally plausible (if not more plausible) that A equals the cessation of medication rather than the February, 1980 fall and back injury.

For all these reasons, we conclude that claimant has not sustained the burden of proving the compensability of his rheumatoid arthritis flare-up that followed his February, 1980 compensable back injury.

Claimant's request for hearing also raised an issue of the extent of disability awarded by the December 9, 1980 Determination Order. The Referee did not reach that issue, but instead set aside that Determination Order because the Referee ordered SAIF to accept and process claimant's arthritis condition. We will reinstate the Determination Order and remand to the Referee for a ruling on the extent of disability issue.

ORDFP

The Referee's order dated June 12, 1981 is reversed. The SAIF Corporation's partial denials dated October 30, 1980 and November 25, 1980 are reinstated and affirmed. The Determination Order dated December 9, 1980 regarding claimant's back injury is reinstated and this case is remanded to the Referee for further proceedings in accordance with this order.

CLAUDE ALLEN, Claimant
Olson, Hittle et al, Claimant's Attorneys
Giacomini, Jones & Assoc., Defense Attorneys

WCB 78-09801
June 30, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

Claimant seeks Board review of Referee Leahy's order which granted him 50% unscheduled permanent partial disability for his 1971 low back injury, in lieu of the 30% unscheduled disability awarded by two prior Determination Orders. The primary issue at the hearing was extent of disability. Claimant's amended request for hearing raised two additional issues -- entitlement to additional time loss benefits and an alleged de facto denial of a purported aggravation claim. The Referee denied relief on these additional issues.

On review claimant states the issues as being extent of disability, claimant contending he is permanently totally disabled, and whether claimant was entitled to have his aggravation claim closed by the Evaluation Division pursuant to ORS 656.268. One of the many difficulties with the latter argument is that claimant has to establish the compensability of an aggravation claim before he is entitled to any form of claim closure.

Claimant compensably injured his low back on July 19, 1971 while loading a 60-pound cast iron sprocket into a truck while working as a millwright's helper. That claim was closed by Determination Order dated May 1, 1972. Since then there have been several intervening injuries and exacerbating incidents affecting claimant's neck and shoulder, for which apparently no separate claims were filed.

The 1971 claim was most recently reopened in February of 1977 which led to a second Determination Order being issued July 11, 1978. Claimant requested a hearing on that Determination Order.

I

We share the employer's confusion regarding identifying the alleged aggravation claim. Apparently claimant regards Dr. Campagna's December 18, 1978 report as an aggravation claim. That report reads in full:

"The patient returns stating that he has left hip and left leg pain starting one month ago. He is working and feels he cannot tolerate it.

"Physical examination reveals the back motions are limited 50% normal range. The knee jerks are normal. The ankle jerks are normal on the right and absent on the left. The straight leg raising testing is normal on the right and positive on the left at 30 degrees.

"IMPRESSION: Lumbar spondylosis L5-S1.

"RECOMMENDATION: (1) Naprosyn 250 mg., bid; (2) Recheck one month; (3) No work for one month."

On the one hand, this report, when compared with Dr. Campagna's prior June 15, 1978 report, suggests that claimant's condition has worsened. For example, in June claimant could bend to the ankle without pain; in December the range of motion of his back was limited to 50% of normal.

On the other hand, Dr. Campagna's December diagnosis was "lumbar spondylosis." There is nothing in this record that suggests any reason why, on account of the 1971 compensable low back injury, the employer should be expected to be responsible for all subsequent progression of claimant's spinal disease.

Further complicating matters, the employer paid claimant temporary total disability benefits from December 8, 1978 -- presumably because of Dr. Campagna's report -- until September 23, 1979, even though there is some indication that claimant was working in his own business during at least some of this time and even though Dr. Campagna again found claimant medically stationary on July 5, 1979.

We need not, however, wade any further into the question of whether an aggravation claim was perfected because of a simple jurisdictional problem. Claimant's claim was first closed by Determination Order dated May 1, 1972. His aggravation rights lasted for five years from that date, or until May 1, 1977. His claim was last reopened in February of 1977, before aggravation rights expired, and then reclosed on July 11, 1978, after aggravation rights had expired. Under these circumstances claimant was able to request a hearing to contest the extent of disability awarded by the July 11, 1978 Determination Order. Coombs v. SAIF, 39 Or App 293 (1979); Carter v. SAIF, 52 Or App 1027 (1981). However, nothing in Coombs or Carter amends the aggravation statute to permit an aggravation claim to be made as a matter of right more than five years after the first claim closure. Instead, once five years have passed since the first claim closure, what could previously have been presented as an aggravation claim as a matter of right, must thereafter be addressed to the Board's discretionary own motion authority pursuant to ORS 656.278.

Any other result would create an unequal and thus possibly unconstitutional classification. One group of claimants would have five years, no more, in which to perfect aggravation claims. If the claimant in this case still could perfect an aggravation claim in December of 1978 after his aggravation rights expired in May of 1977, there would be another group of claimants who would have some greater period, conceivably infinite, in which to perfect aggravation claims. Such disparate treatment could not have been intended and makes no sense. We, therefore, conclude that, assuming arguendo that claimant made any aggravation claim in this case, it was made after the expiration of claimant's aggravation rights and was thus invalid.

II

Turning to the extent of disability issue, we confront considerable confusion. Much of claimant's medical treatment since his 1971 back injury has been for shoulder and neck conditions, the connection of which to this low back claim is not apparent. Also, many of the medical reports refer to claimant having cervical and lumbar spondylosis, the connection of which to this claim is not obvious. Depending upon how much of claimant's physical impairment is properly part of the present calculus, it would appear that claimant's compensable impairment could be as low as 30% or as high as 50%. The social/vocational factors identified in OAR 436-65-600 all contribute positive values:

Age, 55: + 8

Education, did not complete 6th grade: +15

Work experience, millwright helper;
DOT 638.484-010; SVP = 3: + 3

Adaptability, millwright
DOT STR = 4 (heavy work),
now limited to light work: +10

Mental capacity, average: 0

Emotional and
psychological,
unremarkable: 0

Labor market, RFC = light,
SVP = 4, result
15%: + 1

When these factors are combined with claimant's compensable impairment, the result is as low as about 40% unscheduled disability using the lower impairment figure of 30%, or as high as about 65% unscheduled disability using the higher impairment figure of 50%. Given the ambiguities in the record about claimant's impairment, we conclude we cannot improve upon the Referee's award.

ORDER

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

RUTH COWDREY, Claimant	WCB 80-04667
Olson, Hittle et al, Claimant's Attorneys	June 30, 1982
SAIF Corp Legal, Defense Attorney	Order on Review

Reviewed by Board Members Barnes and Ferris.

The SAIF Corporation seeks Board review of Referee Johnson's order which granted claimant an award of 160° for 50% unscheduled disability. SAIF contends this award is excessive.

The facts as recited by the Referee are adopted as our own. Claimant's impairment, based on a totality of the evidence, is minimal (5%). Claimant is 60 years of age (+10 value; OAR 436-65-602) with a high school education (0 impact; OAR 436-65-603). Because of the residuals of her industrial injury, claimant is now precluded from her regular occupation and is restricted to light work (+10 value; OAR 436-65-605). Based on a consideration of claimant's education, restrictions and work experience, we find claimant has 3% of the general labor maker still open to her (+15 value, OAR 436-65-608). Utilizing the guidelines set forth in OAR 436-65-600 et. seq., we find that claimant is entitled to an award of 35% unscheduled disability.

SAIF contends that the determinations of the Evaluation Division are entitled to a presumption of "correctness" under ORS 41.360(15). We considered and rejected this contention in Michiel Harth, 34 Van Natta 703 (1982).

ORDER

The Referee's order dated January 20, 1981 is modified. Claimant is hereby granted an award of 112° for 35% unscheduled disability. This award is in lieu of the award granted by the Referee.

The attorney's fee should be adjusted accordingly.

JESUS GARCIA, Claimant

Dennis J. Graves, Claimant's Attorney

Schwabe, Williamson et al, Defense Attorneys Order on Review

WCB 81-00374 & 80-08510

June 30, 1982

Reviewed by the Board en banc.

The employer requests Board review of Referee Danner's order, amended order and second amended order. In his first order, the Referee found:

(1) The employer's Notice of Closure dated September 17, 1980 was improper and assessed penalties against the employer in accordance with ORS 656.268(3);

(2) That claimant aggravated his shoulder sometime between November 7, 1979 and March 27, 1980. The Referee thus set aside the employer's denial issued on March 4, 1981, and awarded claimant's attorney an employer-paid fee of \$500 for prevailing on the denial;

(3) That claimant's back and shoulder conditions were related to his March 27, 1980 injury and allowed claimant 10% permanent partial unscheduled disability for each of these conditions for a total award of 20% unscheduled permanent partial disability.

In his amended order, the Referee vacated his previous finding on the aggravation issue and found that the claimant failed to establish his claim for aggravation, but adhered to his previous finding that the September 17, 1980 closure by the employer was improper and that all of claimant's permanent partial disability was chargeable to the March 27, 1980 injury. In his second and final amended order, the Referee adhered to his first amended order in all respects, with the exception of a technical correction.

On November 7, 1979 claimant sustained a compensable injury to his left shoulder while employed at Crown Zellerbach. Dr. Davies diagnosed tenosynovitis of the left shoulder. Claimant was subsequently released to work and the employer issued a Notice of Closure on April 7, 1980 allowing benefits for temporary total disability from November 7, 1979 through January 20, 1980. On March 27, 1980, while loading a grinder for the employer, claimant incurred a back strain. This claim was also accepted by the employer. Claimant returned to work on April 7, 1980. The employer's Notice of Closure dated May 22, 1980 allowed claimant temporary total disability benefits from March 27, 1980 to April 6, 1980. Dr. Davies indicated in his July 23, 1980 report that claimant's back injury aggravated on June 23, 1980. Claimant apparently returned to work again on June 25, 1980 but suffered another exacerbation on or about July 7, 1980. Claimant's condition once again became stationary and the employer issued another Notice of Closure dated September 17, 1980 allowing claimant temporary total disability benefits from March 27 to April 31, 1980. On January 15, 1981, pursuant to a request to review the employer's September 17, 1980 Notice of Closure, a Determination Order issued upholding that Notice in its entirety.

I

The employer first contends that the Referee erred in finding the employer's September 17, 1980 closure to be improper and in his assessment of penalties against the employer in conjunction with that finding. The Referee based his finding that the employer's closure was not supported by substantial evidence on his conclusion that the employer chose to "...completely disregard Dr. Stanford's reports, which indicated that claimant had sustained permanent disability as a result of the March 27, 1980 injury." The claimant has treated with various doctors throughout the history of these two claims. This has resulted in the generation of a plethora of sometimes conflicting and generally confusing medical reports. A careful examination of all of the reports serves to clarify the situation, however, and leads to the conclusion that the Referee was incorrect in finding the employer's closure to be improper.

Claimant originally was treated by Dr. Davies and Dr. Stanford after his 1979 shoulder injury. Following his return to work and subsequent injury of March, 1980, he was treated by Dr. Davies and Dr. Hoppert. He had been treated by Dr. Stanford as

late as February, 1980 in relation to his previous shoulder injury, but did not see him again until July, 1980. Again, the treatment with Dr. Stanford was primarily in regard to the 1979 shoulder injury. This becomes quite apparent from Dr. Stanford's reports of October 27, 1980 and December 5, 1980 which only discuss the claimant's shoulder condition. In his report of December 29, 1980 Dr. Stanford indicated that he had never treated claimant in regard to a low back injury of March 27, 1980. In his January 28, 1981 report Dr. Stanford indicated that he understood that the claimant had reinjured his shoulder in March, 1980, although he was unaware of the low back injury. Dr. Stanford clarifies this somewhat in his report of February 13, 1981 in which he indicates that his source of knowledge regarding the March "reinjury" of claimant's shoulder was claimant's counsel, and that claimant's shoulder condition in July, 1980, subsequent to the March injury, was basically the same as it had been in February, 1980, prior to the back injury. There is, in fact, no evidence that claimant reinjured his shoulder in March, 1980.

All of the above noted communications make it clear that Dr. Stanford's treatments and reports related only to claimant's 1979 shoulder injury and had nothing to do with the March, 1980 back claim. The employer's Notice of Closure of September, 1980 only related to claimant's March, 1980 back claim. Reliance by the Referee on Dr. Stanford's reports for his conclusion that the employer improperly closed the back claim is therefore misplaced. There are no reports from Dr. Stanford indicating that claimant suffered disability to his back as a result of the March, 1980 injury, and he indicates in his February 13, 1981 report that any restrictions he had placed on the claimant were attributable only to the 1979 shoulder injury. Dr. Stanford's reports do not support the Referee's conclusion of improper closure of claimant's back claim by the employer.

Turning to the reports of Dr. Hoppert, issued subsequent to claimant's March, 1980 injury, we find that they also fail to support the Referee's conclusion. Dr. Hoppert's August 20, 1980 chart note indicates that claimant had enjoyed a complete remission of pain with regard to his back and had full 90° straight leg raising and no lumbosacral or paravertebral muscle spasm. In his report of September 3, 1980 Dr. Hoppert rated the degree of permanent impairment to the claimant's back as a result of the March, 1980 injury to be none. Additionally in his September 12, 1980 report he relates that the restrictions he suggested for the claimant were not the result of his industrial injury, but due to his physical characteristics in general which results in his susceptibility to various inflammatory processes precipitated by lifting activity. He adhered to his opinion that claimant suffered no permanent impairment due to the March, 1980 injury. With regard to claimant's back injury of March, 1980, to which the September, 1980 employer's Notice of Closure related, we therefore find that closure to have been supported by substantial evidence, which indicated that claimant suffered no permanent disability as a result of that injury. Since a finding that the employer's closure was not supported by substantial evidence presages the imposition of a penalty under ORS 656.268(3), that portion of the Referee's order must also be reversed.

II

The employer argues as a second issue that the Referee's award of a total of 20% unscheduled permanent partial disability is excessive and not supported by a preponderance of medical evidence or by claimant's testimony. We agree with regard to claimant's back condition. As we noted above, Dr. Hoppert was unable to find any permanent impairment to the claimant's back due to the March, 1980 injury, although he felt claimant's physical and biological characteristics made him naturally more susceptible to such flare-ups. Upon examination by the Orthopaedic Consultants on December 5, 1980, it was found that claimant's back strain had resolved and that there was no permanent impairment. This opinion was reaffirmed upon reexamination on March 23, 1981. There is, therefore, no medical evidence that claimant suffered any permanent impairment to his back as a result of his March 27, 1980 industrial injury. We are not persuaded that claimant's testimony supports an award of permanent partial disability in the face of this overwhelming and contrary medical evidence.

We affirm the Referee's award of 10% unscheduled permanent partial disability for claimant's shoulder injury. The Orthopaedic Consultants rated claimant's permanent impairment as 5% of the left shoulder and anticipated continued improvement. Dr. Hoppert agreed. Dr. Stanford, in his April 15, 1981 report indicated that claimant's tendonitis had resolved quite well and that he could perform most jobs but that above-shoulder lifting would likely result in some difficulty. Considering claimant's minor impairment, we believe the Referee's award of 10% unscheduled permanent partial disability for claimant's shoulder to have been adequate.

ORDER

The Referee's orders dated August 31, 1981, November 3, 1981 and November 16, 1981 are affirmed in part and reversed in part. Those portions of the orders finding the employer's Notice of Closure dated September 17, 1980 to be improper and assessing a penalty against the employer for that closure are reversed. Those portions of the orders allowing claimant an award of 10% unscheduled permanent partial disability for his back injury of March 27, 1980 are reversed. The remainder of the orders is affirmed.

ALVAH HUBBARD, Claimant	WCB 81-05865
Cowling, Heysell et al, Claimant's Attorneys	June 30, 1982
SAIF Corp Legal, Defense Attorney	Denial of Reconsideration

The Board has received a motion for reconsideration of its Order on Review dated June 8, 1982.

Having considered the motion, it is hereby denied.

IT IS SO ORDERED.

BAMBI NEWLIN, Claimant	WCB 80-09128
Welch, Bruun et al, Claimant's Attorneys	June 30, 1982
Keith Skelton, Defense Attorney	Order on Review

Reviewed by Board Members Lewis and Barnes.

The employer seeks Board review of Referee Johnson's order which granted claimant compensation for 30% unscheduled disability. The employer contends that the Determination Orders, which granted claimant no compensation for permanent disability, should be reinstated and affirmed.

The sole issue before us is the extent of claimant's disability resulting from an injury sustained on August 14, 1979. The diagnosis at that time was musculo-ligamentous strain of the cervical and thoracic spine. The consensus of the medical evidence is that claimant's impairment is minimal. Dr. Anderson found full range of motion in the neck and shoulder. Claimant's treating doctor, Dr. Hartmann, concurs with the minimal rating insofar as claimant's loss of function of the neck is concerned, but also finds residuals from the chronic muscle strain of the cervical and thoracic spine. We conclude that claimant's impairment rating should be 10%. Claimant's social/vocational factors will be considered in light of OAR 436-65-600, et. seq. Claimant is 25 years old (-7 value; OAR 436-65-602) with a high school education (0

value; OAR 436-65-603). Although she has taken some community college courses, it appears that she was unable to complete any of the classes. Claimant's work has an SVP value of +3 (+3 impact; OAR 436-65-604). Claimant is precluded from the job she was doing at the time of her injury due to certain restrictions placed upon her activities by her doctors (+5 value, OAR 436-65-605). Based on a consideration of her education, restrictions and past experience, we find claimant has at least 17% of the general labor market still open to her (0 value; OAR 436-65-608). After combining these figures, we conclude that claimant would be more properly compensated with an award equal to 48° for 15% unscheduled disability due to her August 14, 1979 industrial injury.

ORDER

The Referee's order dated November 27, 1981 is modified.

Claimant is hereby granted compensation equal to 40° for 15% unscheduled disability. This award is in lieu of that granted by the Referee's order. The attorney fee granted by the Referee should be modified accordingly.

The remainder of the Referee's order is affirmed.

EULA V. WALLACE, Claimant
Charles Paulson, Claimant's Attorney
Schwabe, Williamson et al, Defense Attorneys

WCB 81-01971
June 30, 1982
Order on Review

Reviewed by Board Members Ferris and Barnes.

Claimant seeks Board review of Referee Leahy's order which upheld the carrier's partial denial. As best as we understand his order, the Referee reached that conclusion in part because of his apparent finding that claimant had never perfected an occupational disease claim. Claimant argues she did perfect an occupational disease claim for degenerative disc disease and that her claim is compensable on the merits.

The informality with which issues appear to be formed in workers compensation cases are sometimes frustrating to those connected with the workers compensation system. In this case, for example, it is obvious to us that claimant sincerely thinks she has made an occupational disease claim and the carrier, with equal sincerity, thinks she has not made an occupational disease claim. However, even if we were to assume that claimant had perfected an occupational disease claim for degenerative disc disease, we find any such claim not compensable on the merits.

Dr. Sacamano, who has been claimant's treating physician for some time, does not think claimant's work activity contributed to the progression of her degenerative disease. Dr. Duff shares that opinion. Dr. Cohen believes otherwise, offering the opinion that claimant's problem is "work related" without explanation or elaboration. The test for compensability of an occupational disease claim is whether work activity was the major cause. SAIF v Gygi, 55 Or App 570 (1982). It is far from clear that Dr. Cohen's opinion, even considered alone, satisfies the Gygi standard. But it is clear that, considering all the medical evidence, the preponderance does not establish that claimant's work activity was the major cause of claimant's degenerative disc disease.

ORDER

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

CARL F. WEST, Claimant
Zafiratos & Roman, Claimant's Attorneys
Schwabe, Williamson et al, Defense Attorneys

WCB 80-00288
June 30, 1982
Order Vacating Order of Dismissal

On June 25, 1982 the Board entered an order sua sponte dismissing claimant's request for review.

It has come to the Board's attention that this order was entered in error.

ORDER

The Order of Dismissal entered on June 25, 1982 is hereby vacated and set aside.

ARNOLD WYTTEBERG, Claimant
Pozzi, Wilson et al, Claimant's Attorneys
Daniel Meyers, Defense Attorney
Wolf, Griffith et al, Defense Attorneys

Own Motion 81-0050M
June 30, 1982
Own Motion Order

This is a companion case to Arnold Wyttenberg, WCB Case Nos. 81-01180 and 81-01284 (decided this date). The issue is carrier responsibility.

For the reasons stated in the companion case, the request for own motion relief is denied.

IT IS SO ORDERED.

CHAIRMAN BARNES DISSENTING:

For the reasons stated in my dissenting opinion in Arnold Wyttenberg, WCB Case Nos. 81-01180 and 81-01284 (decided this date), I would grant own motion relief by ordering EBI to accept responsibility for claimant's 1980 hernia condition and treatment as causally related to his 1974 hernia claim for which EBI is responsible.

ARNOLD WYTTEBERG, Claimant
Pozzi, Wilson et al, Claimant's Attorneys
Daniel Meyers, Defense Attorney
Wolf, Griffith et al, Defense Attorneys

WCB 81-01180 & 81-01284
June 30, 1982
Order on Review

Reviewed by the Board en banc.

Farmers Insurance Company seeks Board review of Referee Mulder's order which set aside its denial of claimant's claim for compensation in connection with his 1980 hernia treatment. The issue is carrier responsibility: whether claimant's 1980 hernia treatment is the responsibility of Farmers on the theory that claimant sustained a new injury in 1980 while employed by Garrett Freightliners, insured by Farmers, or instead whether claimant's 1980 treatment relates back to his prior 1974 hernia claim that arose while he was employed by Bower Moving and Storage, then insured by EBI.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated October 23, 1981 is affirmed. Claimant's attorney is awarded \$450 as and for a reasonable attorney's fee, payable by Farmers.

CHAIRMAN BARNES DISSENTING:

The basic facts are not disputed. In 1974 claimant filed a hernia claim while employed by Bower Moving and Storage, then insured by EBI. The claim was accepted and claimant's hernia was surgically repaired. In 1980 claimant filed another claim for hernia and associated infection while employed by Garrett Freightliners, then insured by Farmers.

The two carriers concede compensability of the 1980 claim; the issue is responsibility. Is the 1980 claim causally linked to the prior 1974 claim for which EBI would be responsible? Or, instead, is the 1980 claim a "new injury" claim for which Farmers would be responsible?

Drs. Reichle and Battalia have expressed opinions. They generally agree that claimant's infection in 1980 at the site of his 1974 hernia surgery preceded and was a material cause of claimant's 1980 hernia. The question thus becomes: what is the etiology of the 1980 infection?

Dr. Reichle's bottom line is that claimant's lifting activities at Garrett Freightliners caused the infection. Dr. Battalia, on the other hand, believes that claimant's work at Garrett "absolutely did not" cause the infection. Dr. Battalia instead opines that the infection was a suture abscess associated with the non-absorbable suture material that was used at the time of claimant's 1974 hernia surgery.

Neither medical opinion is overwhelming. The passage of so much time between the 1974 surgery and symptoms of an active infectious process in 1980 makes Dr. Battalia's opinion hard to accept in logic, common experience or common sense. However, Dr. Reichle's opinion that lifting caused an infection makes even less sense. Given that compensability has been conceded and the only issue is responsibility, I find Dr. Battalia's opinion to be slightly more plausible. It follows that responsibility for compensation in connection with claimant's 1980 infection and hernia should be placed on Bower Moving and Storage and its insurer, EBI.

I would reverse the Referee's order dated October 23, 1981; reinstate and affirm the denial issued by Farmers Insurance Company dated January 28, 1981; find claimant's 1980 hernia condition and treatment to be the responsibility in the companion own motion case decided this date; and order EBI to reimburse Farmers for a claim incurred in reliance on the Referee's order.

WORKERS' COMPENSATION CASES

April-June 1982

Decided in the Oregon Court of Appeals:

	page
<u>Anderson v. SAIF</u> , 57 Or App 770 (1982)-----	853
<u>Bales v. SAIF</u> , 57 Or App 621 (1982)-----	845
<u>Cascade Steel Rolling Mills v. Madril</u> , 57 Or App 398 (1982)---	805
<u>Egge v. Nu-Steel</u> , 57 Or App 327 (1982)-----	803
<u>Employers Ins. of Wausau v. Dozier</u> , 56 Or App 627 (1982)--	782
<u>Gallea v. Willamette Ind.</u> , 56 Or App 763 (1982)-----	787
<u>Gray & Co. v. McKenzie</u> , 57 Or App 426 (1982)-----	815
<u>Hicks v. Fred Meyer, Inc.</u> , 57 Or App 68 (1982)-----	796
<u>Holub v. SAIF</u> , 57 Or App 571 (1982)-----	840
<u>Hubble v. SAIF</u> , 57 Or App 513 (1982)-----	824
<u>Kemple v. Myers Drum Co.</u> , 57 Or App 733 (1982)-----	851
<u>Langston v. K-Mart</u> , 56 Or App 709 (1982)-----	784
<u>Larson v. Brooks-Scanlon</u> , 57 Or App 561 (1982)-----	831
<u>Nat'l Farmers' Union Ins. v. Scofield</u> , 57 Or App 23 (1982)-----	792
<u>Partridge v. SAIF</u> , 57 Or App 163 (1982)-----	799
<u>Peterson v. Eugene Burrill Lumber</u> , 57 Or App 476 (1982)-----	820
<u>Stone v. SAIF</u> , 57 Or App 808 (1982)-----	859
<u>Thornsberry v. SAIF</u> , 57 Or App 413 (1982)-----	810
<u>Univ. Medical Associates v. Multnomah Co.</u> , 57 Or App 451 (1982)-----	833
<u>Westfall v. Multnomah Co.</u> , 57 Or App 459 (1982)-----	816

Decided in the Oregon Supreme Court:

<u>Bracke v. Baza'r, Inc.</u> , 293 Or 239 (1982)-----	868
<u>Fossum v. SAIF</u> , 293 Or 252 (1982)-----	884
<u>McIntyre v. Wright</u> , 292 Or 784 (1982)-----	867
<u>Satterfield v. Satterfield</u> , 292 Or 780 (1982)-----	864

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
Ronny L. Dozier, Claimant.
EMPLOYERS INSURANCE OF WAUSAU,
Petitioner,
v.
DOZIER et al,
Respondents.

(WCB Nos. 80-02053, 80-02054, CA A21473)

Judicial Review from Workers' Compensation Board.

Argued and submitted January 13, 1982.

Frank A. Moscato, Portland, argued the cause for petitioner. With him on the brief was Moscato and Meyers, Portland.

Michael Gutzler, Salem, argued the cause for respondent Ronny L. Dozier. On the brief were Gary Allen and Allen & Vick, Salem.

Emil Berg, Portland, argued the cause for respondent Brooks-Scanlon, Inc. With him on the brief was Wolf, Griffith, Bittner, Abbott & Roberts, Portland.

Before Richardson, Presiding Judge, and Thornton and Van Hoomissen, Judges.

THORNTON, J.

Affirmed. Costs and attorney fee awarded to claimant, payable by Wausau. Brooks-Scanlon awarded costs from Wausau.

THORNTON, J.

Based upon our de novo examination of this record we reach the following conclusions:

(1) Wausau's contention that it cannot be held responsible for the claim because claimant did not request a hearing within 60 days after a November 15, 1979, "denial letter" cannot be sustained. The November 15, 1979, letter was written by a claims examiner for Wausau in response to claimant's attorney's request for medical information Wausau had on file. The information was forwarded along with a statement that the "claim remains in a denied status." This letter does not comply with ORS 656.262(6) (current version at ORS 656.262(7)). It was not sent to claimant, it did not contain reasons for a denial, and it did not state the 60-day appeal-right language. Further, even as a denial, it was ambiguous, because it might have referred to claimant's Parkinson's disease claim denial and not his aggravation claim. In sum, as claimant's attorney states, the letter was nothing more than a routine cover letter forwarding documents to claimant's attorney at the request of that attorney. Claimant was prejudiced by the failure to comply with ORS 656.262(6) because neither claimant nor his attorney took the letter to be a denial of the aggravation claim.

(2) While the evidence is not undisputed, the preponderance of the medical evidence is that claimant suffered an aggravation of his previous injury while Wausau was on the risk.

(3) Claimant is entitled to recover against Wausau his costs and an attorney fee under ORS 656.382(2). *Hanna v. McGrew Bros. Sawmill*, 45 Or App 757, 609 P2d 422 (1980).

(4) Brooks-Scanlon is also entitled to recover its costs on appeal from Wausau.

Affirmed. Costs and attorney fee awarded to claimant, payable by Wausau. Brooks-Scanlon awarded costs from Wausau.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation
of Olive E. Langston, Claimant.

LANGSTON,
Petitioner,

v.

K-MART,
Respondent.

(No. 80-04325, CA A22045)

Judicial Review from Workers' Compensation Board.

Argued and submitted December 9, 1981.

W. D. Bates, Jr., Eugene, argued the cause and filed the
brief for petitioner.

Marshall C. Cheney, Portland, argued the cause and
filed the brief for respondent.

Before Gillette, Presiding Judge, and Young, Judge, and
Roberts, Judge Pro Tempore.

GILLETTE, P. J.

Affirmed.

GILLETTE, P. J.

The issue in this workers' compensation case is whether the injury claimant suffered in California in 1979 is compensable under Oregon's Workers' Compensation Law. Both the referee and the Workers' Compensation Board (Board) held that it is not. Claimant appeals. We affirm.

Claimant was employed by K-Mart when she suffered a job-related injury in 1979. She began working for K-Mart in 1969 in Washington. In 1977, she was promoted to Regional Personnel Supervisor, a position that required her to travel throughout 14 states opening new stores. Later in 1977, claimant asked to be reassigned. K-Mart assigned her to a store in Springfield, Oregon, with the understanding that she would remain there permanently. She moved from Washington to Springfield.

In July, 1978, claimant was again assigned to her previous job of Regional Personnel Supervisor. She continued to reside in Oregon, although her regional headquarters was in Los Angeles, California. K-Mart withheld Oregon income taxes from her wages, and claimant filed an Oregon income tax return annually. However, from July, 1978, when claimant resumed her position as Regional Personnel Supervisor, until the time of her August, 1979, injury, claimant performed no duties in Oregon. On discovering, following her return to work in October, 1979, that she would not be able to continue working, claimant resigned. She then spent her final two weeks of employment for K-mart as a substitute employe at the Springfield store.

The referee and the Board denied claimant's claim on the ground that she was not an Oregon employe for workers' compensation purposes. ORS 656.126(1) entitles "a worker employed in this state," who "temporarily leaves the state incidental to that employment" and is injured while outside the state, to Oregon Workers' Compensation benefits. The inquiry is focused on the extent to which claimant's work outside the state was *temporary*. In *Kolar v. B & C Contractors*, 36 Or App 65, 69, 503 P2d 562 (1978), the claimant, who was hired in Oregon to work for an Oregon employer, was injured while working for that

employer in Washington. This court held that claimant was entitled to Oregon workers' compensation benefits, pointing out that, according to the evidence, claimant was scheduled to return to work on projects in Oregon following completion of his assignments in Washington.

In contrast, claimant's out-of-state work here was not temporary. As the referee correctly concluded:

"The critical determinant is whether a worker is permanently, as opposed to temporarily, employed in Oregon at the time of an out-of-state injury: *Kolar, supra; Jackson v. Tillamook Growers Co-op*, 39 Or App 247 [, 592 P2d 235] (1979). Not only am I unable to find that the claimant was permanently employed in Oregon in August, 1979, she was not even temporarily employed in Oregon at that time. Her work in California was not in any way incidental to Oregon employment * * *."

Our conclusion that claimant was not an Oregon employe in August, 1979, is not affected by claimant's return to Springfield to work for her final two weeks with the company. That return to work in Oregon was after her resignation from employment with K-Mart and was the result of a discontinuance of her non-Oregon employment.

Claimant also assigns error to the Board's failure to award her penalties and attorney's fees. She argues that her claim was not denied within 60 days of the notice to the employer pursuant to ORS 656.262(5), that her employer failed to supply claims information within the required time, and that both such failures were unreasonable. She therefore seeks penalties and attorney's fees pursuant to ORS 656.262(8), which then stated:¹

"(8) 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."

We believe *Kolar*, by implication, also resolves this question. If claimant was not an employe subject to the

¹ The section was amended in 1981 to become ORS 656.262(9). Or Laws 1981, ch 535, § 7.

Oregon Act at the time of her injury, it follows that refusal to pay her penalties and attorney fees were not unreasonable. *See also, Bell v. Hartman*, 289 Or 447, 615 P2d 314 (1980).

Affirmed.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
Cindy Gallea, Claimant.

GALLEA,
Petitioner,

v.

WILLAMETTE INDUSTRIES,
Respondent.

(WCB Case No. 80-07747, CA A21787)

Judicial Review from Workers' Compensation Board.

Argued and submitted December 4, 1981.

Gerald Doblle, Portland, argued the cause for petitioner.
On the brief were James L. Francesconi and Doblle,
Francesconi & Welch, P.C., 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 Richardson, Presiding Judge, and Thornton and
Van Hoomissen, Judges.

THORNTON, J.

Affirmed.

Van Hoomissen, J., dissenting.

THORNTON, J.

Claimant raises two issues in this workers' compensation case. She contends that she is entitled to an unscheduled award for permanent partial disability to her shoulder and that the Board erred in not considering an additional medical report and in not remanding her claim to the referee for consideration of the report. We affirm.

Claimant is 27 years of age. She was employed by Willamette Industries. In March of 1979, she first felt a "snap" in her right wrist while working on the "green chain."¹ Although she felt pain in her wrist and arm, she did not see a doctor for the problem until August, 1979, when she saw Dr. Crook. He advised her to perform only light duties at the mill.

Claimant's injury was diagnosed by a neurologist, Dr. Throop, as a carpal tunnel syndrome and on December 4, 1979, right carpal tunnel decompression surgery was performed by Dr. Crook. Claimant returned to work but was able to work only two months of fairly light duty. On January 30, 1980, she saw Dr. Crook complaining of diffuse pain and numbness in her entire right arm. Dr. Crook could not make positive orthopedic or neurological findings to support the complaints. She was re-examined by Dr. Throop in March, 1980. He concluded that claimant's symptoms were either functional in nature or due to an apparent compromise at the thoracic outlet region. He stated that the positive Adson's maneuver (a method of detecting thoracic outlet syndrome), the nature of the diffuse symptomatology and the electrical studies reflected a lesion at the brachio-plexus level. Dr. Throop's report, however, failed to relate this condition specifically to claimant's March, 1979, injury.² After talking to Dr. Throop, Dr. Crook reported that:

"Apparently the patient has electrical evidence of slowing in the area of the thoracic outlet on the right side which would explain her rather diffuse and at times bizarre symptoms. The symptoms, historically, appear to

¹ Working on the "green chain" involved pulling lumber off a moving chain and placing it in piles.

² The report did note that claimant stated that she had never had any relief from her right hand and forearm. Dr. Throop further noted that claimant related numbness and pain in her upper right arm after returning to work.

be exacerbated by her work activities at the mill and for this reason it has been elected to treat her with 6 weeks of relative inactivity. She will be reassessed at the end of that time."

Dr. Crook saw claimant again April 30, 1980, and reported that she continued to complain of considerable pain in her right shoulder despite the fact that she had not worked since she was last seen. He also reported a positive Adson's maneuver bilaterally at that time. He advised that consideration be given to vocational rehabilitation and felt that if claimant's symptoms continued to increase, a thoracic outlet decompression might be required.

On July 11, 1980, Dr. Crook reported claimant still complained of her right girdle, was tender over the thoracic outlet to a mild degree and displayed a diffuse decreased sensation in her right upper extremity. On July 23, 1980, he felt claimant was medically stationary, because her symptoms continued to be stable and she was not receiving diagnostic or therapeutic treatments.

A Determination Order on August 18, 1980, awarded claimant 5 percent for loss of use of her right forearm. On August 27, 1980, Dr. Crook again saw claimant who continued to complain of pain. At that time, she had a negative Adson's maneuver bilaterally. He believed claimant could do work that did not require strenuous or repetitive use of her upper extremities.

Claimant requested a hearing and testified that she continued to experience pain and discomfort from March, 1979, to the time of the hearing. She found household functions difficult to perform. She stated that although her wrist had improved, her arm sometimes feels frozen and numb and that she experiences sharp pain in her neck and shoulder. The referee awarded claimant 15 percent for unscheduled permanent partial disability to claimant's right shoulder equal to 48 degrees in addition to the earlier 7.5 degree Determination Order for the disability of her wrist. The Board affirmed the award for the wrist injury, but reversed the unscheduled shoulder award, finding that there was no medical evidence causally relating the shoulder condition to the wrist injury, establishing that the shoulder condition is permanent or establishing any impairment of wage earning capacity.

The burden is on claimant to establish by a preponderance of the evidence that the particular disability, specifically her right shoulder condition, was legally and medically caused by a compensable accident. *Edwards v. SAIF*, 30 Or App 21, 23, 566 P2d 189, *rev den* 279 Or 301 (1977). Proof of medical causation here required expert medical evidence establishing that the thoracic outlet syndrome was caused by a compensable accident. Neither Dr. Crook nor Dr. Throop stated that claimant's shoulder condition was caused by the March, 1979, incident, or by any other on-the-job injury. Dr. Crook's report that her "symptoms, historically, appear to be exacerbated by her work activities at the mill" does not establish that an on-the-job injury *caused* the thoracic outlet syndrome. We find that claimant has failed to establish that her thoracic outlet syndrome was caused by a compensable accident.

Claimant also assigns as error the Board's refusal to consider an additional medical report by Dr. Crook or to remand the claim to the referee for admission of the report. In the alternative, claimant requests that we consider the additional report. ORS 656.298(6). The report was in the form of a letter by Dr. Crook to claimant's attorney. In pertinent part, it stated:

"The March 5, 1980 office note, which is also enclosed for your review, clearly demonstrates that the patient did indeed have a thoracic outlet syndrome. From a historical standpoint, I would conclude that the thoracic outlet syndrome probably was present to an increasing degree all along and in the absence of any other historical evidence to explain its existence, would conclude that it was a result of her industrial injury."

The report was apparently based on examinations conducted by Dr. Crook on October 30, 1979, and March 5, 1980. The letter was written by Dr. Crook on October 27, 1980, the date of the hearing, but was not received by claimant's attorney until a day or two after the hearing. No attempt was made to keep the record open for submission of the letter.³ The first attempt to admit the letter was after employer requested Board review on December 5, 1980.

³ Claimant's attorney stated in a letter to the Board on December 12, 1980, prior to the appeal, that when he received the letter he contacted employer's

The Board had no authority to consider this additional evidence not admitted at the hearing and not a part of the record. *Brown v. SAIF*, 51 Or App 389, 625 P2d 1351 (1981). Therefore, claimant's request that the Board admit the report was properly denied. Under ORS 656.295(5), the Board may remand a case to the referee for further evidence taking if the case has been improperly, incompletely or otherwise insufficiently developed. Because a report by Dr. Crook could have been available well in advance of the hearing, given the dates of the examination, and because it was based on examinations conducted by Dr. Crook months before the hearing, we cannot say that the Board abused its discretion under ORS 656.295(5) in refusing to remand the case to the referee.

Claimant requests, alternatively, that we consider the letter ourselves. For like reasons, we decline to do so. The report was "obtainable" under ORS 656.298(6) at the time of the hearing.⁴ See also *Maumary v. Mayfair Markets*, 14 Or App 180, 183-84, 512 P2d 1370 (1973); *Mansfield v. Caplener Bros.*, 3 Or App 448, 452, 474 P2d 785 (1970).

Affirmed.

VAN HOOMISSEN, dissenting.

I respectfully dissent because in my view a legitimate claim is being denied here as a result of a misunderstanding between the attorneys. In a case such as this, where the Board has reversed the referee's order which

attorney. He contends that he did not attempt to introduce the report because employer's attorney asked that the report not be introduced until after the Opinion and Order for the reason that there might not be a need for the report if the referee found the shoulder claim compensable. Employer's attorney responded in a letter to the Board on December 29, 1980, that after hearing of the report, he told claimant's attorney that he would object to the admission of the report and that it would be necessary to take additional testimony if the report were admitted. He maintained that as a result of the conversation "claimant decided not to submit the medical report at this time, but advised that [claimant's counsel] might attempt to submit it later. I advised that I would have the same objection later as I had at that time * * *."

⁴ Claimant does not request that we remand the case to the referee for further evidence taking. See ORS 656.298(6); *Penifold v. SAIF*, 49 Or App 1015, 621 P2d 642 (1980). Even if she had requested a remand, we find no compelling reason to do so. *Russell v. A & D Terminals*, 50 Or App 27, 621 P2d 1221 (1981).

Cite as 56 Or App 763 (1982)

769

granted claimant an unscheduled disability award for her right shoulder condition, all doubts should be resolved in favor of a full and complete resolution of the claim on its merits. The workers' compensation law is remedial in character and should be liberally construed to promote the beneficial results intended by the legislature. *Newell v. Taylor et al*, 212 Or 522, 321 P2d 294 (1958). Procedural technicalities should yield to the public policy implicit in the law. I would remand to the referee for consideration of Dr. Crook's report. ORS 656.298(6).

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.

On respondent Employers Insurance of Wausau's petition for reconsideration (filed March 4, 1982) of former opinion on reconsideration filed February 2, 1982 (55 Or App 820, 639 P2d 718).

Frank A. Moscato, Deborah S. MacMillan, and Moscato & Meyers, Portland, for petition.

Before Richardson, Presiding Judge, and Thornton and Van Hoomissen, Judges.

THORNTON, J.

Reconsideration granted. Former opinion, 54 Or App 804, 636 P2d 970, adhered to as modified. Former per curiam opinion, 55 Or App 820, 639 P2d 718, withdrawn. No costs to any party on reconsideration.

THORNTON, J.

In its two petitions for reconsideration respondent Employers Insurance of Wausau correctly points out that the fact statement in the previous opinion (54 Or App 804, 636 P2d 970 (1981)), is in error, namely that there is nothing to indicate that claimant mailed his report of the 1974 accidental injury to his employer or that he hand-carried it to the employer's office. Nevertheless, we conclude that Wausau cannot prevail because we are satisfied after again reviewing the record that claimant's claim was not barred by untimeliness.

Before a claim can be barred for late filing, the employer/insurer must overcome the "presumption that [s]ufficient notice of injury was given and timely filed * * *." ORS 656.310(1)(a). Claimant testified that following the accident of August 27, 1974, he "filled out the regular form that we had and I filled it in on my next time sheet for that day." Claimant also introduced into evidence a Supervisor's Accident Investigation Report book which contained, *inter alia*, a carbon copy of the handwritten report claimant testified he made out reporting the August 27, 1974, incident. Claimant's supervisor at the time, Kenneth Papenhausen, testified in detail concerning reporting procedures. He stated that, while he had no specific recollection of having seen this particular accident report, since claimant worked by himself, he kept his own Supervisor's Accident Investigation Report Book; that he vaguely recalled claimant's accident; and that it was customary for him to receive the originals of these reports, scrutinize them and then go to the office manager, who in turn would file them in the personnel files. We note that Wausau in a letter to claimant dated May 3, 1979, denied claimant's 1974 claim, not on the basis of lack of notice to the employer, but, rather, because

" * * * it appears your problems are the result of a May 23, 1977 incident rather than a minor incident in 1974."

Also, we point out that on February 21, 1979, Thomas E. Davis, Office Manager of Lane Electric Cooperative (claimant's employer), wrote to Wausau:

" * * * * *

"Enclosed is an accident form used internally in 1974. The form was completed but a 801 Form was not submitted.

"The accident on August 27, 1974, occurred in the McKenzie River area while Mr. Scofield was installing a new service. He was pulling * * * wire up a steep incline and tripped over a log, injuring his left leg and back.

"The claim was originally filed with National Farmers Union, our carrier at that time. They rejected the claim because they were not the carrier at the time of the accident. In their rejection letter, they indicated that SAIF was the carrier. So many weeks went by before it was discovered that your company [sic] the insurer.

"I apologize for the delay, but if I can be of future help, please contact me.

" * * * * * "

There was also testimony that Lane Electric had apparently experienced some problems in keeping its personnel files and that claimant's personnel file at Lane Electric did not contain an original accident report form for his August 4, 1973, back injury, his August 27, 1974, back injury, or the May 23, 1977, incident, although the original of the supervisor's report is in a number of other files. Claimant testified that Mr. Newland, Lane Electric's office manager and later general manager, had told him that there was a report of the August, 1974, incident in his personnel file, possibly in 1974, 1976 or thereafter.

Taking into consideration all the above circumstances we conclude that claimant gave notice to the employer of the 1974 accident and complied with the requirement of proof of notice of claim to the employer under ORS 656.265(1).

Assuming *arguendo* that the claim was filed late, the burden is on the employer/insurer to prove prejudice due to late filing. *Vandre v. Weyerhaeuser Co.*, 42 Or App 705, 601 P2d 1265 (1979). Wausau has not met that burden. It relies on *Vandre* to show prejudice in the case at bar; however, it offers only conclusory statements and no facts. As noted in *Vandre*, the purposes of timely notice are to facilitate prompt investigation and prompt diagnosis of the injury, to provide prompt medical attention, to assure an opportunity to make an accurate record of the occurrence

and to decrease the chance for confusion because of intervening causes.

Here, the employer is not prejudiced, because claimant, the only witness, did not leave the area and was available to substantiate the injury. He received prompt medical treatment, and the employer had notice of the injury. Claimant, as supervisor on the job site, testified that at the time of the 1974 injury he completed a Supervisor's Accident Investigation Report and turned it in with his time sheets. The carbon copy of this report was retained in the book. No one from the employer was able to state categorically that the report was not turned in, and the employer had no explanation for why the original was missing and why a Workers' Report of Accidental Injury was not completed.

The employer does not deny that claimant slipped and fell in August, 1974. Indeed, witnesses for the employer testified that if Mr. Scofield said he had reported the injury, then he did, because he is "as honest as the day is long." Thus, the claim for injury of August 28, 1974, is not barred for want of timeliness because the employer had knowledge, was not prejudiced and the claim was properly filed.

Reconsideration granted. The language pertaining to the presumption of the receipt of a mailing (54 Or App at 811) is deleted. Because the factual error does not change the result in this case, we adhere to our former opinion (54 Or App 804, 636 P2d 970 (1981), in all respects. The per curiam opinion, 55 Or App 820, 639 P2d 718 (1982)), is withdrawn. No costs to any party on reconsideration.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
Vida Hicks, Claimant.

HICKS,
Petitioner,

v.

FRED MEYER, INC. et al,
Respondents.

(No. 79-00920, CA A21996)

Judicial Review from Workers' Compensation Board.

Argued and submitted January 13, 1982.

Alice Goldstein, Portland, argued the cause for petitioner. With her on the brief was Welch, Bruun and Green, Portland.

Patric J. Doherty, Portland, argued the cause for respondents. With him on the brief were Dennis R. VavRosky, E. Kimbark MacColl, Jr., and Rankin, McMurry, VavRosky & Doherty, Portland.

Before Richardson, Presiding Judge, and Thornton and Van Hoomissen, Judges.

RICHARDSON, P. J.

Affirmed.

RICHARDSON, P. J.

Claimant appeals the order of the Workers' Compensation Board which affirmed and adopted the opinion and order of the referee. The order awarded claimant 10 percent unscheduled permanent partial disability and allowed employer to recover by setoff an overpayment of temporary disability benefits. Claimant contends that her claim was prematurely closed and should be reopened for further medical treatment and temporary total disability payment. She also contends that the award was insufficient and that employer is foreclosed from seeking recovery of the overpayment because the issue was not initially raised before the referee. We conclude that the referee was correct in determining that the claim was properly closed and in the amount of the award. We address only claimant's argument regarding the overpayment.

Claimant does not dispute the fact that there was an overpayment or the amount. She argues that employer waived its right to recoup the overpayment by failing to raise the issue at the commencement of the hearing before the referee. She relies on *Wilson v. SAIF*, 48 Or App 993, 618 P2d 473 (1980), where we stated:

"The situation with which we are confronted is one in which there are competing policy considerations. On the one hand, there is a patent unfairness in permitting the claimant to retain over \$2,800 to which he is not entitled. On the other hand, there is the desirability of maintaining an orderly compensation process, wherein not only amounts of awards but also any deductions to be made from those awards are established by an appropriate action by the Board or its representative, rather than by the unilateral decision of a workers' compensation carrier." 48 Or App at 997.

In *Wilson*, the carrier acted unilaterally by deducting the amount of overpayment from the compensation awarded by the determination order. We held this practice to be improper and concluded:

"* * * A policy of requiring the carrier to raise a claim of offset as provided in ORS 656.268(3) will encourage the parties to litigate all of the issues at a single hearing, rather than creating new issues and a necessity for further hearings at a time after a final award of compensation has been determined. * * *" 48 Or App at 998.

In the present case employer did not raise the issue of overpayment until after the hearing was concluded and the referee had issued his opinion and order. Employer moved for reconsideration, and the referee issued an order on reconsideration permitting employer to deduct, pursuant to OAR 436-54-320, the amount of overpayment from the award. The referee recognized that *Wilson* requires a carrier to raise the issue at the hearing but declined to apply the rule, because *Wilson* was decided after the hearing in this case and "it would not be fair to penalize the carrier in this instance for not raising the offset issue at the time of the hearing." We do not accept the referee's reasoning; *Wilson* did not change the law but merely applied a previously-existing principle requiring resolution of all issues at an adjudicative hearing rather than by unilateral action.

However, we conclude that the referee's action was not improper. Although employer did not raise the issue at the hearing, neither did it act unilaterally. Employer brought the issue to the referee's attention; and had claimant contested the issue, the referee could have reopened the hearing. The procedure was not unfair to claimant, and the policy favoring an orderly compensation process was satisfied.

Affirmed.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
Lorene Partridge, Claimant.

PARTRIDGE,
Petitioner,

v.

STATE ACCIDENT INSURANCE FUND
CORPORATION,
Respondent.

(WCB No. 78-07510, CA A20647)

Judicial Review from Workers' Compensation Board.

Argued and submitted August 26, 1981.

D. Richard Hammersley, Portland, argued the cause for petitioner. With him on the brief was Brad L. Johnson, Portland.

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 appeals an order of the Workers' Compensation Board (Board) which reversed a referee's order granting her compensation for permanent total disability. The issues on appeal are (1) whether claimant's pre-existing psychiatric condition was worsened by her industrial injury, (2) whether claimant's osteoarthritis condition is related to her industrial injury, and (3) whether claimant has been adequately compensated for her knee injury by the determination order. We review *de novo*. ORS 656.298(6).

Claimant was 58 years old in January, 1976, when she sustained a work-related knee injury. Dr. Bernardez diagnosed a left knee strain. State Accident Insurance Fund (SAIF) accepted responsibility for that injury. Although both parties agree that claimant had pre-existing psychological problems, she had no history of professional treatment for those problems prior to her knee injury. Dr. Means, a psychologist, examined claimant in November, 1976. She reported that:

"[claimant] gives a history of withdrawal and the inability to establish close interpersonal relationships. She feels alienated, isolated, misunderstood, and not part of the general social environment. * * * She seems to create her own private fantasy world and she maintains this by being socially introverted. * * * In spite of the fact that [claimant] has always been outside the general social environment, she has managed to work and support herself for a number of years and I feel that she will be able to do this in the future. As long as she is able to stay aloof or emotionally unresponsive, she will be able to handle her life situation. * * *"

Claimant underwent two knee surgeries. In March, 1976, Dr. Robertson discovered a torn meniscus and extensive degenerative arthritis during surgery. He reported to SAIF that claimant could not return to work for an undetermined period of time. In September, 1976, Dr. Robertson reported to SAIF that claimant's knee condition was still not stationary and that he thought "we should wait another 3 to 6 months." The second surgery, in November, 1977, was for a total knee replacement. After claimant entered

the hospital for the second surgery, a psychiatrist recommended a transfer to Woodland Park Mental Health Center because of her depression and suicidal ideation. Since then she has been in and out of Woodland Park several times. Dr. Larsen became her treating psychiatrist at Woodland Park, and he examined her thereafter on a regular basis. He reported to SAIF that she suffers from severe depressive neurosis, with possible simple schizophrenia, with poor prognosis. He did not believe that she had experienced any significant depression prior to her knee injury.

Dr. Parvaresh, a psychiatrist, examined claimant in March, 1978. He noted that (1) she had family problems during her entire life, (2) she had never trusted people, (3) she had ongoing difficulties with her husband and children, and (4) she had her daughter jailed on a drug charge. He found that she presented signs and symptoms of psychosis and, under sufficient distress, psychotic symptomatology. He recommended that she continue psychiatric treatment with Dr. Larsen but concluded that the prognosis was guarded. He did not find a causal relationship between her psychological problems and her knee injury, and he concluded that the knee injury contributed neither directly nor materially to her psychiatric disorder. He thought that, if she continued under psychiatric care, she could return to her previous employment from a psychiatric viewpoint, but that the knee condition would govern her physical labor.

Dr. Waldram released claimant for work with a satisfactory total knee replacement in June, 1978; however, her prosthesis limited her ability to work. A determination order was issued in September, 1978. It allowed claimant temporary total disability from the date of the accident through August 1, 1978, less time worked, and 65 percent loss of the injured knee.

Claimant was readmitted to Woodland Park on January 31, 1979. She was discharged on February 16, 1979. The impression at that time was severe depressive neurosis with borderline psychosis and depression secondary to her industrial accident. Dr. Larson then told SAIF that he disagreed with Dr. Parvaresh's assessment. He noted that claimant had been employed throughout her life and that she had been self-sufficient until her knee injury.

His view was that her "underlying schizophrenic illness" was exacerbated by her knee injury and that her depression and suicidal ideation had a direct causal relationship to her injury, surgeries, pain and physical disability.

Claimant was examined in May, 1979, by Dr. Stolzberg, a psychiatrist and neurologist, who concluded that claimant's emotional problems were not related to her knee injury. She diagnosed claimant as suffering from a masochistic personality disorder and felt that her problems which followed the knee injury were simply the reaction of a disordered personality to a stressful injury. Dr. Stolzberg felt that claimant's psychological problems, viewed in this way, had not in fact worsened at all:

"The [masochistic] personality played a role in her dealing with the injury. And she dealt with the injury very much in the same way she dealt with other stresses in her life. * * * Her injury took away something that she needed to function and cope with the world * * *."

The doctor speculated that claimant's Woodland Park hospitalizations were related to the illness of her brother and the pregnancy of her unmarried daughter and not to her knee injury. Dr. Larsen disagreed. He felt that Dr. Stolzberg had either ignored or had been totally unaware of claimant's recent repetitive depression, psychiatric hospitalizations and the results of psychological testing. He again opined that claimant's emotional problems were the result of her knee injury.

We conclude that Dr. Larsen, the treating psychiatrist, proceeded upon an erroneous premise that claimant had no significant emotional problems before her knee injury. The weight of the evidence indicates otherwise. This conclusion is supported by the opinions of Drs. Parvarsh, Stolzberg and Means. Even Dr. Larsen referred to claimant's "underlying schizophrenic illness" in one of his reports to SAIF. The burden of proof was on claimant to prove by a preponderance of the evidence that her pre-existing psychiatric condition was worsened by her industrial injury. *Hutcheson v. Weyerhaeuser*, 288 Or 51, 602 P2d 268 (1979); *Briggs v. SAIF*, 36 Or App 709, 585 P2d 79 (1978). That she is now receiving treatment for her psychological condition, where before she was not, is only circumstantial evidence of a worsened condition. We take as more

168 Partridge v. SAIF

persuasive the testimony of SAIF's expert witnesses that there is no causal connection between claimant's knee injury and her psychological problems. We agree with the Board that she has failed to sustain that burden of proof.

We also agree with the Board that (1) claimant's osteoarthritic condition is not related to her industrial injury and (2) claimant has been adequately compensated for her knee injury by the determination order.

Affirmed.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
Lance David Egge, Claimant.

EGGE,
Petitioner,

v.

NU-STEEL,
Respondent.

(WCB 79-07880, CA A22857)

Judicial Review from Workers' Compensation Board.

Argued and submitted April 9, 1982.

Alice Goldstein, Portland, argued the cause for petitioner. With her on the brief was Welch, Bruun & Green, Portland.

Katherine H. O'Neil, Portland, argued the cause for respondent. On the brief were Ridgway K. Foley, Jr., and Schwabe, Williamson, Wyatt, Moore & Roberts, Portland.

Before Buttler, Presiding Judge, and Warren and Rossman, Judges.

BUTTLER, P. J.

Remanded to the referee for further proceedings in light of this opinion.

BUTTLER, P. J.

Claimant appeals from determinations by the Workers' Compensation Board (Board) denying his request for a remand to consider newly discovered evidence and upholding the referee's finding that no unscheduled disability to his low back resulted from a 20-foot fall onto concrete.

In denying claimant's original motion to remand,¹ the Board articulated its reason:

"It is unclear from the present record why the medical reports here in question could not have been obtained for the hearing by delaying the hearing date or keeping the record open * * *."

On *de novo* review, we conclude that the record furnishes a reasonable explanation. Claimant's Oregon physicians had not diagnosed any objective cause for claimant's low back pain. Claimant informed one doctor that he would keep on seeing doctors until he found out what was causing his pain. A month before the hearing, claimant moved to the state of Washington. At the time of the hearing, claimant had no reason to know that further medical examination would yield a different diagnosis, so there was no basis for his requesting postponement or continuation of the hearing. As part of his continuing effort to seek medical evaluation and treatment, claimant saw a physician in Washington, who reported the day after the referee's opinion issued that claimant's X-rays revealed a hairline vertebral fracture at the L1 level.

The foregoing facts constitute an explanation "why the evidence could not reasonably have been discovered and produced at the hearing." OAR 436-83-480(2). We remand to the referee for further proceedings in light of this opinion.² ORS 656.298(6).

Remanded to the referee for reconsideration.

¹ Subsequently, a renewed motion to remand was summarily denied by the Board. Claimant appeals from both orders denying remand.

² Our disposition makes it unnecessary to reach the issue whether claimant has demonstrated unscheduled disability without the benefit of the additional medical reports.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
Ralph S. Madril, Claimant.

CASCADE STEEL ROLLING MILLS,
Petitioner,

v.

MADRIL et al,
Respondents.

(WCB Nos. 78-57984, 79-8024,
79-00051, CA A21203)

Judicial Review from Workers' Compensation Board.

Argued and submitted November 25, 1981.

Dennis R. VavRosky, Portland, argued the cause for petitioner. With him on the brief were Patric J. Doherty, and Rankin, McMurry, VavRosky & Doherty, Portland.

Robert W. Muir, Albany, argued the cause for respondent Ralph S. Madril. With him on the brief was Emmons, Kyle, Kropp & Kryger, P.C., Albany.

David O. Horne, Beaverton, waived appearance for respondent Parker's Specialty Mfg.

Before Richardson, Presiding Judge, and Van Hoomissen and Warden, Judges.

VAN HOOMISSEN, J.

Remanded with instructions to clarify whether the award of 25 percent unscheduled low back disability was made with regard to the combined effect of claimant's injuries and his past receipt of money for such disabilities.

VAN HOOMISSEN, J.

Employer appeals from an order of the Workers' Compensation Board (Board) which affirmed an order of the referee awarding claimant compensation for permanent partial disability equal to 80 degrees for 25 percent unscheduled low back disability. The issue is whether the award of compensation was made with regard to the combined effect of claimant's present and past low back injuries and his past receipt of money for such disabilities. ORS 656.222.¹

In February, 1974, claimant incurred a back injury while working for his employer, Parker's Specialty Mfg. (Parker's). In March, 1974, Dr. Fax performed a bilateral partial laminectomy of L4-5 with disc removal. In March, 1975, Dr. Fax found claimant's condition medically stationary and released him to return to work. He immediately began working for Cascade Steel Rolling Mills (Cascade) as a forklift operator. In May, 1975, by determination order, claimant was awarded temporary total disability and 64 degrees for 20 percent unscheduled permanent partial disability of his low back. On hearing, a referee increased the award to 192 degrees for 60 percent unscheduled low back disability.

In February, 1976, claimant aggravated his back condition while working at Cascade. In August, 1977, a referee found that the 1976 injury constituted an aggravation of the 1974 Parker injury, not a new injury for which Cascade was responsible. In June, 1978, claimant's low back claim was closed by a second determination order which awarded him temporary total disability but reduced his permanent partial disability award to 30 percent unscheduled low back disability. Claimant did not appeal that determination. Prior to that determination, claimant had been fully paid the earlier 60 percent award.

¹ ORS 656.222 provides:

"Should a further accident occur to a worker who is receiving compensation for a temporary disability, or 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 March, 1979, claimant incurred a new back injury while working at Cascade. In April, 1979, a laminectomy and disc removal at L5-S1 were performed. In August, 1980, a referee awarded claimant compensation for permanent partial disability equal to 80 degrees for 25 percent unscheduled low back disability for the 1979 injury.

Employer contends that the Board and referee erred in failing to apply ORS 656.222. Here, claimant received compensation equal to 60 percent unscheduled low back disability for the Parker's-related injuries, even though it was later determined that he was entitled to only 30 percent disability. Employer urges that claimant's receipt of a 60 percent award for a 30 percent disability should have precluded him from receiving the additional 25 percent permanent partial disability awarded for the injury in March, 1979, because the combined effect of the two injuries amounts to only 55 percent disability.

Employer appears to contend that ORS 656.222 requires a strict arithmetic offset between the compensation received for the initial injury and the compensation awarded for the subsequent injury. In *Hannan v. Good Samaritan Hosp.*, 4 Or App 178, 198, 471 P2d 831, 476 P2d 931 (1970), *rev den* (1971), we recognized that "[w]e are required to consider the previous disability award when determining the award for claimant's present disability." In *Green v. State Ind. Acc. Com.*, 197 Or 160, 251 P2d 437, 252 P2d 545 (1952), in affirming an award of permanent partial disability on facts similar to the present ones, the Supreme Court stated:

"* * * The Workmen's Compensation Law must always be given a liberal interpretation. It is just a coincidence that plaintiff's second injury involved the same part of his body as that injured in the first accident, and that fact can have no bearing upon plaintiff's right to compensation for the permanent injury actually suffered as the result of the second accident.* * *" 197 Or at 169.

Employer argues that *Green* no longer stands as reliable authority, because the Oregon Legislature had not then adopted mandatory vocational benefits as a means of obtaining temporary total disability. In 1953, unlike today, injured workers were given permanent partial disability to assist "in readjusting [themselves] so as to be able to again

follow a gainful occupation." *Green v. State Ind. Acc. Com.*, *supra*, 197 Or at 169. Even though the overall statutory scheme has changed since that time, ORS 656.222 has not changed. Similarly, the policy of liberally construing the workers' compensation law has not changed, and therefore we cannot conclude that ORS 656.222 requires a more strict arithmetic offset than the court construed it to have in *Green*.

Although ORS 656.222 requires that, when a worker has been paid compensation for a permanent disability his award of compensation for future accidents shall be made with regard to the combined effect of his injuries and his past receipt of money for such disabilities, we hold that in unscheduled permanent partial disability cases nothing in the statute requires that a strict arithmetic offset be made between compensation for the first injury and subsequent injuries. A strict offset is particularly inappropriate when the condition underlying the first injury has substantially improved and a work-related injury is then incurred that diminishes the claimant's future earning capacity.² Here, the Board impliedly affirmed the referee's finding that:

" * * * Despite the large awards previously granted to claimant on account of the first injury, it would appear that the loss of future earning capacity has been substantially wiped away by the recovery process between the first injury and the second injury."

It is unclear from the referee's order whether the award to claimant of 25 percent low back disability was made "with regard to the combined effect of his injuries and his past receipt of money for such disabilities." ORS 656.222. The referee's order stated, in part:

"(2) Claimant is awarded permanent partial disability compensation equal to 80 degrees for 25 percent unscheduled low back disability as a result of the March 20, 1979 injury (Ex. 87, Claim 79-0051; WCB 79-8024) without any offsetting on account of awards made on any other claims * * *."

² Such an approach is consistent with the policy expressed in ORS 656.214(5), mandating that the basis for rating a disability shall be the permanent loss of earning capacity "due to the compensable injury."

The order can be read in at least two ways. First, it can be construed to mean that, in fact, the award was not made with regard to the past receipt of money for the initial injury. Second, it can be construed to mean that the referee considered the past awards and past injuries in making the award but decided that, considering that claimant had substantially recovered from the past injury and considering the effect of the present injuries on his future income-earning capacity, he was entitled to 25 percent unscheduled low back disability. If the first construction is correct, then the referee erred; but if the second version is correct, then the disability award was proper. Because we are unable to determine the basis of the Board's decision in affirming the referee, we remand to the Board for clarification.

Remanded to the Board with instructions to clarify whether the award of 25 percent unscheduled low back disability was made with regard to the combined effect of claimant's injuries and his past receipt of money for such disabilities.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

THORNSBERRY,

Appellant,

v.

SAIF CORPORATION,

Respondent.

(No. 81-649, CA A21302)

Appeal from Circuit Court, Coos County.

James A. Norman, Judge.

Argued and submitted January 26, 1982.

Robert K. Udziela, Portland, argued the cause for appellant. 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 Roberts, Presiding Judge Pro Tempore, Gillette and Young, Judges.

YOUNG, J.

Affirmed.

YOUNG, J.

Plaintiff commenced this action in circuit court for a redetermination of an order of the Workers' Compensation Department (Department), which reduced a prior court-adjudicated award of permanent total disability. The circuit court dismissed the complaint on the grounds that the court lacked jurisdiction of the subject matter and that a proceeding pending before the Workers' Compensation Board (Board) between the same parties constituted an election of remedies by plaintiff. Plaintiff appeals, and we affirm.

In 1953, plaintiff sustained an injury which was compensable under the workers' compensation law then in effect. On March 19, 1958, judgment was entered on a jury verdict, awarding plaintiff permanent and total disability. On October 3, 1980, the Department mailed a determination order on re-evaluation which terminated the permanent total disability award and awarded permanent partial disability.

On October 23, 1980, plaintiff requested a *hearing* before the Board to contest the Department's redetermination of his permanent total disability. On January 2, 1981, plaintiff filed a petition for *rehearing* with the State Accident Insurance Fund (SAIF). The request for a hearing before the Board was pending when this action was filed on March 27, 1981.

Plaintiff contends that he is now entitled to a jury trial. ORS 656.202(2) provides:

"Except as otherwise provided by law, payment of benefits for injuries or deaths under ORS 656.001 to 656.794 shall be continued as authorized, and in the amounts provided for, *by the law in force at the time the injury giving rise to the right to compensation occurred.*" (Emphasis added.)

Jury trials in circuit court were permitted at the time plaintiff was injured. Former ORS 656.288(3) (repealed by Or Laws 1965, ch 285, § 95). Claim procedures prior to the effective date of Or Laws 1965, ch 285, were retained to the extent that a claimant with a pre-1966 compensable injury could elect to proceed with the law in effect at the time of the injury. Section 43 of the 1965 Act provides:

"(1) Subject to the provisions of subsections (2) to (5) of this section, all proceedings, rights and remedies with respect to injuries that occurred before the fully operative date prescribed by section 97 of this 1965 Act, shall be governed by the law in effect at the time the injury occurred.

"(2) The powers, duties and functions performed by the State Industrial Accident Commission under such law shall be performed by the manager of the department except that the board shall exercise all powers, duties and functions imposed on the commission under ORS 656.278 with respect to claims arising from such injuries.

"(3) When the department makes an order, decision or award under ORS 656.282 pertaining to any claim based on an injury that occurred before the fully operative date prescribed by section 97 of this 1965 Act, the claimant may, in lieu of exercising rehearing and appeal rights under the law in effect at the time of the injury, choose to request a hearing under the provisions of ORS 656.002 to 656.590 as changed by this 1965 Act and subsequent Acts.

"(4) In the event the claimant chooses to proceed under subsection (3) of this section, the rules and procedures contained in ORS 656.002 to 656.590 as changed by this 1965 Act and subsequent Acts shall govern hearings, review by the board, judicial review, aggravation and continuing jurisdiction except that the claimant shall have 60 days from the date on which the notice was mailed to him within which to request a hearing under section 34 of this 1965 Act.

"(5) The copy of the order, decision or award served upon the claimant under ORS 656.282 shall contain a statement informing the claimant of his rights under subsection (3) of this section, the form of the statement to be determined by the department."

A claimant with a pre-1966 compensable injury who elects to have his claim processed under the former law is faced with complications. The complexity is due in part to changes in the agencies and the mechanisms established to administer the law. Prior to 1966, the State Industrial Accident Commission (SIAC) was charged with the administration of the Workmen's Compensation Law. Former ORS 656.410 (amended by Or Laws 1965, ch 285, § 54). It had continuing authority to modify or terminate awards of compensation formerly made. Former ORS 656.278 (amended by Or Laws 1965, ch 285, § 33). In sum, SIAC

served as insurer, administrator and quasi-judicial body for review of claims. By the enactment of the 1965 Act, those powers, except the function of an insurer, were transferred to the Workmen's Compensation Board. See former ORS 656.278, 656.708, 656.726. See also *McDowell v. SAIF*, 13 Or App 389, 391, 510 P2d 587 (1973).¹

McDowell inserted a measure of uncertainty when it approved the procedure used there by a claimant with a pre-1966 injury. The claimant was awarded permanent total disability in 1955. In 1971, at the request of SAIF, the Board on its own motion reexamined the extent of claimant's disability. The Board then ordered a reduction of the award to permanent partial disability. The claimant petitioned SAIF for a rehearing of the Board's order and then filed an action against SAIF in circuit court. *McDowell* held that a claimant could petition SAIF for a rehearing. We now believe that that holding was wrong. There is no sound reason to permit or require a claimant to seek a rehearing before SAIF on a determination order issued by the Department. SAIF's principal function is that of an insurer. It has no quasi-judicial or administrative authority to review determination orders issued by the Department on its own motion. To the extent that *McDowell v. SAIF, supra*, is inconsistent with this opinion, it is overruled.

Under the law in effect in 1953, a claimant had 60 days from the date of a SIAC order to seek a rehearing before SIAC. A request for rehearing was a prerequisite to an appeal to the circuit court. Former ORS 656.284 (repealed by Or Laws 1965, ch 295, § 95). In the present case, the determination order that plaintiff sought to have reviewed and thereby to make it the predicate for a jury trial, was mailed by the Department on October 3, 1980. When plaintiff filed his petition for rehearing with SAIF, he was doing what had been approved in *McDowell*. But, even if we consider plaintiff's request to SAIF for a rehearing to be required under the former law, plaintiff's right to

¹ By the enactment of Or Laws 1965, ch 285, all of the functions performed by SIAC were transferred either to the State Compensation Department or the Workmen's Compensation Board, now the Workers' Compensation Board. The functions of an insurer which were transferred to the state compensation department are now the responsibility of SAIF. See Reviser's Notes for the 1965 revisions to ORS 656 at pp 121 and 122b.

circuit court review is clearly lost because the request to SAIF was made on January 2, 1981, more than 60 days after the mailing of the determination order. However, in view of *McDowell* our analysis cannot end there.

Plaintiff's request for a hearing before the Board is not contained in *this record*, and it was apparently not before the trial court.² SAIF stated in its motion to dismiss that plaintiff had

"filed a Request for Hearing with the Workers' Compensation Board of the State of Oregon, contending the Determination Order of October 3, 1980 to be in error, and alleging that he remained permanently and totally disabled. * * *"

The request apparently did not expressly state that plaintiff was electing to proceed under the current procedures rather than the procedures in effect in 1953. The request, then, could be consistent with an attempt to follow the 1953 procedures by requesting a rehearing from the successor to SIAC in its capacity as the body making a determination on re-evaluation of the extent of disability. That being so, such a request would not constitute an *election* to proceed under current procedure.

Viewing plaintiff's request to the Board as a request for a rehearing, we must determine whether plaintiff has proceeded appropriately under the law in effect in 1953. Plaintiff was required to request a rehearing within 60 days of the mailing of the redetermination order. Plaintiff's request to the Board was timely. Former ORS 656.284(6) (repealed by Or Laws 1965, ch 285, § 95) provided that an application for rehearing is deemed denied if not acted upon within 60 days from the date of filing. Although the Hearings Division of the Board acknowledged plaintiff's request for a hearing, no action was taken within 60 days from the date of the request. Plaintiff's request must be deemed to have been denied 60 days from its October 23, 1980, filing. Plaintiff then had 30 days within which to appeal to the circuit court. Former ORS 656.286(1). He did not file this action until March, 1981.

² Plaintiff's request for a hearing before the Board appears in the appendix to respondent's brief in this court. The request for hearing was not annexed to respondent's motion to dismiss, nor does it otherwise appear in the trial court file. Accordingly, we do not consider it.

Cite as 57 Or App 413 (1982)

419

Under the law in effect in 1953, plaintiff's action in circuit court was not timely filed.

Affirmed.³

³ We do not consider this decision to have any effect on the efficacy of plaintiff's petition now pending before the Board.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
Joe McKenzie, claimant.

R. A. GRAY & COMPANY,
Petitioner,

v.

McKENZIE,
Respondent.

(WCB Case No. 80-03508, CA A21273)

Judicial Review from Workers' Compensation Board.

On petitioner's petition for reconsideration filed April 7, 1982. Former opinion filed March 8, 1982, 56 Or App 394, 641 P2d 672 (1982).

Emil R. Berg and Wolf, Griffith, Bittner, Abbott & Roberts, Portland, for petition.

Before Joseph, Chief Judge, and Warden and Warren, Judges.

PER CURIAM

Petition for reconsideration allowed; former opinion affirmed as modified to provide that the commencement date for claimant's benefits for permanent and total disability is June 3, 1981.

Cite as 57 Or App 426 (1982)

427

PER CURIAM.

Employer petitions for reconsideration of the opinion of this court, *R. A. Gray & Co. v. McKenzie*, 56 Or App 394, 641 P2d 672 (1982), which affirmed an order of the Workers' Compensation Board awarding claimant compensation for permanent and total disability. We modified the Board's order, changing the commencement date of claimant's award from June 3, 1981, to July 2, 1980.

Employer correctly points out that claimant's cross-appeal, in which he had asked for the earlier date for commencement of his benefits, was dismissed for late filing. Therefore, there was no cross-appeal. A respondent who has not cross-appealed cannot recover a more favorable judgment from the appellate court than that entered below. *Gas-Ice Corporation v. Newbern*, 263 Or 227, 234, 501 P2d 1288 (1972).

Our prior opinion is modified to provide that the commencement date for claimant's benefits for permanent and total disability is June 3, 1981, as found by the Board.

Affirmed as modified.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
Thomas Westfall, Claimant.

WESTFALL,
Petitioner,

v.

MULTNOMAH COUNTY,
Respondent.

(No. 80-01122, CA A21461)

Judicial Review from Workers' Compensation Board.

Argued and submitted November 25, 1981.

Robert K. Udziela, Portland, argued the cause for petitioner. With him on the brief was Pozzi, Wilson, Atchison, Kahn & O'Leary, Portland.

Paul G. Mackey, Deputy County Counsel, Portland, argued the cause for respondent. With him on the brief was John B. Leahy, County Counsel, Portland.

Before Richardson, Presiding Judge, and Thornton and Van Hoomissen, Judges.

RICHARDSON, P. J.

Affirmed.

RICHARDSON, P. J.

In this workers' compensation case, claimant appeals an order of the referee, affirmed by the Workers' Compensation Board, denying his claim for compensation on the ground that he was not a covered employe. We affirm.

The facts are not in dispute. Claimant was injured while incarcerated at the Multnomah County Correctional Institution serving a sentence. He was assigned to an inmate work crew and taken to the county jail to move some rock. The inmates on the work crew were paid one dollar per day for working on the crew. During the process of moving the rock, claimant injured his back. He subsequently received medical treatment, including surgery, and filed a workers' compensation claim with the county. It was stipulated that the county was self-insured but had not filed an election to cover jail inmates pursuant to ORS 656.041. Following a number of procedural events not material to the issue under review, the county ultimately denied the claim and moved to dismiss the proceedings on the ground that claimant was not a subject worker entitled to compensation. The referee upheld the denial on the basis that, because the county had not filed the election required by ORS 656.041, claimant was not covered for compensation benefits.

Claimant argues that he is a "subject worker" as defined in ORS 656.027:

"All workers are subject to ORS 656.001 to 656.794 except those nonsubject workers described in the following subsections:

"* * * * *"

None of the subsections specifically exclude jail inmates. Claimant contends that, if he is a "worker," he is covered under the Act because his type of employment is not excluded under ORS 656.027. He argues that he is a worker because there was an employer-employee relationship at the time of his injury. For the purposes of the Workers' Compensation Act, an employment relationship must exist, determined by a two-pronged test of remuneration for labor and the right of the putative employer to control the alleged employe. *Robinson v. Omark Industries*, 46 Or App

263, 611 P2d 665, *rev allowed* 289 Or 741 (1980), *petition dismissed as improvidently granted* 291 Or 5, 627 P2d 1263 (1981). Claimant contends that both prongs of the test are met because the county, through the jail staff, had the right to and did exert control over his performance of duties as part of the work crew and because he was paid one dollar per day remuneration for his labor. He argues that, because he is a subject worker under ORS 656.027, it is immaterial that the county did not elect to cover jail inmates under ORS 656.041.

We conclude that claimant is not a subject worker and is not covered under the Act, because the county did not file the election of coverage. *See Miner v. City of Vernonia*, 47 Or App 393, 614 P2d 1206, *rev den* 290 Or 149 (1980). When possible, we must construe statutes on the same subject so as to achieve consistency. *Davis v. Wasco IED*, 286 Or 261, 593 P2d 1151 (1979); *Urban Renewal v. Swank*, 54 Or App 591, 635 P2d 1344(1981), *rev den* 292 Or 450 (1982). The authority of the county to require inmates to perform work derives from ORS 169.320, which provides:

"Except as otherwise provided in ORS 169.170 to 169.210, each county sheriff shall have custody and control of all persons legally committed or confined in the county local correctional facility * * *, he shall work such prisoners in the county local correctional facility * * * at such places and such time and in such manner as the [county] court or board may direct. The sheriff may retain and put to work such number of such prisoners as may be required to perform necessary services in and about the facility and in the care thereof."

See also ORS 169.170.

The sheriff is authorized to require the inmates to work because of their status as prisoners, not because they are employees. They are essentially conscripts. For inmates to be covered under the Act for injuries while performing "authorized employment" the county must file a notice of election with the director of the Workers' Compensation Department. "Authorized employment" means the employment of an inmate on work authorized by the governing body of the county. ORS 656.041(1)(a). Reading these statutes together, it is clear that the legislature did not intend to include inmates performing work authorized by ORS

169.320 as subject workers under the Workers' Compensation Act. If, as claimant contends, inmates doing such work for even token remuneration are subject workers, it would have been unnecessary to provide specifically a special provision for coverage of inmate injuries. The two statutes—ORS 656.027 and 656.041—would be inconsistent if we adopted claimant's construction.

Claimant presents an alternative argument. He points out that the statute construed in *Miner v. City of Vernonia, supra*, (ORS 656.031) provides that volunteer personnel of a city "shall not be considered as workers unless the municipality filed the election." He argues that, because this same language does not appear in ORS 656.041, the legislature did not intend the election of coverage to be the sole method of covering inmates for work injuries. It follows, he contends, that an injured inmate may seek compensation under the general provisions for subject workers. We disagree. ORS 656.041(2) provides that "A * * * county may elect to have inmates performing authorized employment considered as subject workers * * *." There is no material difference in the effect of the two statutory provisions. In either instance a volunteer or an inmate becomes a subject worker only if the election is filed.

We conclude that claimant is not a subject worker as defined in ORS 656.027 and is not covered under the Act, because the county did not file the election of coverage required by ORS 656.041.

Affirmed.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
Marvin Peterson, Claimant.

PETERSON,
Petitioner,

v.

EUGENE F. BURRILL LUMBER,
Respondent.

(No. 79-5443, CA A20708)

Judicial Review from Workers' Compensation Board.

Argued and submitted October 30, 1981.

Peter W. McSwain, Salem, argued the cause for petitioner. On the brief were Steven C. Yates, and Malagon, Velure & Yates, Eugene.

Richard W. Davis, Portland, argued the cause for respondent. With him on the brief was Lindsay, Hart, Neil & Weigler, Portland.

Before Joseph, Chief Judge, and Richardson and Warren, Judges.

RICHARDSON, J.

Reversed; referee's order reinstated.

RICHARDSON, J.

In this workers' compensation case, the referee ordered defendant to accept claimant's aggravation claim under ORS 656.273. The Workers' Compensation Board reversed, finding that claimant lacked credibility and that he had failed to carry his burden of proof. Claimant appeals, contending that the record is sufficient to prove that his current low back problems are a compensable aggravation of injuries sustained in an earlier industrial accident. We reverse.

To establish a compensable aggravation claim, claimant must show by a preponderance of the evidence that his worsened condition *resulted from* the original injury. *Johnson Lbr. Co. v. SAIF*, 20 Or App 419, 532 P2d 38 (1975); ORS 656.273(1), (7). Our review in this case is governed by the rule announced recently by the Supreme Court in *Grable v. Weyerhaeuser Company*, 291 Or 387, 400-401, 631 P2d 768 (1981):

"We believe that the compensability of a worsened condition following an off-the-job injury may be determined equally as well under the rule stated and applied in *Lemons [v. Compensation Department]*, 2 Or App 128, 467 P2d 128 (1970),] and *Standley [v. SAIF]*, 8 Or App 429, 495 P2d 283 (1972),] as that stated by Professor Larson [1 Larson Workmen's Compensation Law 3-348, §§ 13.00, 13.11 (1978),] and paraphrased in *Christensen [v. SAIF]*, 27 Or App 595, 557 P2d 48 (1976)]. We conclude that if the claimant establishes that the compensable injury is a 'material contributing cause' of his worsened condition, he has thereby necessarily established that the worsened condition is not the result of an 'independent, intervening' nonindustrial cause. We hold that an employer is required to pay workers' 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."¹

¹The present case is not the type of off-the-job injury case presented in *Lemons* (off-the-job fall), *Standley* (off-the-job incidents injuring the low back), and *Christensen* (slip and fall in bathtub). Nor does the present case involve the issue of which of two worker's compensation carriers should be liable for a later injury. See *Smith v. Ed's Pancake House*, 27 Or App 361, 556 P2d 158 (1976) ("last

Claimant injured his lower back in an industrial accident in December, 1975, while employed by defendant. As a result he was awarded 5 percent unscheduled permanent partial disability benefits. He continued the same work, but left in May, 1976, to become a self-employed cedar gleaner, salvaging downed cedar logs from logging sites. The work was seasonal and apparently involved some stooping and lifting. During this period the pain in his lower back gradually increased so that, by December, 1978, he could no longer tolerate further exertion. He filed a claim for aggravation in January, 1979. The claim was submitted to the referee on medical reports and depositions; no oral testimony was offered. Consequently, demeanor evidence is not a factor, and we have before us the same information that the referee and Board had in making their respective determinations.

In January, 1979, claimant sought medical treatment for "chronic low back pain," which had become particularly acute during the previous months. Claimant was referred to Dr. Becker, who treated him on a continuing basis during 1979. In September, 1979, Dr. Becker wrote to claimant's attorney that it was his "best medical judgment that [claimant's] current symptoms do relate to the injury of 1975."

In October, 1979, claimant was examined by Dr. Gilsdorf, who had treated claimant's 1975 on-the-job injury. Relying on claimant's stated history, his 1975 treatment and his 1979 examination, Dr. Gilsdorf's report stated: "Impression: Chronic mechanical low back pain as a result of lumbosacral instability, spondylolisthesis." He attributed the spondylolisthesis to a preexisting spinal defect that was aggravated by the 1975 accident, resulting in chronic back pain since that accident.

Claimant, Dr. Becker and Dr. Gilsdorf were deposed at separate times in early 1980 in anticipation of the

injurious exposure" rule); *Grable v. Weyerhaeuser Company*, *supra*, 291 Or at 401-402. In the present case, the later injury, strictly speaking, occurred on the job; however, claimant had not elected to be covered by workers' compensation. Therefore, claimant's position is analogous to the *Lemons*, *Standley*, and *Christensen* situations, and the question is whether the prior on-the-job injury is a "material contributing cause" of the claimant's worsened condition at the time he filed his claim for aggravation.

hearing before the referee. Dr. Gilsdorf amplified his earlier report, stating that the 1975 injury caused a pathological change in claimant's condition. The resulting condition was manifested by low back pain in proportion to claimant's level of activity. Dr. Gilsdorf was not aware of any specific recent episode that caused claimant's worsened back pain; however, Dr. Gilsdorf was relying on claimant's history as related to him by claimant. Dr. Becker stood by his earlier reports, although he was unwilling to make a specific causal link between the 1975 injury and claimant's current problems. He stated that, because he had not examined claimant in 1975, all he could base his opinion on was his 1979 examinations, along with claimant's stated history.

In his deposition, claimant explained in detail the nature of his work as a cedar gleaner. He stated that he did little lifting, although his work required climbing up and down embankments and other strenuous activities. He reported increasing back pain and denied that there was any specific event which had triggered his current problems. He stated that by December, 1978, the pain had increased to the extent that he had to give up the cedar gleaning business.

There are some inconsistencies between claimant's statements in his deposition and those made to his treating physicians. They imply that claimant may be attempting to minimize how hard he has worked and to maximize the degree of low back pain since the 1975 industrial accident. The Board reversed the referee's order, because it doubted claimant's credibility. The Board's order on review did not explain the basis of its doubts other than saying that it was not persuaded by the medical reports because the reports relied heavily on claimant's stated history and the claimant was not credible. After reviewing the record, we conclude that the inconsistencies are outweighed by the evidence as a whole.

The referee recognized that the evidence was mixed and that claimant gave somewhat differing histories to each of the physicians who treated him. The referee concluded:

Cite as 57 Or App 476 (1982)

481

"Dr. Becker and Dr. Gilsdorf are relying on the history given by claimant and their objective findings. Despite the possibility that the present condition of claimant is not related to his industrial injury, I am of the opinion the medical evidence indicates his present condition is related to his 1975 injury and is a worsening of that condition."

Claimant has satisfied his burden of proof. The Board's order is reversed, and the order of the referee is reinstated.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
Walter Hubble, Claimant.

HUBBLE,
Petitioner,

v.

STATE ACCIDENT INSURANCE FUND
CORPORATION,
Respondent.

(WCB Case No. 79-10883, CA A21021)

Judicial Review from Workers' Compensation Board.

On petitioner's petition for attorney fees filed April 1,
1982.

Rolf Olson and Olson, Hittle & Gardner, Salem, for
petition.

Darrell Bewley, Appellate Counsel for State Accident
Insurance Fund Corporation, Salem, contra.

Before Thornton, Presiding Judge, and Warden and
Young, Judges.

WARDEN, J.

Claimant's attorney awarded \$3,020 attorney fee.

Thornton, J., concurs in the result.

WARDEN, J.

This matter comes before us on petitioner's petition for attorney fees and respondent's objection thereto. The issue is whether petitioner is entitled to an award of attorney fees for legal services rendered at the referee level and before the Workers' Compensation Board (Board) as a part of the fee awarded by this court pursuant to ORS 656.386.¹

Petitioner's knee injury was found to be non-compensable by the referee; the Board affirmed that determination. We reversed and instructed the Board to allow the claim. *Hubble v. SAIF*, 56 Or App 154, 641 P2d 593 (1982).

Respondent objects to the award of fees for legal services performed at the referee level and before the Board on the ground that petitioner did not prevail at either of those levels. Respondent cites three opinions of this court in support of its objection: *Schartner v. Roseburg Lumber Co.*, 20 Or App 1, 530 P2d 545 (1975); *Giese v. Safeway Stores*, 10 Or App 452, 499 P2d 1364, 501 P2d 982 (1972); and *Bailey v. Morrison-Knudsen*, 5 Or App 592, 485 P2d 1254 (1971). None of the cited cases controls the determination of the issue before us.

Bailey v. Morrison-Knudsen, supra, did not involve a denied claim. In that case claimant was awarded 25 percent unscheduled disability by the administrative determination order. The referee found the claimant to be permanently and totally disabled. On review, the Board reduced the award of disability from permanent total

¹ ORS 656.386 provides:

"(1) In all cases involving accidental injuries where a claimant prevails in an appeal to the Court of Appeals from a board order denying the claim for compensation, the court shall allow a reasonable attorney fee to the claimant's attorney. In such rejected cases where the claimant prevails finally in a hearing before the referee or in a review by the board itself, then the referee or board shall allow a reasonable attorney fee; however, in the event a dispute arises as to the amount allowed by the referee or board, that amount may be settled as provided for in ORS 656.388(2). Attorney fees provided for in this section shall be paid by the insurer or self-insured employer.

"(2) In all other cases attorney fees shall continue to be paid from the claimant's award of compensation except as otherwise provided in ORS 656.382."

disability to permanent partial disability of 160 degrees unscheduled disability. The claimant appealed to the circuit court, which found him to be permanently and totally disabled. The employer appealed from that judgment to this court; the claimant cross-appealed, contending that the circuit court erred in refusing to award an attorney fee in addition to the disability award. On the attorney fee issue, this court affirmed the circuit court, holding that ORS 656.386² did not apply, because the Board order appealed from did not deny the claimant's claim but merely reduced it. Although we recognized the merit of claimant's argument that it was inequitable to require the claimant to compensate his attorney from his disability award in these circumstances, we left it to the legislature to remedy that inequity. 5 Or App at 600.

In *Giese v. Safeway Stores, supra*, the claimant petitioned this court for attorney fees to be paid by his employer for his successful appeal to this court from an adverse judgment of the circuit court and for his unsuccessful appeal to the circuit court from the adverse decision of the Board. We denied the petition, holding that the statute did not authorize an award of an attorney fee on appeal from the circuit court to this court and that the claimant was not entitled to recovery of an attorney fee in circuit court, because he had not prevailed there.³

² ORS 656.386, prior to amendment, Or Laws 1977, ch 804, § 14, provided:

"(1) In all cases involving accidental injuries where a claimant prevails in an appeal to the circuit court from a board order denying his claim for compensation, the court shall allow a reasonable attorney's fee to the claimant's attorney. In such rejected cases where the claimant prevails finally in a hearing before the referee or in a review of the board itself, then the referee or board shall allow a reasonable attorney's fee; however, in the event a dispute arises as to the amount allowed by the referee or board, that amount may be settled as provided for in subsection (2) of ORS 656.388. Attorney fees provided for in this section shall be paid from the Industrial Accident Fund as an administrative expense when the claimant was employed by a contributing employer, and be paid by the direct responsibility employer when the claimant was employed by such an employer.

"(2) In all other cases attorney fees shall continue to be paid from the claimant's award of compensation except as otherwise provided in ORS 656.301 and 656.382."

³ See n 2, *supra*.

In *Schartner v. Roseburg Lumber Co.*, *supra*, the claimant, widow of a deceased workman, appealed the judgment of the circuit court denying her claim for death benefits after the referee and the Board had held the claim compensable. We reversed the circuit court. The claimant argued that success in this court should entitle her to recover attorney fees for all lower proceedings. We did not allow recovery. ORS 656.386 still did not allow an award of attorney fees by the Court of Appeals.⁴ The claimant, as in *Giese v. Safeway Stores*, *supra*, had not prevailed in the circuit court and, consequently, was not entitled to an award of an attorney fee in that court.

Two other cases, not cited by respondent, also bear on this issue. They are *Atwood/Christensen v. SAIF*, 30 Or App 1009, 569 P2d 52, *rev den* 280 Or 521 (1977), and *Korter v. EBI Companies, Inc.*, 46 Or App 43, 610 P2d 312 (1980). *Atwood/Christensen* was a consolidated appeal by SAIF from awards of attorney fees by the circuit court on entry of mandates following appeals. One claimant prevailed on appeal in this court; the other appealed unsuccessfully to this court but prevailed in the Supreme Court. No attorney fee was awarded on either appeal, but, on entry of the mandates, the circuit court awarded attorney fees for representation at all levels of the proceedings. The circuit judge reasoned that the entry of mandates by the circuit court after successful appeals justified awards of attorney fees for having prevailed in the circuit court. We reversed, because the claimants had not prevailed in their appeals from the Board to the circuit court. ORS 656.386 did not then provide for an award of attorney fees on appeal to this court.⁵

By the time *Korter v. EBI Companies, Inc.*, *supra*, was decided, ORS 656.386 had been amended.⁶ In *Korter* the referee found that the claimant's claim was compensable, that the claimant was entitled to interim compensation and that the rate of compensation for temporary total disability should be recalculated; claimant was awarded an

⁴ See n 2, *supra*.

⁵ See n 2, *supra*.

⁶ See n 1, *supra*.

attorney fee. The Board disallowed the claim and the award of an attorney fee, but affirmed the balance of the referee's order. We concluded that the claimant's disability was compensable and reinstated the referee's award of an attorney fee. On review here the claimant contended that the Board erred in not granting him an attorney fee at the Board level. We affirmed the Board in that regard and found ORS 656.386(1) not applicable, because the claimant did not finally prevail before the Board and because the appeal to the Board was not based on a denial of the claim by the referee. The claimant in *Korter* did not raise the issue we have before us in this case: whether claimant is entitled to recover fees for attorney's services rendered at the referee and Board levels as a part of the fee allowed in this court. We think he is so entitled.

ORS 656.386 simply provides that when a claim has been denied by the Board but the claimant prevails on review in this court we must allow a reasonable attorney fee. The statute does not expressly limit the fee to compensation for legal services rendered only in this court, and we find no such limit implied in the statutory language. We construe the statute to allow the award of attorney fees by this court for legal services rendered at both the referee and Board levels, as well as for those rendered in this court.⁷

⁷ ORS 656.388(1) provides:

"No claim for legal services or for any other services rendered before a referee or the board, as the case may be, in respect to any claim or award for compensation, to or on account of any person, shall be valid unless approved by the referee or board, or if proceedings on appeal from the order of the board in respect to such claim or award are had before any court, unless approved by such court."

The language of that section would appear to require that any fees awarded for services rendered before the referee or the board must be approved by the referee or the board.

ORS 656.388(1) was originally enacted in 1933 as Or Laws 1933, ch 115. At that time, attorney fees were payable only from the compensation awarded a claimant. ORS 656.386, providing for payment of attorney fees by the insurer or employer in cases where a claimant prevails on a denied claim, was not passed until 1951. Or Laws 1051, ch 330. See *Franklin v. State Ind. Acc. Com.*, 202 Or 237, 239-40, 274 P2d 279 (1954).

The purpose of the legislature in 1933, in enacting what is now ORS 656.388(1), was to protect injured workmen, because all attorney fees were paid out of injured workmens' awards, by requiring that claims for attorney fees be

There are several reasons for our holding. First, the statute provides for a "reasonable" attorney fee. Before a case can get to this court, most, if not all, of the work performed by the attorney will have been completed; in most cases it will have been completed prior to the referee's hearing. Most of the appellate-type legal work will have been done in preparing briefs for the Board. The services rendered in this court will ordinarily represent but a fraction of the total services for which an attorney is entitled to be compensated. Allowing a claimant's attorney payment for only that fraction would not amount to "a reasonable attorney fee." The claimant would be required to pay the larger portion of the fees charged by his attorney out of his award pursuant to ORS 656.386(2), even though denial of his claim was improper. It is unlikely that the legislature intended such a result in light of its statement of objectives of the Workers' Compensation Law. ORS 656.012(2).⁸

Second, in cases where a claimant seeks only medical benefits, he might well lose more in out-of-pocket payments to his attorney for legal services at the referee and Board levels than he would gain from this court's final

subject to supervision by State Industrial Accident Commission (now by the referee or the board) or by the court. *Cox v. State Ind. Acc. Com.*, 168 Or 508, 529, 121 P2d 919, 123 P2d 800 (1942). ORS 656.388(1) still serves that function of providing supervision of awards of attorney fees to be paid from claimants' awards of compensation. ORS 656.386(2). However, it does not apply to awards made pursuant to ORS 656.386(1).

⁸ ORS 656.012(2) provides, in pertinent part:

"[T]he objectives of the Workers' Compensation Law are declared to be as follows:

"(a) To provide, regardless of fault, sure, prompt and complete medical treatment for injured workers and fair, adequate and reasonable income benefits to injured workers and their dependents;

"(b) To provide a fair and just administrative system for delivery of medical and financial benefits to injured workers that reduces litigation and eliminates the adversary nature of the compensation proceedings, to the greatest extent practicable;

"(c) To restore the injured worker physically and economically to a self-sufficient status in an expeditious manner and to the greatest extent practicable; and

"(d) To encourage maximum employer implementation of accident study, analysis and prevention programs to reduce the economic loss and human suffering caused by industrial accidents."

determination that the medical expenses were compensable. Surely, that was not the legislature's intent.⁹

Finally, as we have already recognized in *Korter v. EBI Companies, Inc.*, *supra*, where a claimant prevails in this court on review of a claim accepted by the referee but denied by the Board, he is entitled to an attorney fee for legal services at the referee level. In *Korter*, the claimant did not ask this court to allow an attorney fee for representation before the Board; instead, he appealed the failure of the Board to award him a fee. We properly held that the Board could not award the fee. We did not conclude that this court could not allow his attorney a fee for those services.

We hold that an attorney fee allowed by this court, where the claimant appeals from a Board order denying his claim for compensation, may include reasonable fees for legal services performed in representation of the claimant at the hearing before the referee and in the review by the Board. We find \$3,020 to be a reasonable fee to be allowed claimant's attorney in this case and award that amount to be paid by respondent.

Thornton, J., concurs in the result.

⁹ See n 7, *supra*.

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.

(CA A20838, No. 79-07895)

Judicial Review from Workers' Compensation Board.

On petitioner's petition for reconsideration of petition
for attorney fees filed February 16, 1982.

Martin E. Hansen and Johnson, Marceau, Karnopp &
Petersen, Bend, for petition.

Emil R. Berg and Wolf, Griffith, Bittner, Abbott &
Roberts, Portland, contra.

Before Thornton, Presiding Judge, and Warden and
Young, Judges.

PER CURIAM

Reconsideration of petition allowed; attorney fee of
\$2,750, less any sums already paid, allowed to claimant's
attorneys.

PER CURIAM

Claimant seeks reconsideration of his petition for attorney fees and the award made by this court after we reversed the Workers' Compensation Board's denial of his claim for aggravation of a 1975 injury. *Larson v. Brooks-Scanlon*, 54 Or App 861, 636 P2d 984 (1981), *rev den* 202 Or 581 (1982).

ORS 656.386(1) provides, in pertinent part:

"In all cases involving accidental injuries where a claimant prevails in an appeal to the Court of Appeals from a board order denying the claim for compensation, the court shall allow a reasonable attorney fee to the claimant's attorney."

Claimant alleges in his petition for reconsideration that the reasonable fee allowable includes fees for legal services rendered at the referee and Board levels as well as a fee for representation in the Court of Appeals. We agree. *Hubble v. SAIF*, ___ Or App ___, ___ P2d ___ (decided this date).

We reconsider our former allowance of attorney fees and find a reasonable fee for legal services provided by claimant's attorneys in the hearing, Board and appeal proceedings to be \$2,750. We allow that sum, less any sums already paid pursuant to our prior orders, to be paid by respondent to claimant's attorneys.

Reconsideration of petition allowed; attorney fee of \$2,750, less any sums already paid, allowed to claimant's attorneys.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

UNIVERSITY MEDICAL ASSOCIATES,
Appellant,

v.

MULTNOMAH COUNTY,
Respondent.

(No. A8005-02502, CA 19619)

Appeal from Circuit Court, Multnomah County.

Charles S. Crookham, Judge.

Argued and submitted October 28, 1981.

John H. Heald, Portland, argued the cause for appellant. With him on the brief was Fellows, McCarthy, Zikes & Kayser, P.C., Portland.

J. Noelle Billups, Deputy County Counsel, Portland, argued the cause for respondent. With her on the brief was John B. Leahy, County Counsel, Portland.

Before Richardson, Presiding Judge, and Thornton and Van Hoomissen, Judges.

RICHARDSON, P. J.

Affirmed.

RICHARDSON, P. J.

Plaintiff appeals from a judgment dismissing its complaint on defendant's motion for summary judgment. The issue is whether circuit court clerks of Multnomah County are county or state employees for the purposes of tort liability under the theory of *respondeat superior*. Plaintiff brought an action against the county alleging that two circuit court clerks were county employees and were negligent in failing to process writs of attachment and notices of garnishment within a reasonable time. Plaintiff alleges that, as a result of the negligence of the clerks, it was unable to collect a judgment. The county moved for summary judgment based on the affidavit of the circuit court administrator, which stated that the court administrator is hired by and responsible to the circuit court judges and that the circuit court clerks are hired by and responsible to the court administrator. In response, plaintiff filed an affidavit that did not dispute the facts set out in the court administrator's affidavit but attached a copy of a Multnomah County ordinance, which plaintiff contends gave the county the right to control the circuit court administrator.

Plaintiff agrees that the circuit court clerks are under the direct supervision and control of the circuit court administrator and that the issue is whether the administrator is a county or a state employee. Both parties agree that the primary test to determine if a master servant relationship exists is the right to control. *See Peeples v. Kawasaki Heavy Indust., Ltd.*, 288 Or 143, 603 P2d 765 (1979); *Soderback v. Townsend*, ___ Or App ___, ___ P2d ___ (May 12, 1982); 1 Restatement 2d, Agency, § 220. The precise issue is whether the circuit court administrator is subject to the control or the right to control by the county.

In the first assignment plaintiff contends that there is a genuine issue of material fact to be decided and that defendant is therefore not entitled to a summary judgment. In *Forest Grove Brick v. Strickland*, 277 Or 81, 559 P2d 502 (1977), the court stated the standard for review of a grant of summary judgment:

"To warrant summary judgment the moving party must show that there is no genuine issue of material fact. It is not the function of this court on review to decide issues

of fact but solely to determine if there is an issue of fact to be tried. We review the record on summary judgment in the light most favorable to the party opposing the motion." (Footnote omitted.) 277 Or at 87.

Plaintiff, without pointing to any precise fact issue, contends that the issue of the county's right to control the court administrator is an issue of fact and cites *Jones v. Herr*, 39 Or App 937, 594 P2d 410, *rev den* 287 Or 1 (1979), in support of its argument. In *Jones v. Herr, supra*, we determined that there was a fact issue whether the alleged agent was performing services in the business of the purported principal and whether the alleged tortious conduct of the agent was in the scope of any duties performed for the purported principal. Here, however, the issue of the right of control is one of law under the statutes creating the position of court administrator and the county ordinance purporting to exercise a measure of control over the duties of the administrator. The facts stated in the affidavit submitted with the motion for summary judgment were not controverted. We conclude that there is no outstanding issue of material fact to be decided.

In the second assignment plaintiff contends that as a matter of law the county had the right to control the circuit court administrator and was thus his employer. Plaintiff first argues that a comparison of the statute authorizing appointment of the state court administrator, ORS 8.110,¹ with that creating the circuit court administrator, ORS 8.070,² supports a conclusion that the circuit court administrator is a county employe. ORS 8.110 provides:

"The Supreme Court or a majority of the judges thereof shall appoint a State Court Administrator and fix his compensation and that of his staff. The State Court Administrator shall hold his office during the pleasure of the court. The State Court Administrator shall be paid monthly in the same manner as other state officers are paid."

ORS 8.070 provides:

¹ ORS 8.110 was amended in the 1981 special session of the legislature. Or Laws 1981, (special session) ch 1, § 12.

² ORS 8.070 was repealed effective January 1, 1983. Or Laws 1981 (special session) ch 3, § 141.

"(1) In a single county judicial district described in ORS 3.011 with a population of 70,000 or more, according to the latest federal decennial census, the presiding judge may appoint a person to serve as court administrator subject to the approval of a majority of the judges of the circuit court. The administrator holds office at the pleasure of a majority of the judges of the circuit court, and shall perform the functions prescribed by court rule adopted by the judges of the circuit court of the judicial district where appointed.

"(2) A majority of the judges of the circuit court shall fix the compensation of the administrator, subject to the approval of the board of county commissioners. Such compensation shall be commensurate with the duties performed by the administrator and shall be paid by the county in the same manner as the salaries of county officers are paid.

"* * * * *"

Plaintiff points out that ORS 8.110 makes appointment of a state court administrator mandatory, while appointment of a circuit court administrator is discretionary. Although there is a difference in the terms used, the substance of each statute is the authority to appoint the administrator. If the circuit judges decide in their discretion to have a court administrator, they have the sole authority to appoint one. The county is given no authority to appoint. Plaintiff next notes that the salary of the state court administrator is fixed by the Supreme Court, is not subject to approval of any other body and is paid by the state. In contrast, the salary of the circuit court administrator is fixed by the court, but is subject to approval of the county and is paid by the county. The apparent argument is that because the county must approve and pay the administrator's salary, the county is setting and paying the remuneration of its employe. In *Multnomah County v. Hunter*, 54 Or App 718, 635 P2d 1371 (1981), involving an analogous issue, we quoted the following from *Harris v. State Ind. Acc. Comm.*, 191 Or 254, 271-72 230 P2d 175 (1951):

"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 employee was actually under the control of another person during the progress of the 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 the wages were paid by another should be disregarded. * * * (Citations omitted.)" 54 Or App at 721.

The allocation of responsibility to pay the salary of the administrator adds little to the analysis of the right to control. The payment of the administrator's salary is the result of funding statutes and not of the fact that the administrator is a county employe or that the county exercises a measure of control over the administrator. See *Multnomah County v. Hunter, supra*, and Or Laws 1979, ch 536.

The final contention in plaintiff's comparative analysis argument is that ORS 8.110 specifically designates the state court administrator as a state officer by the language that that administrator shall be paid "as other state officers are paid." The comparable language in ORS 8.070 is that the circuit court administrator shall be paid "in the same manner as the salaries of county officers are paid." The language quoted from ORS 8.070 does not designate the circuit court administrator as a county employe; it merely provides that the salary due is to be paid in the same way that the county pays county officers. We do not interpret the statutory language as indicating that the administrator is paid in the status of a county officer.

It is clear from the statutes relating to the duties and appointment of a circuit court administrator that the administrator is under the control of the circuit court judges, who are state officers. ORS 8.070 provides that the administrator holds his office at the pleasure of the circuit judges and is to perform functions prescribed by court rule adopted by the judges. ORS 8.070(4) requires the court administrator of Multnomah County to perform the duties set forth in ORS 205.110³ and, in performing those duties, to conform to the direction of the court.

Plaintiff does not seriously contend that the statutes give the county the right to control the circuit court

³ ORS 205.110 was amended by Or Laws 1981 (special session) ch 3, § 39, effective January 1, 1983.

administrator in performance of his duties. However, plaintiff argues that Multnomah County Ordinances 2.30.360 and 2.30.370⁴ give the county ultimate control over the court administrator. The ordinances purport to give the county authority to assign duties to the administrator, review the performance of those duties and to remove functions from the purview of the court administrator if the county deems they are not being properly performed and to reassign those duties to county departments. Plaintiff appears to argue that the county can remove all duties from the court administrator and thus exercise a large measure of control simply by determining what duties the administrator may perform. We do not read the ordinances that broadly. Their purpose was to assign duties over which the county had control to either the court administrator, the County Department of Administrative

⁴ Multnomah County Ordinances 2.30.360 and 2.30.370 provide:

"2.30.360 *Assignment of court administration functions.* The functions formerly performed by the Division of Courts Process of the Department of Justice Services shall be assigned as follows:

"(A) The Circuit and District Court Administrators shall perform the services and duties imposed by state law and county ordinances upon the county clerk and district court clerk with reference to administration of the courts and maintenance and custody of court files and records;

"(B) The Department of Administrative Services shall perform all other services and duties imposed by state law and county ordinances upon the county clerk, including, without limitation, recording, maintenance and custody of public records other than court records and licensing; and

"(C) The Department of Justice Services shall perform the services and duties imposed by state law and county ordinances upon the county sheriff with reference to civil process and other services to the courts.

"2.30.370 *Board review of court functions.* Because assuring satisfactory performance of the functions assumed by the court administrators under MCC 2.30.360 is the responsibility of Multnomah County under the Constitution and laws of the State of Oregon, the board shall at all times remain responsible for determining that those functions are being performed in a manner it considers satisfactory and in the interests of the people of Multnomah County. The board shall periodically review whatever matters it regards as relevant to this determination, and, if at any time it determines that those functions are not being performed in a satisfactory manner or in a manner which best promotes the interests of the people of Multnomah County, the board shall by ordinance assign them to the Department of Justice Services or to such other county departments or offices as it may select. At that time, the court administrators shall immediately cease performance of the functions and shall assist in all necessary and appropriate manners the transfer of the functions to the departments or offices to which they are assigned.

Services or the County Department of Justice Services. We do not read the ordinance as an assumption by the county of authority over those duties and functions given by statute to the court administrator. The county would have no authority to remove from the court administrator the duties specifically assigned by ORS 205.110 or the duties given to the administrator by the court.

The duties that plaintiff alleges were negligently performed were duties given by statute to the court administrator to be performed under direction of the circuit court. The county had no control over these duties or the performance of them. The ordinances do not give the county the right to control the administrator necessary to impose liability on the theory of *respondeat superior*.

The county argues that, if the ordinances are construed as plaintiff suggests, they are invalid as exceeding the county's home rule authority. We need not discuss the contention because, as we construe the ordinances, the county does not have control over the court administrator sufficient to make the administrator a county employe.

Affirmed.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of
Roy F. Holub, Claimant.

Roy F. Holub,

Petitioner,

v. No. 79-04003
CA A21445

State Accident Insurance Fund
Corporation,

Respondent.

Judicial Review from Workers' Compensation Board.

Argued and submitted October 30, 1981.

J. Davis Walker, Forest Grove, argued the cause for
petitioner. With him on the brief was Bump, Young
& Walker, Forest Grove.

Darrell E. Bewley, Appellate Counsel, SAIF, Salem,
argued the cause and filed the brief for respondent.

Before Joseph, Chief Judge, and Warden and Warren, Judges.

JOSEPH, C. J.

Order of Board reversed; order of referee reinstated.

FILED: JUNE 9, 1982.

JOSEPH, C. J.

The issue in this workers' compensation case is the extent of unscheduled disability from a head injury. By the determination order claimant was awarded 10 percent disability; after a hearing the referee awarded 60 percent; the Workers' Compensation Board reduced the award to 30 percent. Claimant appeals.

Claimant is 41 years old, has a tenth grade education and has been a butcher and meatcutter nearly all of his working life. On December 2, 1977, while hoisting a live hog for slaughter, he was knocked unconscious when struck on the head by a 40 or 45 pound metal shackle that had fallen about 18 feet from above. He was admitted to the hospital for observation and released in good condition. He subsequently began suffering unsteadiness, difficulty in concentration, bi-temporal headaches and tinnitus. One day in February, 1978, he blacked out while driving his pickup and again while sitting in a tow truck. He was readmitted to the hospital and diagnosed to have a subdural hematoma. On March 10, 1978, a craniotomy was performed to remove it. He nevertheless continued to suffer right-sided headaches, "pins and needles" in his left arm, hand and leg, numbness in his left leg, intermittent clumsiness and episodes of fainting. Dr. Grimm, his treating neurologist, reported on November 27, 1979, that claimant's "problems continue and are possibly worsening." On March 4, 1980, the doctor reported that an EEG demonstrated a change for the worse caused by scarring following the craniotomy. He said the scarring was also responsible for epileptic seizures that claimant suffered every three to four weeks.

Claimant testified that, after his injury, he was unable to function at work because his headaches caused dizzy spells that made operation of the butcher saws unsafe. He said that he suffered blackout spells, his left leg would become numb from standing and he could not stand up for eight hours a day. He noted also that his emotional character had changed so that he became irritable and easily upset and had difficulty getting along with his fellow employes and his family.¹ He said that he suffers from a constant headache and cannot read because of blurred vision.

In January, 1979, claimant suffered an occupational disease of the right forearm, caused by "prolonged arm movement while on the kill floor." He developed similar problems in his left wrist. He was diagnosed to have a carpal tunnel syndrome and severe degenerative joint disease in both wrists. The treating physician recommended that claimant obtain employment other than butchering, which strains the wrists. By a determination order, claimant received an award of 35 percent loss of the right forearm. No claim is made that that occupational disease is related to claimant's head injury.

In rejecting the referee's award of 60 percent for his head injury, the Board considered the "impairment ratings" of treating physicians made before claimant's condition was stable. It relied on a May, 1978, report of a Dr. Nash, which stated that claimant's impairment was "mild to moderate," and Dr. Grimm's July 3, 1979, report, which stated that

"* * * the patient's present medical condition with respect to that head injury and impairment from this source alone would have to be minimal and has not changed since after his surgery in March of 1978."

Sole reliance on these reports overlooked Dr. Grimm's subsequent reports that claimant's condition had worsened.

The Board also rejected the referee's award because:

"The evidence before the Board and the Referee does not contain any information about claimant's working restrictions or if he can return to his work as a butcher. Basically the seizures are controlled by medication, but because of the potential of having a seizure, claimant's regular occupation may now be precluded to him. Claimant was already precluded, based in the medicals, from that occupation due to his right forearm and left wrist problems. There is no information about restrictions on claimant from the head injury, except a comment that he can walk, stand, sit and and drive a car."

However, in his March, 1980, report, Dr. Grimm stated:

"It is my opinion that the head injury * * * not only set up this epileptic focus which now requires medical therapy but has limited the fine coordination of the left side of the body which precludes certain activities.

"An exact definition of this deficit cannot be made because of the [occupational disease injury to the wrists.]

"There is no question that the head injury itself has diminished this man's motor skills in various ways but that it does not preclude sitting, standing, walking or driving a car."

We find that this evidence, with claimant's testimony as to his condition, shows that claimant suffered a permanent loss of earning capacity because of the head injury to an extent of 60 percent. The fact that his subsequent occupational disease prevented him from continuing his job as a butcher does not preclude a determination that his head injury was severely disabling. The referee found claimant's testimony as to the

extent of his disability believable. It was also probative.
Dimitroff v. State Ind. Acc. Com., 209 Or 316, 330, 306 P2d
398 (1957).

The order of the Board is reversed, and the order of
the referee is reinstated.

FOOTNOTES

1

Claimant cried when he described these changes at the
hearing. In a January 10, 1978, letter, Dr. Grimm stated that
personality changes can develop within six to twelve months after
a concussion injury.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of
Orville A. Bales, Claimant.

Orville A. Bales,

Petitioner,

v.

No. 80-03397
CA A23327

SAIF Corporation,

Respondent.

Judicial Review from Workers' Compensation Board.

Argued and submitted May 10, 1982.

Benton Flaxel, North Bend, argued the cause for
petitioner. With him on the brief was Flaxel,
Todd & Nylander, North Bend.

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 Warren and
Rossman, Judges.

BUTTLER, P. J.

Reversed and remanded with instructions that the claim
be accepted as compensable.

FILED 6/9/82.

BUTTLER, P. J.

Claimant appeals from a determination by the Workers' Compensation Board (Board) affirming the referee's order denying this claim for benefits for a myocardial infarction he sustained on March 3, 1980. Finding the heart attack to be compensable, we reverse and remand.

At the time of the incident, claimant was 55 years old. He was employed by Coos Head Timber Company. For most of the previous six years claimant's job as "planer feeder" had entailed relatively light work in a seated position turning over pieces of lumber. Two weeks before the incident, claimant was transferred to a position on the "green chain" that involved removing from a conveyor belt green lumber up to 2 inches by 6 inches by 16 feet in dimension. That job was more strenuous. Claimant testified that on the new job he was physically exhausted by the end of the day. On the morning in question, claimant's shift began at 7 a.m. Between 8:15 and 8:30 a.m., he began to experience pain in his chest, nausea and general fatigue. He left work at 9 a.m. and sought medical attention from a physician in North Bend, who administered an EKG test. The results of that test suggested an early anterior infarction. Claimant was admitted that day to the intensive care unit of the local hospital. Enzyme studies and further EKG tests revealed development of an anterior-lateral myocardial infarction. Claimant was released from the hospital on March 13, 1980.

Subsequently, a cardiac specialist in Eugene, to whom claimant had been referred, performed a coronary angiogram, which

revealed several cardiac abnormalities including constriction of one branch of the coronary arteries and total occlusion of one artery. On the basis of claimant's history, the hospital data and the specialist's findings, the physician in North Bend stated in a letter to SAIF that claimant's work activity of pulling on the green chain was a material contributing cause of the myocardial infarction. In response to a written inquiry from SAIF, however, the Eugene specialist opined that the heart attack was related to a natural disease process and was not related, directly or indirectly, to claimant's work activity.

Claimant's medical file was then sent by claimant's attorney to a second cardiac specialist at the University of Oregon Health Sciences Center in Portland, with a brief explanation of claimant's work activity during the two weeks preceding the incident. That specialist, concluding that claimant's work activity was a substantial and material factor in contributing to development of the myocardial infarction, stated in part:

"I base this [conclusion] upon the fact that [claimant,] who was apparently small in stature according to your letter, was doing a different job on the morning in question and was involved in pulling heavy timbers off the green chain."

The Eugene specialist testified by deposition that in the vast majority of heart attack cases, exertion or stress, physical or otherwise, are not factors, indirectly or directly, and that this was true here. He stated in relevant part:

"I don't believe that exertion causes heart attacks. I don't believe there is any evidence exertion or emotional stress causes heart attacks.

"I don't believe there is anything in the literature in the world that supports that. * * *

"* * * * *

"* * * It's one thing that we do have, are a number of statistics that show that people have heart attacks at all hours of the day and night and has no relation to what they're doing.

"* * * * *

"In fact, heart attacks don't come about as a result of physical or emotional stress."

Although elsewhere in his deposition, the Eugene specialist was careful to note that he never says "never," he made no secret of the fact that he is of the school of medical thought holding that exertion or stress does not, in general, cause heart attacks, a point of view for which he claimed a 75 percent following among physicians in Oregon.

The referee found the North Bend physician's opinion of compensability to be conclusory, and the Portland specialist's opinion of compensability to be based on the erroneous belief that claimant was pulling "heavy timbers." The record does support the conclusion that, on the day in question at least, the largest pieces of lumber, known in the trade as "heavy timbers," were being pulled from the other side of the green chain. The referee noted that, although the Eugene specialist's explanation "appeared at times inconsistent, and somewhat questionable," it had an "apparent rationale" that was "in keeping with the majority of his colleagues in the medical community." The referee concluded that there was a failure of proof of causation, and affirmed denial of the claim. The Board adopted the opinion of the referee.

We do not agree that there was a failure of proof of causation here. Two physicians, one a cardiac specialist, were

of the opinion that claimant's work exertion contributed materially to his heart attack. Their opinions, in the form of letters from one to one and one half pages in length, are not conclusory merely because they do not address the stress versus natural progression issue disputed amongst cardiologists. Moreover, we do not believe that the Portland specialist employed the term "heavy timbers" to refer only to certain large pieces of lumber on the green chain. The letter to that specialist used the term without limiting its definition. Furthermore, extremely minor exertion, such as pulling a lever with the hand, has been held to be sufficient to support a medical conclusion that exertion was a material factor in causing heart attack.

Olson v. State Ind. Acc. Com., 222 Or 407, 415-16, 352 P2d 1096 (1960); Batdorf v. SAIF, 54 Or App 496, 502, 635 P2d 396 (1981).

The Supreme Court has rejected the school of thought to which the Eugene specialist subscribes. In Clayton v. Compensation Department, 253 Or 397, 454 P2d 628 (1969), the court reversed the granting of a judgment notwithstanding the verdict of compensability found by the jury, stating in relevant part:

"The question of the sufficiency of evidence to warrant submission of a case to the jury is difficult enough in any area of the law. In the heart attack cases the difficulties are multiplied because the medical authorities themselves are not agreed upon the basic question of whether stress of any kind can be a precipitating factor in causing a heart attack. We are not certain which of these conflicting theses is right but since we must proceed upon the basis of a uniform rule a choice must be made. We have chosen to reject the view that exertion or stress can never be a causative factor in these cases." 253 Or at 402.

Here, the Eugene specialist's opinion appears to be based

primarily on the view that stress can never be a causative factor, a view expressly rejected by the court in Clayton. For that reason, we accord it less weight. On balance, we conclude that the preponderance of the medical evidence establishes that claimant's work-connected exertion was a precipitating factor in the onset of claimant's myocardial infarction. See Batdorf v. SAIF, supra.

Reversed and remanded with instructions that the claim be accepted as compensable.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of
Dennis Kemple, Claimant.

Dennis Kemple,

Petitioner,

v.

WCB No. 78-07534
CA A22253

Myers Drum Co.,

Respondent.

* * * * *

Judicial Review from Workers' Compensation Board.

Argued and submitted January 26, 1982.

Noreen K. Saltveit, Portland, argued the cause for
petitioner. With her on the brief was Merten & Saltveit,
P. C., Portland.

Emil R. Berg, Portland, argued the cause for
respondent. With him on the brief was Wolf, Griffith,
Bittner, Abbott & Roberts, Portland.

Before Gillette, Presiding Judge, Joseph, Chief Judge,*
and Young, Judge.

PER CURIAM

The Board's order on review affirming the referee which
upheld the carrier's denial of January 30, 1979, is reversed
and the claim is remanded for acceptance.

* Joseph, C. J., vice Roberts, J.

FILED: JUNE 9, 1982

PER CURIAM

The issue in this workers' compensation case is whether a meniscectomy (knee surgery) and its sequela, including intercranial hemorrhaging, were causally related to claimant's preexisting compensable knee injury. The question presented is solely factual. We have concluded, on the basis of our de novo review, that claimant has shown by a preponderance of the evidence that the original compensable injury was a material contributing cause of the second knee surgery, and that, the surgery was not the result of an independent, intervening accident. We are further persuaded that the evidence established that the intercranial hemorrhaging was a consequence of the second surgery and is compensable. There is nothing to be gained by a lengthy recitation of the facts. Accordingly, for the reasons stated in Hoag v. Duraflake, 37 Or App 103, 585 P2d 1149, rev'd en 284 Or 521 (1978), we will not publish an extended opinion.

The Workers' Compensation Board's order on review affirming the referee, and the carrier's denial of January 30, 1979, is reversed and the claim is remanded for acceptance.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of
Donald R. Anderson, Claimant.

Donald R. Anderson,

Petitioner,

v.

No. 80-3165
CA A21251

State Accident Insurance Fund Corporation,

Respondent.

Judicial Review from Workers' Compensation Board.

Argued and submitted November 25, 1981.

Allan H. Coons, Eugene, argued the cause for
petitioner. With him on the brief was
Coons & Hall, P.C., Eugene.

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.

RICHARDSON, P.J.

Affirmed.

FILED: June 16, 1982

RICHARDSON, P.J.

Claimant appeals an order of the Workers' Compensation Board that reversed the referee's determination that claimant's respiratory condition is a compensable occupational disease. He contends on appeal that he has met his burden of showing that his chronic obstructive pulmonary disease and related respiratory ailments arose from conditions to which he was subjected on the job. ORS 656.802(1)(a). We review de novo, ORS 656.298(6), and affirm.

At the time he filed his occupational disease claim in January, 1980, claimant had worked for the Hanna Nickel Smelting Company for 23 years. For the last ten years he had worked as an overhead crane operator in the smelter. The referee's opinion and order summarizes claimant's working conditions:

"* * * Claimant worked in an enclosed cab about four and a half feet by five feet in [dimension], five days a week, spending the better part of six hours in this compartment. The crane is used to move heavy objects in the melting furnace area and moving ore into granulators for nickel processing. The crane cab operates between forty to sixty feet above granulators which give off steam laden with particles that rise up into the plant area and on occasion come in contact with the cab. Claimant, as an operator, was required to open the windows of his cab at least once an hour for approximately fifteen minutes in order to see below to perform his job. While building A is large, open and has some ventilating facilities, * * * ore particles have accumulated on all surfaces inside of the plant * * *, and are present in the air in a free floating state. Also, while there is a ventilation system,

inside the cab, there is an accumulation of particles on the ledges which has not been filtered out through the air filtration system. Claimant, when operating the crane, used a half a bottle of Windex during his six hours to keep the windows clean both inside and outside the cab. * * *"

Over time claimant developed chronic coughing with occasional episodes of coughing up blood, as well as other respiratory problems. His coughing was alleviated during a two-month period in 1979 when he was not working, but the problems returned when he began working again.

For all but two of the past 26 years claimant had smoked approximately a pack and a half of cigarettes daily. He gave up smoking for a two-year period, but began again because his coughing did not get better or worse. He finally gave up smoking in June, 1979.

Claimant was examined by a number of physicians. Dr. Owens examined him in July, 1979, and reported: "IMPRESSION: Recurrent rhinosinusitis and tracheobronchitis, secondary to industrial irritants." Dr. Bilder examined him in September, 1979, and reported that, in his opinion, claimant "has chronic obstructive pulmonary disease with chronic bronchitis and bronchial asthma made worse by smog and dusty working involvement." Finally, Dr. Leslie examined claimant in October, 1979. He concluded: "At the present time it is felt that the patient has chronic obstructive pulmonary disease with chronic bronchitis and possibly an asthmatic component which has been exacerbated by pollution and his environmental working conditions."

At the request of SAIF, two of the examining physicians explained their conclusions. Dr. Owens stated, in a letter to SAIF in March, 1980:

"It is impossible to state whether [claimant's] chronic obstructive pulmonary disease was caused primarily by cigarette smoking or exposure to industrial irritants, or a combination of both. The most likely possibility is the latter. Although most people who develop COPD are heavy smokers, it can and does occur in people who have never smoked at all.

"I understand your difficulty in a determination of this disability, or responsibility for his physical problems. However, I am afraid that I cannot state with any degree of certainty what was the primary cause of his medical problem. I can only state that at the time I examined him in July of 1979, his exposure to industrial irritants appeared to be the primary aggravating factor in his symptomatology at that time."

Dr. Leslie stated, in a letter to SAIF in April, 1980, that chronic obstructive pulmonary disease is known to be caused by smoking, air pollution and certain working conditions.

He then explained:

"* * * I feel that Mr. Anderson has chronic obstructive pulmonary disease which has been worsened by his continued smoking over the past several years as well as by working in the job he has held. I don't think that I can say which one has contributed the most, but I feel strongly that both have contributed to his symptomatology. Especially interesting is that he seems to have more difficulty after working and it may be related to his working environment."

ORS 656.802(1)(a) defines an "occupational disease"

as:

"Any disease or infection which arises out of and in the scope of employment, and to which an employe is not ordinarily subjected or exposed other than during a period of regular actual employment therein."

To be compensable, the disease must be caused by conditions which are ordinarily encountered only on the job. James v. SAIF, 290 Or 343, 350, 624 P2d 565 (1981); Weller v. Union Carbide, 288 Or 27, 31, 602 P2d 259 (1979); Beaudry v. Winchester Plywood Co., 255 Or 503, 469 P2d 25 (1970). In James, the Supreme Court set out a test for making this determination:

"* * * 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).
* * *" (Emphasis in original.) 290 Or at 350.

In SAIF v. Gygi, 55 Or App 570, 639 P2d 655, rev den 292 Or 825 (1982), the issue was whether the claimant's psychiatric disability, which was caused by stress, arose from on-the-job circumstances. In reviewing the record, we found that claimant was highly susceptible to the effects of stress both on-the-job and in off-the-job situations. We concluded:

"* * * Nonetheless, when viewed as a cause of his disability, the stress he faced while on the job was of greater intensity and was not substantially the same as the stress faced off the job. James v. SAIF, supra, 290 Or at 350. In short, the work-related stress was the major contributing cause of claimant's disability." 55 Or App at 577.

We accordingly held the claimant's disability to be a compensable occupational disease.

In the present case, claimant concurrently was a heavy smoker and was exposed to nickel ore particles and smelter-generated particulate matter for a long period of time. In order for his chronic obstructive pulmonary disease to be compensable, claimant has the burden of showing that the on-the-job exposure was the major contributing cause of the disease. Reviewing the record, we are unable to conclude that claimant's on-the-job circumstances were the major contributing cause of his respiratory disease. The medical evidence is inconclusive; the examining physicians were unable to determine whether on-the-job or off-the-job circumstances were the greater contributor to claimant's pulmonary disease.

Claimant need not establish medical certainty in order to prove his case, Hutcheson v. Weyerhaeuser, 288 Or 51, 602 P2d 268 (1979), but he must establish more than a mere possibility that the on-the-job circumstances were the major

contributing cause of the disability. See Thompson v. SAIF, 51 Or App 395, 625 P2d 1348 (1981). We agree with the Workers' Compensation Board that there is "no persuasive basis in the record for concluding one cause more likely than the other." We therefore affirm the Board's order.

Affirmed.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of
Sidney A. Stone, Claimant.

Sidney A. Stone,

Petitioner,

v. WCB No. 79-8878
 CA A21258

State Accident Insurance Fund
Corporation,

Respondent.

* * * * *

Judicial Review from Workers' Compensation Board.

Argued and submitted November 25, 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
for respondent. With him on the brief were K. R.
Maloney, General Counsel, and James A. Blevins,
Chief Trial Counsel, Salem.

Before Richardson, Presiding Judge, and Thornton and
Van Hoomissen, Judges.

VAN HOOMISSEN, J.

Affirmed in part; reversed in part; and remanded with
instructions that the referee's order be
reinstated in all respects except that liability
for interim compensation shall run only from July
26 to October 4, 1979.

FILED: June 16, 1982

VAN HOOMISSEN, J.

Claimant appeals an order of the Workers' Compensation Board which affirmed the referee's denial of his occupational disease claim for asbestosis and reversed the referee's order allowing his claim for interim compensation, penalties and attorney fees.

Claimant voluntarily retired from work in 1973 at age 62. At the time of the hearing he was 69 years of age. He concedes that his claim was filed more than five years after his last injurious exposure and thus would be barred under former ORS 656.807(1).¹ He contends, however, that the statute is unconstitutional as applied to his claim for asbestosis.

SAIF suggests that we avoid the constitutional issue by finding that claimant filed his claim more than 180 days from the date he was informed by a physician that he suffered from an occupational disease and that he is thus barred by the second provision of ORS 656.807(1). In support of this contention, SAIF points to the report of one of claimant's examining physicians, dated October 5, 1978, diagnosing him as suffering from asbestosis. However, nothing in that report indicates that claimant was informed of that diagnosis. Claimant testified that he was not informed that he suffered from asbestosis until March 22, 1979, and the referee so found. The evidence supports the referee's finding.

Claimant contends that ORS 656.807(1) is unconstitutional as it applies to asbestos-related occupational disease claims in that, because of the latency period of the disease, the five-year limit on filing claims precludes a class

of workers from obtaining benefits under Oregon's Workers' Compensation law. He argues that (1) the distinction between the class of workers suffering asbestosis and those suffering other occupational diseases bears no rational relationship to the purpose of the legislation and (2) the distinction denies workers with asbestosis claims a remedy for injury in violation of Article I, section 10 of the Oregon Constitution and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.²

Claimant's constitutional claim lacks merit. Shaw v. Zabel, 267 Or 557, 517 P2d 1187 (1974); Josephs v. Burns & Bear, 260 Or 493, 491 P2d 203 (1971). In Josephs, the Supreme Court observed:

" * * * It is a permissible constitutional legislative function to balance the possibility of outlawing legitimate claims against the public need that at some definite time there be an end to potential litigation." 260 Or at 503.

The legislature has perceived the inequality that results in cases of diseases with long latency periods. It has extended the period of limitation to ten years in claims for radiation injury, ORS 656.807(3), and by Or Laws 1981, ch 535, § 47 to forty years in claims for asbestosis or asbestosis-related diseases. ORS 656.807(4). Application of this statute is not involved in this case. The legislature is entitled to right perceived wrongs one at a time. The United States Supreme Court has explained:

" * * * [A] legislature need not run the risk of losing an entire remedial scheme simply because it failed, through inadvertence or otherwise, to cover every evil that might conceivably have been attacked. * * *" McDonald v. Board of Election, 394 US 802, 809, 89 S Ct 1404, 22 L Ed 2d 739 (1969).

We therefore hold that former ORS 656.807(1) is not unconstitutional as applied to claimant's claim for asbestosis.

Claimant next contends that the Board erred in reversing the referee's award of interim compensation, penalties and attorney fees. SAIF did not pay interim compensation within 14 days of July 26, 1979, the day it received notice of the claim, ORS 656.262(4), and did not accept or deny the claim within 60 days. ORS 656.262(6). It urges us to accept the reasoning of the Board in denying the claim for interim compensation that temporary total disability payments are meant to compensate a worker for time lost from work and that because claimant had voluntarily retired before he filed his claim, he is not entitled to interim compensation. We reject that reasoning.

The interim compensation provided for in ORS 656.262(4) prevents an employer from delaying acceptance or denial of a claim. Jones v. Emanuel Hospital, 280 Or 147, 151-52, 570 P2d 70 (1977). The liability for interim compensation attaches even if the claim is ultimately held noncompensable. Jones v. Emanuel Hospital, supra. There is no authority for denying compensation due to the age or retirement status of a claimant. See Krugen v. Beall Pipe & Tank Corp., 19 Or App 922, 529 P2d 962 (1974). We do agree with the Board, however, that SAIF's liability for interim compensation attached only when SAIF received notice of the claim, July 26, 1979.

Affirmed in part; reversed in part; and remanded with instructions that the referee's order be reinstated in all respects, except that liability for interim compensation shall run only from July 26 to October 4, 1979, the date of SAIF's denial.

FOOTNOTES

1

Former ORS 656.807(1) provided:

"Except as otherwise limited for silicosis, all occupational disease claims shall be void unless a claim is filed with the State Accident Insurance Fund Corporation or direct responsibility employer within five years after the last exposure in employment subject to the Workers' Compensation Law and within 180 days from the date the claimant becomes disabled or is informed by a physician that he is suffering from an occupational disease whichever is later."

2

Article I, section 10 of the Oregon Constitution reads in part, " * * * [E]very man shall have remedy by due course of law for injury done him in his person, property, or reputation." The Fourteenth Amendment to the United States Constitution reads in part, " * * * No state shall * * * deny to any person within its jurisdiction the equal protection of the laws."

IN THE SUPREME COURT OF THE
STATE OF OREGON

SATTERFIELD,
Respondent,

v.

SATTERFIELD,
Respondent on Review,
and

WAUSAU INSURANCE COMPANIES,
Petitioner on Review.

(CA 19757, SC 28225)

On review from the Court of Appeals.*

Argued and submitted March 4, 1982.

David Horne, Beaverton, argued the cause for petitioner on review and filed the brief.

Stanton F. Long, Deputy Attorney General, Salem, argued the cause for respondent on review. On the brief were David B. Frohnmayer, Attorney General, John R. McCulloch, Jr., Solicitor General, William F. Gary, Deputy Solicitor General, and Al J. Laue, Assistant Attorney General, Salem.

Before Denecke, C.J., and Lent, Linde,** Peterson, Tanzer and Campbell, JJ.

TANZER, J.

Reversed.

*Appeal from Circuit Court, Coos County (No. 30221) Richard L. Barron, Judge. 54 Or App 184, 634 P2d 787 (1981).

**Linde, J., did not participate in this decision.

TANZER, J.

This is a post-decree garnishment proceeding in a dissolution suit.¹ Plaintiff, while behind in his child support payments, received a workers' compensation award payable in monthly installments. Shortly thereafter, the Support Enforcement Division of the Department of Justice, acting on behalf of plaintiff's former wife, served a writ of garnishment upon the insurer. The circuit court dismissed the garnishment on the basis of ORS 656.234. The Court of Appeals, in banc, citing its earlier decision in *Calvin v. Calvin*, 6 Or App 572, 487 P2d 1164, 489 P2d 403 (1971), reversed and remanded, reinstating the garnishment. Four members dissented.

The controlling statute purports to exempt workers' compensation benefits from garnishment. 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."

The words of ORS 656.234 clearly and unambiguously exempt moneys payable as workers' compensation benefits from garnishment. It is fundamental that courts apply clear, unambiguous, constitutional statutes according to their plain meaning, without resort to extrinsic evidence of legislative intent, *Hillman v. North. Wasco Co. PUD*, 213 Or 264, 310, 323 P2d 664 (1958); *School Dist. 1, Mult Co. v. Bingham et al*, 204 Or 601, 604, 283 P2d 670, 284 P2d 779 (1955), unless application of the literal meaning would produce an unintended, absurd result, *Brown v. Portland School Dist. #1*, 291 Or 77, 83, 628 P2d 1183 (1981), or "if the literal import of the words is so at variance with the apparent policy of the legislation as a whole as to

¹This case and *McIntyre v. Wright*, 292 Or 784, ___ P2d ___ (decided this date), present the same issue and were consolidated for argument. The issues presented and our resolution of them are identical. We have chosen to state our opinion in this case because this was the lead case in the Court of Appeals. Our decision and opinion is based on the advocacy in both cases.

bring about an unreasonable result," *Johnson v. Star Machinery Co.*, 270 Or 694, 704, 530 P2d 53 (1974). Although one policy of the Workers' Compensation Act is to provide for dependents, another is to provide for the worker. We do not find that the literal import of the words produces a result so absurd or unreasonable in light of the apparent policy of the Act that we can say that the intention of the legislature requires that we disregard their plain meaning.

In *Calvin*, the Court of Appeals looked behind the clear language of the statute and held that a garnishment on behalf of the worker's dependents was permissible because the policy of the Workers' Compensation Act was to provide care and support for injured workmen "and their dependents," ORS 656.012 (formerly ORS 656.004). That holding is consistent with the few cases we find decided elsewhere, see *Anno.*, Workmen's Compensation—Exemptions, 31 ALR3d 532, 542. Assuming for argument that a statutory policy statement would have the force of a directory statute, a conflict would be presented between the general provision of ORS 656.012 and the specific provision of ORS 656.234. The latter would prevail because the resolution of such conflict would be governed by ORS 174.020, which provides:

"In the construction of a statute the intention of the legislature is to be pursued if possible; and when a general and particular provision are inconsistent, the latter is paramount to the former. So a particular intent shall control a general one that is inconsistent with it."

We conclude that the workers' compensation benefits in the hands of the insurer are exempt from garnishment, including garnishment for the enforcement of the rights of dependents, under the clear, unambiguous provisions of ORS 656.234. *Calvin v. Calvin* is disapproved.

The judgment of the Court of Appeals is reversed. The circuit court order of dismissal is affirmed.

IN THE SUPREME COURT OF THE
STATE OF OREGON

McINTYRE,
Respondent on Review,

v.

WRIGHT,
Appellant,

and

STATE ACCIDENT INSURANCE FUND
CORPORATION,
Petitioner on Review.

(CA 19231, SC 28239)

On review from the Court of Appeals.*

Argued and submitted March 4, 1982.

Darrell E. Bewley, Appellate Counsel, Salem, argued the cause for petitioner on review. With him on the brief were K. R. Maloney, General Counsel, and James A. Blewins, Chief Trial Counsel, Salem.

Stanton F. Long, Deputy Attorney General, Salem, argued the cause for respondent on review. With him on the brief were David B. Frohnmayer, Attorney General, William F. Gary, Solicitor General, and Al J. Laue, Assistant Attorney General, Salem.

Before Denecke, C.J., and Lent, Linde,** Peterson, Tanzer and Campbell, JJ.

TANZER, J.

Reversed.

*Appeal from Circuit Court, Multnomah County (No. 376-325). Harlow F. Lenon, Judge. 54 Or App 248, 634 P2d 493 (1981).

**Linde, J., did not participate in this decision.

TANZER, J.

This is a post-decree garnishment proceeding in a dissolution suit. The trial court allowed a continuing garnishment against defendant's workers' compensation benefits in the hands of the insurer. The Court of Appeals modified.

The issues in this case are identical to those presented in the case of *Satterfield v. Satterfield*, 292 Or 780, ___ P2d ___ (decided this date). Our decision in this case is based upon the reasons expressed in our opinion *Satterfield*.

The Court of Appeals allowance of the garnishment is reversed.

IN THE SUPREME COURT OF THE STATE OF OREGON

In the Matter of the Compensation of
Sharon Bracke, Claimant.

Sharon Bracke,

Respondent on Review,

v.

Baza'r, Inc.,

and

General Adjustment Bureau,

Petitioners on Review,

Albertson's Food Centers, O.J.'s 42nd Avenue
Thriftway, Aetna Insurance Company, Industrial
Indemnity Company,

Respondents on Review.

Filed: June 22, 1982

CA 17587
SC 27825 and 27819

On review from the Court of Appeals.*

Argued and submitted September 3, 1981.

Mildred J. Carmack of Schwabe, Williamson, Wyatt,
Moore & Roberts, Portland, argued the cause and
filed the petition for review for Baza'r, Inc.,
while self-insured. With them on the briefs
were Ridgway K. Foley, Jr., and Scott M. Kelley
of Cheney & Kelley, Portland.

Scott M. Kelley of Cheney & Kelley, Portland,
argued the cause and filed the petition for
review for Baza'r, Inc., while insured through
General Adjustment Bureau.

R. Kenney Roberts of Lang, Klein, Wolf, Smith,
Griffith & Hallmark, Portland, argued the cause
for respondent on review Albertson's Food
Centers. On the response to the petitions for
review and brief was Margaret H. Leek Leiberan
of Lang, Klein, Wolf, Smith, Griffith &
Hallmark, Portland.

Eugene L. Parker of Parker & McCann, Portland, argued the cause and filed the brief for respondent on review Sharon Bracke, claimant.

Darrell E. Bewley, Appellate Counsel, K. R. Maloney, General Counsel, and James A. Blevins, Chief Trial Counsel, State Accident Insurance Fund Corporation, Salem, filed a brief amicus curiae in support of the petition for review.

Richard William Davis of Lindsay, Hart, Neil & Weigler, Portland, filed the brief for O.J.'s 42nd Avenue Thriftway.

Charles R. Holloway, III, of Tooze, Kerr, Marshall & Shenker, Portland, filed the brief for Aetna Insurance Co.

G. Howard Cliff and Bruce A. Gunter, Certified Law Student, Portland, filed the brief for Industrial Indemnity Co.

Before Denecke, C.J., and Lent, Linde, Tanzer and Campbell, JJ.

TANZER, J.

Affirmed as modified.

*Judicial Review from Workers' Compensation Board (No. 77-6938).
51 Or App 627, 626 P2d 918 (1981).

TANZER, J.

This is a workers' compensation claim under the occupational disease law, ORS 656.802 to 656.824. The claimant has a pulmonary disease colloquially referred to as "meat wrappers' asthma." The issue is whether an employer may interject the so-called "last injurious exposure" rule as a defense to the worker's claim where the claimant establishes that she contracted the disease and suffered disability while working for that employer, but that she also worked for subsequent employers under conditions which could have caused the disease.

The claimant worked intermittently as a food market meat wrapper for Baza'r, Inc., from 1974 until 1977, sometimes full-time and sometimes part-time. In early 1977 the claimant also worked part-time as a meat wrapper for both Albertson's and Thriftway food markets. Her employment with Baza'r terminated March 30, 1977, with Albertson's May 9, 1977, and with Thriftway, her last employer, May 13 or 14, 1977.

The claimant filed claims against Thriftway, Albertson's and Baza'r, all of which were denied. She requested hearings on the denials and the three claims were consolidated.

The Workers' Compensation Board, adopting the referee's order, found that the claimant suffered from a compensable occupational disease. It concluded that under the last injurious exposure rule the claimant's last employer, Thriftway, would be responsible for compensation. It denied the claim, however, because the claimant had not requested a hearing within 60 days of the Thriftway denial and had not shown good cause for her failure to do so as required by ORS 656.319.

The Court of Appeals reversed the Board's order. It found the last injurious exposure rule inapplicable because the claimant had established that she contracted the disease while she was employed by Baza'r and that her later employment caused only symptoms of the underlying disease. It held that Baza'r was the responsible employer, but remanded the case to the Board because of uncertainty in the record as to whether Baza'r was insured or self-insured at the time the claimant contracted the disease. Baza'r filed two petitions in this court, one on its own behalf as a self-insured employer and one through its

insurers. We allowed review to clarify the application of the last injurious exposure rule, adopted by this court in Inkley v. Forest Fiber Products Co., 288 Or 337, 605 P2d 1175 (1980). We affirm the Court of Appeals decision, although on somewhat different reasoning.

The Court of Appeals accepted the testimony of Dr. Emil Bardana who heads the allergy section of the University of Oregon Health Sciences Center, and we are bound by its fact resolution, Sahnov v. Fireman's Fund Ins. Co., 260 Or 564, 491 P2d 997 (1971). Meat wrappers' asthma has only recently been generally recognized as a discrete medical condition. It is a form of reactive airway disease which results from exposure to polyvinyl chloride (PVC) fumes and thallic anhydride. The disease acquired its colloquial name because food market meat wrappers are regularly exposed to these substances. Meat is wrapped in PVC film which produces the fumes when cut with a hot wire. Price label adhesive, when heated, emits thallic anhydride. Some meat wrappers become sensitized to the fumes so that they have asthmatic symptoms when subsequently exposed to them. Although the symptoms come and go, depending upon conditions of exposure, the sensitization is permanent; once sensitized the person is sensitized for life. Sensitization does not get better or worse; it exists or it does not exist. The Court of Appeals described the term "sensitization":

"[Dr. Bardana] drew an analogy to a patient who was administered penicillin successfully 202 times throughout his life for various infections, but on the 203rd administration he has an allergic reaction to the penicillin. From that point on, he said, the patient is unable to tolerate penicillin. With respect to claimant here, Dr. Bardana stated that once she became sensitized to the PVC or the thallic anhydride from price labels, exposure to those substances would produce symptoms, but would not worsen the underlying sensitization which she had already acquired." 51 Or App at 634-635.

With that description of the disease in mind, we set out the pertinent facts in more detail. From May 1974 to September 1975 claimant was employed by Baza'r. She did not work from September 1975 to August 1976. While employed, she began experiencing mild asthmatic symptoms such as shortness of breath. It was during this period of employment that sensitization occurred. The symptoms abated during the 1975-1976 period of nonemployment. In September 1976, she returned to work part-time for Baza'r and the symptoms reappeared. On January 12, 1977, while employed cutting film with a hot wire for Baza'r, she sought hospital emergency room medical treatment for various symptoms, including shortness of breath, rapid breathing and related depression. Her condition was not then recognized, but Dr. Bardana concluded that she was suffering from "state one asthma."

Six days later, claimant was employed by Albertson's and a month later by Thriftway. The working conditions at each of her employers were of the kind which could cause sensitization and activation of symptoms, except possibly at Albertson's where there was more modern equipment and better ventilation. In May 1977, her symptoms became more severe ("state two asthma") and she ceased work. Dr. Bardana concluded that she was "disabled" at this time in the sense that even after her symptoms subsided she could never successfully return to work as a meat wrapper or in any work environment with airborne lung irritants.

Were there no last injurious exposure rule, the facts would support the claim against Baza'r. Meat wrappers' asthma is an occupational disease as defined by ORS 656.802(1)(a):

"As used in ORS 656.802 to 656.824, 'occupational disease' means:

(a) 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."

An occupational disease is deemed an "injury" under the Workers' Compensation Law. ORS 656.804. Claimant's disease is deemed a "compensable injury" because it arises "out of and in the course of employment requiring medical services or resulting in disability," ORS 656.005(8)(a). By January 12, 1977, before employment with food markets other than Baza'r, claimant had been afflicted with the disease and had required medical service for treatment of symptoms which interfered with her ability to work at her occupation. Thus, on that date, claimant was disabled. Claimant has established a claim against Baza'r unless that claim is defeated by events occurring after January 12, 1977.

Baza'r contends that the last injurious exposure rule operates to shift liability from it to the last employer where conditions could have caused the disease regardless of whether they actually did cause the disease. Thus Baza'r invokes the rule as a defense. Whether it is a defense in this case depends in part on the nature and purpose of the rule.

The last injurious exposure rule originated as a judicially adopted doctrine applicable in cases involving successive incremental injuries for which successive employers or insurers might be incrementally liable. Under the rule, the

last employer who materially contributes to a worker's disabling condition is liable for compensation for the entire cumulative disability. In a sense, it is a variation upon the familiar notion that an employer takes the worker as he finds him.

Professor Larson states the rule:

"The 'last injurious exposure' rule in successive-injury cases places full liability upon the carrier covering the risk at the time of the most recent injury that bears a causal relation to the disability.

"If the second injury takes the form merely of a recurrence of the first, and if the second incident does not contribute even slightly to the causation of the disabling condition, the insurer on the risk at the time of the original injury remains liable for the second. In this class would fall most of the cases discussed in the section on range of consequences in which a second injury occurred as the direct result of the first, as when claimant falls because of crutches which his first injury requires him to use. * * *

"On the other hand, if the second incident contributes independently to the injury, the second insurer is solely liable, even if the injury would have been much less severe in the absence of the prior condition, and even if the prior injury contributed the major part to the final condition. This is consistent with the general principle of the compensability of the aggravation of a pre-existing condition." (Footnotes omitted.) 4 Larson, Workmen's Compensation Law, § 95.12, 17-71--17-78.

The Court of Appeals adopted the rule tacitly in the accidental injury case of Cutright v. Amer. Ship Dismantler, 6 Or App 62, 486 P2d 591 (1971). Both the Court of Appeals and this court subsequently adopted the rule expressly in the occupational disease context. Inkley v. Forest Fiber Products Co., 288 Or 337, 605 P2d 1175 (1980); Mathis v. SAIF, 10 Or App 139, 499 P2d 1331 (1972).

The common reference to the rule as if it were unitary is somewhat misleading. There are at least two last injurious

exposure rules, each serving a different function in different types of cases. One is a substantive rule of liability assignment; another is a rule of proof.¹ The dichotomy is evident in the caselaw and in Larson's text, although it has not, to our knowledge, been previously expressed.

The substantive rule of liability is perhaps the most common. It operates to assign liability to one employer in cases of successive, incremental injuries. The rule serves as a substitute for allocation of liability among several potentially liable employers, each of whom would otherwise be liable for a portion of the disability. Typically in such cases, causation is readily determinable, but the task of allocation among several partially liable employers would be difficult and impractical. For example, where a worker suffers successive back injuries while working for successive employers, it would be difficult to determine the exact proportion of the resulting disability attributable to each employer. Allocation would also require undesirably duplicative and costly litigation. Instead, the rule assigns liability for the entire aggregate disability to the employer at the time of the last injury and dispenses with the need for allocation. For examples, see, Cutright v. Amer. Ship Dismantler, supra, and Smith v. Ed's Pancake House, 27 Or App 361, 556 P2d 158 (1976). In Davidson Baking v. Ind. Indemnity, 20 Or App 508, 532 P2d 810 rev den (1975), the rule was applied to incremental, determinable hearing loss.

The other rule, the rule of proof, was the basis of our decision in Inkley. There, the claimant suffered incremental hearing loss caused over a period of time when claimant was

subjected to conditions which could cause the disability. During that period, however, his employment was insured by successive insurers.² It could not be determined whether employment under the last insurer actually caused any additional hearing loss. This court held that the last insurer would be liable for the entire disability if the conditions of employment were of a nature which could have contributed to the disability. In such a case, the last injurious exposure rule was applied not only as a substitute for allocation, as in the first class of cases, but also for an altogether different purpose: to relieve the claimant of the "burden of proving medical causation," as to any specific insurer, 288 Or at 345. Thus, it is seen that one rule is to efficiently assign liability and another distinct rule fulfills a requirement of claimant's burden of proof.

The last injurious exposure rules of liability and proof also apply to occupational disease cases, but they differ in certain respects which reflect differences between injuries and diseases. Injuries are generally caused by identifiable events, such as accidents. Diseases are more commonly acquired gradually and their existence is often not perceived until after the time of affliction. Consequently, the origin of disease often is not as easily pinpointed in time and place as that of an injury. Indeed, a disease may not become apparent until years after termination of employment, see, e.g., Fossum v. SAIF, ___ Or ___, ___ P2d ___ (decided this date). As this court said in White v. State Ind. Acc. Comm., 227 Or 306, 322, 362 P2d 302 (1961):

"* * * An occupational disease is stealthy and steals upon its victim when he is unaware of its presence and approach. Accordingly, he can not later tell the day, month or possibly even the year when the insidious disease made its intrusion into his body. Although his weakened condition may manifest ill health its cause may be uncertain and puzzle even the most skillful of physicians. * * *"

We recognized in Inkley v. Forest Fiber Products Co., 288 Or at 342, that:

"Uncertainties as to the cause and date of onset of chronic occupational maladies make the assignment of liability to any one employer difficult and somewhat arbitrary."3

The Workers' Compensation Act makes no provision for allocation of liability among employers. It is desirable in occupational disease cases to designate an identifiable event for the assignment of liability, analogous to accidents in injury cases, to reduce uncertainty. This court in Inkley judicially adopted an analogous rule of last injurious exposure for the assignment of liability in occupational diseases, as had the Court of Appeals five years before in Mathis v. SAIF, 10 Or App 139, 499 P2d 1331 (1972). In particular, we adopted the rule as stated by Larson establishing the onset of disability as the decisive event for fixing liability:

"In the case of occupational disease, liability is most frequently assigned to the carrier who was on the risk when the disease resulted in disability, if the employment at the time of disability was of a kind contributing to the disease. It will be observed that, in broad outline, this is comparable to the 'last injurious exposure' rule discussed in the previous subsection [regarding injuries, see Larson, § 95.12, quoted supra], except that it places more stress on the moment of disability. Occupational disease cases typically show a long history of exposure without actual disability, culminating in the enforced cessation of work on a definite date. In the search for an identifiable instant in time which can perform such

necessary functions as to start claim periods running, establish claimant's right to benefits, determine which year's statute applies, and fix the employer and insurer liable for compensation, the date of disability has been found the most satisfactory. Legally, it is the moment at which the right to benefits accrues; as to limitations, it is the moment at which in most instances the claimant ought to know he has a compensable claim; and, as to successive insurers, it has the one cardinal merit of being definite, while such other possible dates as that of the actual contraction of the disease are usually not susceptible to positive demonstration." (Footnotes omitted.) 4 Larson, Workmen's Compensation Law, § 95.21, 17-79--17-86.

Both last injurious exposure rules apply to cases of occupational disease as well as injury cases. They most commonly apply to two different fact situations. In cases of successive, incremental injury or disease exacerbation, the liability assignment rule comes into play. The last injurious exposure rule of proof more typically applies where one employment caused the disease, but more than one could have. By arbitrarily assigning liability to the last employment which could have caused the disease, the rule satisfies claimant's burden of proof of actual causation. The reason for the rules lies not in their achievement of individualized justice, but rather in their utility in spreading liability fairly among employers by the law of averages and in reducing litigation.

The primary difference in occupational disease cases is that the onset of disability rather than the occurrence of injury is the critical event in the application of the rules.⁴ Under the last injurious exposure rule of assignment of liability in cases of successive employment, each of which has contributed to the totality of the disease, the potentially causal employer at the time disability occurs is assigned liability for the cumulative whole. If the claimant is not in potentially causal employment when disability occurs, the last such employer is liable. Under

the last injurious exposure rule of proof, if claimant proves that a disease was triggered at one time, claimant has carried his burden of proof by establishing that the employer on the risk at the time disability occurred could have caused it, even though previous employers provided conditions which could have caused it, and the rule relieves a claimant of any burden of proving actual causation. If a disability occurs when a claimant is no longer subject to potentially causal conditions, the last employment providing such conditions is deemed proved to have caused the disease even though the claimant has not proved that the conditions of last employment were the actual cause of the disease and even though a previous employment also possibly caused the disease. Date of disability controls.

Although previous cases have not presented the occasion to distinguish these applications of the rules, they are consistent with the above analysis. Both Mathis and Fossum involve diseases incurred gradually over a period of successive employment. Disability did not occur until years after the last employment which probably caused the disease. In Mathis, the claimant had probably contracted the disease (asbestosis) 10 years prior to actual disability. Claimant retired when the disability became manifest. The last employer was held liable because the last injurious exposure rule served to fulfill claimant's burden to prove that the last employment was a "material contributing cause" of the disease. In Fossum, the disability (terminal cancer) appeared many years after the last of successive

employments, any one of which involved conditions which could have caused the disease. The last such employer was held liable. In both cases, the rule was applied both as a rule of proof and as a rule of liability assignment to the employer at the time of disability or to the last employer prior to disability.

In this case, the claimant has proved that she contracted her disease and suffered disability during and as a result of her employment with Baza'r. She has proved compensability and disability without reliance upon the last injurious exposure rule. The rule enters the case only because Baza'r contends in defense that a subsequent employer, not Baza'r, should be deemed liable for the disability.

The operation of the rule, as we said in Inkley, provides certainty in a way which is "somewhat arbitrary." It operates generally for the benefit of the interests of claimants. It is fair to employers only if it is applied consistently so that liability is spread proportionately among employers by operation of the law of averages. We hold that employers have and may assert an interest in the consistent application of the last injurious exposure rules, either as to proof or liability, so as to assure that they are not assigned disproportionate shares of liability relative to other employers who provide working conditions which generate similar risk.⁵

Liability was properly assigned to Baza'r in this case because the disease was contracted and disability occurred during employment at Baza'r. According to the evidence believed by the Court of Appeals, the employment subsequent to Baza'r did not contribute to the cause of, aggravate, or exacerbate the

underlying disease. Had that occurred, a later employer would be liable under the last injurious exposure rule of liability, see n 5. Rather, claimant's subsequent employment only activated the symptoms of a pre-existing disease, a difference we discussed in Weller v. Union Carbide, 288 Or 27, 602 P2d 259 (1979), and need not repeat. Liability for the disability caused by the underlying disease is fixed when the disability arises. A recurrence of symptoms which does not affect the extent of a continuing underlying disease does not shift liability for the disabling disease to a subsequent employer. Had there been a finding that the underlying disease had been aggravated or exacerbated during employment at Thriftway or Albertson's, one of those later employers might have been liable under the last injurious exposure rules, but that is not the case. Baza'r is liable.⁶

Affirmed as modified.

FOOTNOTES

1

There are other purposes and functions of the rule. For example, one purpose is to provide certainty so that claimants are protected from the risk of late filing after an initial filing against an employer who would otherwise be liable. Inkley, 288 Or at 343-344. Because of our disposition of the case, this aspect of the rule and the ramifications which flow from it are not examined in this opinion.

2

We held in Inkley that the rule applied to successive insurers of the same employer in the same way it applied to successive employers. See also, Grable v. Weverhaeuser Company, 291 Or 387, 402, 631 P2d 768 (1981).

3

We also spoke in Inkley, 288 Or at 343, of a "rule governing allocation of liability among several employers." Because only one employer is liable, it is more accurate to say that the rule assigns rather than allocates responsibility.

4

Arguably, given the wording of ORS 656.005(8), above, the date when symptoms necessitate medical treatment could also be deemed a triggering date for liability or a substitute for proof of causation. Because claimant suffered disabling symptoms when she first sought medical treatment, we need not examine the effect to be given to the date of first treatment.

5

There is no reason to apply the rule with any greater arbitrariness than is required to achieve its purposes, but there is no basis in this case to recognize an exception or qualification of the rule. It is arguable that an employer has no interest in the unnecessary dominance of an artificial rule when a claimant foregoes the benefit of the rule and relies upon

proof of actual causation. It is questionable whether an employer can invoke the rule of proof as a defense to defeat the rights of a claimant who successfully proves actual causation. To allow that would be to allow an employer to inject the rule into a case to defeat the very interests of a claimant which the rule is intended to serve. Similar considerations may apply in cases presenting limitations problems, see n 1. In cases of incremental injury, such as Inkley, it may be that an employer may invoke the rule of liability assignment to shift liability to a later employer. Procedures exist whereby any causal employer can join a later causal employer in order to protect its proportional interest. See, e.g., Oregon Administrative Rule 436-54-332. Also, an employer's interests may be protected where, as here, a claimant files against all possibly liable employers. Because we hold that disability occurred during Baza'r employment, we need not consider the application of the rules in those situations. See also, Fossum v. SAIF, supra at n 1.

6

Our resolution of this case renders remand for determination of insurance coverage unnecessary. The record establishes that Baza'r was insured by New Hampshire Insurance Co. on January 12, 1977, the date claimant became disabled.

IN THE SUPREME COURT OF THE STATE OF OREGON

In the Matter of the Compensation of
James E. Fossum, Deceased,

Helen Fossum,

« Respondent on Review,

v.

State Accident Insurance Fund,

Petitioner on Review,

Argonaut Insurance Company, and
Underwriters Adjusting Co.,

Respondents on Review.

Filed: June 22, 1982

CA 14961
SC 27959

On review from the Court of Appeals.*

Argued and submitted February 8, 1982.

Darrell E. Bewley, Appellate Counsel, Salem,
argued the cause and filed the petition for
review for the State Accident Insurance Fund.

Allen T. Murphy, Jr., Portland, argued the cause
for respondent on review Helen Fossum. With him
on the brief was Richardson, Murphy, Nelson &
Lawrence, Portland.

Emil Berg, Portland, argued the cause for
respondent on review Argonaut Insurance Company.
On the brief were Margaret H. Leek Leiberan and
Lang, Klein, Wolf, Smith, Griffith & Hallmark,
Portland.

Jerard S. Weigler, Portland, argued the cause for
respondent on review Underwriters Adjusting Co.
With him on the brief was Lindsay, Nahstoll,
Hart, Neil & Weigler, Portland.

Before Denecke, C.J., and Lent, Linde, Peterson,
Tanzer and Campbell, JJ.

TANZER, J.

Affirmed.

*Judicial review from Workers' Compensation Board
Nos. 77-3475, 77-6112, 78-958, 78-959, 78-957
52 Or App 769, 629 P2d 857 (1981).

TANZER, J.

This is a workers' compensation claim under the Occupational Disease Law, ORS 656.802 to 656.824, brought by the widow of a worker who died from mesothelioma, a form of cancer caused by exposure to asbestos. There are two issues: The first is which of several potentially causal employers is liable for compensation. The second is whether an inference is permissible that the deceased worker's former employer was insured by the State Industrial Accident Commission (SIAC), predecessor to the State Accident Insurance Fund (SAIF), where applicable law required the employer to secure coverage by SIAC or to file a notice of intent not to be covered.

The deceased was an electrical worker. During the early 1940's he worked for three different shipbuilders, the last of which was Kaiser Company T.R.D. From 1948 to 1967 he worked primarily for W.R. Grasle Company. From 1969 to 1976 he worked for Willamette Western. Shortly after leaving Willamette Western, the deceased was diagnosed as having mesothelioma. He died on August 5, 1977.

The procedural history of this claim is involved. The worker's widow filed claims with SAIF against the three shipbuilders, and against W.R. Grasle Company and Willamette Western. All the claims were denied and were consolidated for hearing before the Workers' Compensation Board.

The referee found that the claimant suffered from an occupational disease and that Kaiser was the responsible employer and SAIF the carrier liable for benefits. The board reversed, finding that the claimant had not proved either medical or legal

causation. The Court of Appeals concluded that the claim was barred by the applicable statute of limitations, Fossum v. SAIF, 45 Or App 77, 607 P2d 773 (1980). This court reversed on the limitations issue and remanded for a determination of the merits of the claim, 289 Or 777, 619 Pd 233 (1980).

On the merits, the Court of Appeals reversed the board. It found that the deceased's mesothelioma was an occupational disease caused by exposure to asbestos in the workplace. Because mesothelioma does not generally develop until 20 to 40 years after exposure to asbestos, the court found that employment within the last 20 to 40 years could not have actually contributed to the cause of the deceased's disease. It concluded that the only exposure which could have contributed to the cause of the disease occurred while the deceased was employed in the shipyards. Under the last injurious exposure rule, Kaiser, the last shipbuilder for whom claimant worked, was the responsible employer. In addition, it found that SIAC was Kaiser's carrier during the deceased's employment there, and that SAIF was therefore responsible for benefits.

SAIF petitioned for review, contending that the Court of Appeals misapplied the last injurious exposure rule in finding Kaiser to be the responsible employer, and that it impermissibly shifted the burden of proof to SAIF to establish that Kaiser was not insured by SIAC during the relevant time period. We allowed review to further refine the proper application of the last injurious exposure rule, see also, Bracke v. Baza'r, ___ Or ___, ___ P2d ___ (decided this date), and to consider whether the claimant may rely on an inference of SIAC's coverage under the

circumstances presented here. We affirm, but on different reasoning.

According to the medical testimony accepted by the Court of Appeals, mesothelioma is caused by exposure to asbestos scattered in the air in very small particle form. Two physicians testified, based upon statistical evidence, that exposure to asbestos under the conditions of close containment which existed in World War II shipyards causes mesothelioma 20 to 40 years after exposure. They also testified (one as a medical probability, the other as a medical certainty) that work at the shipyards was the actual cause of the worker's mesothelioma.

There was an attempt to prove that the worker was exposed to asbestos during post-1945 employment with Grasle and Willamette Western under conditions which could have caused mesothelioma. We conclude the evidence was insufficient as a matter of law to establish that fact. The nature and intensity of the worker's exposure at Grasle, an electrical construction company, is not established by evidence. Particularly, there is no evidence that the Grasle conditions of exposure were of the nature and intensity which can cause mesothelioma. Similarly, as to Willamette Western, where the worker was exposed to asbestos released in the course of making brake linings, one physician said that there was no statistical evidence that brake lining manufacture caused mesothelioma, although it was possible only in the sense that it could not be ruled out. The other physician said employment at Willamette Western could not have caused it. Again, a fact finder could not have found from the evidence that the worker was exposed at Willamette Western to conditions which could have caused mesothelioma.

The Court of Appeals found that the shipyard employment caused the worker's mesothelioma and that employment at Grasle and Willamette Western did not, based on the physicians' testimony that the disease appears 20 to 40 years after the causal exposure. In applying the last injurious exposure rule to claims for occupational disease, however, the issue is not which employment actually caused the disease, but which employment involved conditions which could have caused it. If conditions of exposure at Grasle could have caused the disease, for example, the exposure would have been prior to the 20-year minimum period for disease development and Grasle would have been liable as potentially causative under the last injurious exposure rule. The Court of Appeals apparently excluded the Grasle employment because it was not an actual cause. The correct analysis under the last injurious exposure rule, however, is that Grasle is not liable because there is no evidence of exposure at Grasle to conditions which could have caused the disease. The same may be said of the employment at Willamette Western.¹

That leaves the shipyards as the only possible contributing causes of the worker's disease. Determining which of the three shipbuilders is liable requires application of the last injurious exposure rule.

As we observed in Bracke, there are at least two last injurious exposure rules, one which assigns liability where successive employment contributes to the totality of the disease, and one which substitutes for proof of actual causation. Here, both rules apply. The deceased was exposed to asbestos in the shipyards during successive employments, each of which could have

contributed to cumulative cause of the disease. The claimant has proved that one or more of those employments actually caused the disease, but cannot prove which did so. Under both rules, Kaiser, the last potentially causal employer, is solely liable.

Kaiser no longer exists. Thus the second issue is whether SIAC was Kaiser's carrier during the deceased's employment, making SAIF the carrier responsible for benefits.

Under the workers' compensation statutes in effect at that time, SIAC and only SIAC was authorized to provide workers' compensation coverage under the Workers' Compensation Law. OCLA §§ 102-1752; 102-1735. Every injured workman who sustained injury while employed by a covered employer was entitled to compensation benefits from SIAC, "in lieu of all claims against his employer." OCLA § 102-1752.

Kaiser was a shipbuilder. OCLA § 102-1725(c) provided that "shipbuilding operations" were "hazardous occupations." An employer in a "hazardous occupation" which did not file a notice with SIAC was nevertheless automatically subject to the act. OCLA § 102-1721. OCLA § 102-1712 provided, however, that "hazardous occupation" employers could opt out of workers' compensation coverage:

"All persons, firms and corporations engaged as employers in any of the hazardous occupations hereafter specified shall be subject to the provisions of this act; provided, however, that any such person, firm or corporation may be relieved of certain of the obligations hereby imposed and lose the benefits hereby conferred by filing with the Commission written notice of an election not to be subject thereto in any manner hereinafter specified * * *. It is the purpose of this act that an occupation and all work incidental thereto and all workmen engaged therein shall be wholly subject to or wholly outside the provisions of this act." OCLA § 102-1712.

OCLA § 102-1713 set forth the procedure by which an employer engaged in a hazardous occupation could elect "not to contribute to the Industrial Accident fund." If an employer made such an election, injured employees of such employer were not eligible for compensation benefits, Carlston v. Greenstein, 256 Or 145, 148, 471 P2d 806 (1970), but the employer was subject to suit from the injured employee, and the defenses of assumption of risk, contributory negligence, and fellow servant, were unavailable to the employer. OCLA § 102-1713.

In summary, reference to the statutes in effect at the time of last injurious exposure establishes as a matter of law that with one exception, SIAC was required to pay compensation benefits to injured workers of employers in hazardous occupations, whether or not SIAC received contribution from any such employer, even if SIAC was unaware of the employer, and even if the employer did nothing. OCLA § 102-1721. The only situation in which SIAC would have no obligation to pay compensation benefits to an injured employee of an employer in a hazardous occupation was if the employer had opted out under OCLA § 102-1713. Thus it is established that the worker was covered and there is no evidence from which a fact finder could find the sole exception to coverage to have been proved. We therefore conclude that this record establishes as a matter of law that SAIF is liable.²

Affirmed.

FOOTNOTES

1

The employment at Willamette Western could not have been an actual cause of the disease because it was during the 20-year period before which actual causation must have occurred. Had it been proved and found that the conditions of exposure at Willamette Western were of a kind which could have caused the disease, then under the last injurious exposure rule as described by Larson, Willamette Western would be liable even though that employment could not have been the actual cause. See 4 Larson, Workmen's Compensation Law § 95.21, but see, Bracke, n 5. Where, as here, claimant's interests are protected because all potentially causal employers are parties, it is arguable that a defense of actual impossibility should be allowed to reduce the otherwise arbitrary operation of the last injurious exposure rule. Cf., Bracke, n 5. Because there is no evidence of potentially causative exposure at Willamette Western or Grasley, however, we need not decide this issue.

2

We do not consider whether the claimant's burden of proof goes beyond establishing the identity of a liable employer. Normally, assignment of liability is litigated by potentially liable insurers with nominal participation by the claimant. See

ORS 656.307. Here, the Court of Appeals' finding of coverage resolves the factual issue regardless of who had the burden of proof.

Also, we realize that our decision has enormous financial implications. It subjects SAIF to an immense pool of unforeseen risk, incurred when SIAC was a monopoly. Obviously, some of the asbestos cases presently in litigation and to come will require payment from current premiums, which may leave SAIF in an untenable competitive position. The economic and humanitarian problem of asbestos-related diseases is larger than the scope of the courts' case-by-case decision-making, and may be more amenable to legislative solution.

INDEX CONTENTS

Overview of Subject Index	894
Subject Index	896
Case Citations	911
Van Natta Citations	916
ORS Citations	919
Administrative Rule Citations	921
Larson Citations	922
Own Motion Jurisdiction	923
Memorandum Opinions	926
Claimants Index	930

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
COVERAGE
CREDIBILITY ISSUES
CRIME VICTIMS ACT
DEATH BENEFITS
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
HEARINGS PROCEDURE
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, CONDITION,
OR INJURY
OFFSETS
ORDER ON REVIEW
ORDER TO SHOW CAUSE
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

Volume 34

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

Dual purpose trip, 448
Employer acquiescence, 153
Going & coming rule, 165
Injury vs. disease discussed, 363
Inmate on work release, 517
Personal mission, 96
Personal project as benefit, 153
Prohibited conduct, 48,96
Right-to-control test, 522,833
Risk of job, 359
Unwitnessed accident, 97

AFFIRM & ADOPT See MEMORANDUM OPINIONS

AGGRAVATION CLAIM

See also: CLAIMS, PROCESSING; OWN MOTION RELIEF

Accept/deny

Even though D.O. appealed, 710
As collateral attack on last arrangement of compensation, 98
Compared with reopening, 621
Compared with .245 claim, 215,490
Definition, 490,551,710
Employer duty to notify insurer, 308
"Further medical services" discussed, 621
"Last arrangement of compensation" defined, 290
Perfection of, 252,536,622
Pre-1973 non-disabling claim, 116
Reliefs available, 490
Res judicata, 290
Successive aggravation claims, 290
Time for filing, 252

AGGRAVATION/NEW INJURY

Aggravation found, 81,105,141,143,158,242,287,308,331,478,543,629
Different test for off-job injury, 331,453,543
Discrete areas of injury, 170
Grable test applied, 453,629,639,751
Last injurious exposure, 295
Lay testimony as deciding order, 143
New injury found, 101,116,170,295,582,779
Psychological condition, 242
Reimbursement between insurers, 141,189
Second injury supersedes first
If PPD, 109,582,732
Unless body parts separate, 732
Subsequent worsening, 109

AGGRAVATION (WELLER)

See also: REOPENING

Applies only to occupational disease, 298

Last injurious exposure rule, 176

Retroactive application, 667

Swelling documents worsening, 460

Symptoms not worsened, 435

Underlying disease

Made symptomatic, 550

Not worsened, 464,476

Worsened, 58,176,234,264,460,636,660

Weller applicable only where underlying condition symptomatic before injury, 202,278,435,460,512,550

AGGRAVATION (WORSENING)

See also: REOPENING; AGGRAVATION CLAIM

Back claim requires medical evidence,203

Claim not made, 70

Grable test, 453,820

Industrial relation not shown, 95,157

"Last arrangement of compensation" discussed, 52,541,759

"Material contributing cause" test, 820,851

No worsening shown, 23,30,98,140,145,157,168,230,267,435,446,
515,541,574

Not due to injury, 30,62,79,756,759

Off-job incident, 453,514

PPD on last injury: aggravation claim against prior, 727,732

Pre-existing condition worsened, 26,230

Reopening date discussed, 75

Subjective complaints alone not sufficient, 230,446,510,515,573

Successive injuries, 727

Surgery required after industrial exposure, 435

Worsening shown, 52,69,75,219,447,506,592,820

APPEAL & REVIEW

See also: REMAND; REQUEST FOR HEARING; REQUEST FOR REVIEW

Board reconsideration while appeal to Court pending, 290

Board review limited to testimony, exhibits, argument, 213

Interim order not appealable, 631,725

Issue not raised

Can be decided, 375

Can't be decided, 278

ATTACHMENT See GARNISHMENT

ATTORNEY'S FEES

Aggravation/new injury, 181,357

Apportion between carrier-paid and claimant-paid from
increased compensation, 249

Awarded by amendment, 441

Based on efforts & results, 5,35,79,181,241,249,254,267,
281,700

Board Review

Additional fee awarded, 202,723

Must defend all issues to get award, 484,588,727,738

No additional fee, 232,510

ATTORNEY'S FEES (Continued)

- Carrier-paid fee
 - In extent case, 80,255
 - Denied claim, 564,824
- Claimant's costs, 100,357
- Denied claim later accepted, 205
- Interest on award, 469
- Modified, 123,249,338,522,531
- None awarded where no penalty, 57
- Not compensation, 494
- Own Motion matters, 109,433
- Payable by Field Services, 761
- Range of fees, 652
- "Reasonable fee" at Court level, 824,831
- Reasonableness of fee, 196,531,676
- Referee's award excessive, 205,493,652,700
- On Remand from Court of Appeals
 - Authority limited to extent cases, 37,510
 - Award, 47,48,51,196,614
 - No authority, 6,37,103
- Third Party Recovery, 615
- .307 cases
 - Claimant's attorney's fee, 357

BENEFICIARIES

- Child, not life in being at time of injury, 135
- Widow, not wife at time of injury, 135

CAUSATION

CLAIMS, FILING

- Good cause, 571
- Late filing, 225,342,659,792
- Notice of claim, 792
- Occupational disease, 646,859,868,884
- Occupational disease vs. injury, 868
- Perfection of claim, 252,536

CLAIMS, PROCESSING

- Adjustment between carriers on .307 order, 669
- Claim closure, 773
- Duty to process defined, 551
- Independent exam, 11
- Occupational disease vs. injury, 363,659,664,689
- Successive claims, one disease, 646
- Successive injuries, carriers, 109,583
- Termination of TTD, 114
- Unreasonable, 551
- Upon remand, 551

COLLATERAL ESTOPPEL

- See also: RES JUDICATA
- Application to non-complying employer, 676

CONDITIONS See OCCUPATIONAL DISEASE, CONDITION, OR INJURY

CONSTITUTIONAL ISSUES

COVERAGE

See also: NON-COMPLYING EMPLOYER
Prime contractor vs. subcontractor, 222
Termination of coverage

CREDIBILITY ISSUES

Board vs. Referee judgement, 707
Credibility questioned, no objective evidence, 504
Defer to Referee, 619
Failure to tell doctors, 195
Lapse between injury & report, 195
Referee's finding affirmed, 22,74,99,195,225,378,552,572,619
Unwitnessed accident, 97

CRIME VICTIMS ACT

Good cause, late filing, 579
Prejudice, late filing, 579

DEATH BENEFITS

Calculation of PTD & TTD, 135
Compensability, 547

DENIAL OF CLAIMS

After acceptance, 667
Copy of denial letter to attorney, 623
Effective, 782
No appeal rights on denial letter, 145
No basis for, 558
When 60 days runs, 145

DEPENDENTS See BENEFICIARIES

DETERMINATION ORDER

DISCOVERY

Claimant's deposition: procedure for taking, 592
One year delay, 90
Production of medical, vocational reports, 502,612

DISPUTED CLAIM SETTLEMENTS See SETTLEMENTS & STIPULATIONS

DOCUMENTARY EVIDENCE

Offered for impeachment, limited use, 25

EMPLOYMENT RELATIONSHIP

EVIDENCE

See also: DOCUMENTARY EVIDENCE
Adverse inference: failure to submit to exam, 258
Burden of proof
On party requesting hearing, 703
Speculation no substitute for fact, 74
Uncomplicated medical question, 35
Definition, 754
Hearing loss cases, 467,470
Hearing scheduled before Board, 614,615
Inadmissibility vs. probative value, 547

EVIDENCE (continued)

Medical opinion based on interview, 547
New, not considered on review, 141,176,248,346,787
New, not proper for remand, 19,21,534
Own Motion Relief
 When clear & convincing evidence required, 127
Presumption of correctness
 Determination Order, 687,700,702,703,714,717,772
Production of documents to second attorney, 447
Ten-day rule
 Enforced, 25,40,612,634,655
Scientific measurement vs. subjective, 470

FEDERAL EMPLOYEES LIABILITY ACT

FIREFIGHTERS

GARNISHMENT

Child support, 864,867

HEARINGS PROCEDURE

Closing argument
 Unrecorded--stipulations, admissions, 97
Continuances
 Limitations, 731
 Reasons for, 731
Referee to consider only issues raised, 98

HEART ATTACKS, HEART DISEASE

Heart condition
 Compensable
 Not compensable, 34,285
MI as part of disease process, 547
Myocardial infarction
 Compensable, 845
 Not compensable, 24,547
Personality types, 547
Stress as a causal factor, 845

INDEMNITY ACTIONS

INMATE INJURY FUND

Injury not covered, 516

INTERIM ORDER

Denial of Motion to Dismiss, 466

JURISDICTION

See also: OWN MOTION RELIEF
Adjustments between carriers, 141,439,522
Board limited to compensation of workers, 314
Circuit Court; 1953 injury, 810
Director of Workers' Compensation Department, 314
Extent issue not deferred, compensability not final, 289
Field Services issue, 761
None in Board until final order of Referee, 466,747,764
Request for hearing after aggravation rights expire, 252,769
Third Party matters limited, 728

LUMP SUM See PAYMENT

MEDICAL CAUSATION

Adverse inference: refusal to submit to exam, 258
Back claim requires medical evidence, 203
Board expertise, 499
Burden of proof
 Discussed, 336,450
 Failure to meet, 15,336,450
 Failure to submit to diagnostic exam, 258
 Met, 342
 Uncomplicated case, 35
Expert opinion
 Not required, 35
 Required, 94,787
Failure to report injury to doctors, 195,526
Injury
 Condition related to, 11,435,679,720
 Condition unrelated to, 271,338,648,787
Later injury caused by earlier one; rated together, 661
Left knee injury caused right knee condition, 298
Major contributing cause test, 132,143
Material contributing cause defined, 453
Multiple possible causes, 15,18
Obesity
 Duty to lose weight, 2
 Not caused by injury, 2
Pre-existing condition, 435
Permanent disability, 42
Relationship between PTD and injury, 154
Shoulder, arm conditions related, 308
Stapling gastric fundoplasty not compensable, 2
Woodman test applied, 679

MEDICAL OPINION

Analysis vs. observation, 196,450
Based on history
 Incomplete history, 209,446,799
 Inconsistent histories, 25,132,173,464,560,756
 Witness not credible, 756
Based on interviews, 547
Based on temporal relationship only, 766
Conclusory opinion without analysis, 76,94,105,173,204,464,777
Consultant vs. treating physician, 173,450,456,464,799
Experts vs. treating physician, 76,766
Inconsistent theories, 173
Scope of expertise: psychologist on heart attack, 221
Hearing tests, 125,560
Uncontroverted opinion not binding, 652

MEDICAL SERVICES

Authorization for future services, 490
Authorization requested where claimant doesn't want treatment, 249,497
Chiropractic treatment
 Compensable, 194
 Not compensable, 86

MEDICAL SERVICES (continued)

- Claim for, vs. aggravation claim, 218,490,582
- Consequences of negligent treatment compensable, 237,615,739
- Denial of service upheld; carrier pays anyway, 667
- Elective surgery, 258
- Independent consultation, 11
- Nerve stimulator, 104
- Out-of-state, 744
- No denial if no bill presented to carrier, 764
- Overdose compensable, 237
- Pain clinic referral, 249,267
- Palliative treatment, 168
- Pay pending appeal (pre-1979 injuries), 328
- Psychological services
 - Compensable, 24
 - Not compensable, 197
- Refusal of treatment, 674,679
- Retroactive denial not allowed, 157
- Submission to independent exam, 258
- Successive injuries, insurers, 109,582
- Sex therapy, 766
- Surgery following lump sum award, 227
- Surgery for pre-existing condition, 435,460
- Surgery to resolve differential diagnoses, 642
- Surgery without authorization, 227,258
- Termination: date of new injury, 248
- Travel expenses for treatment, 20,194,350
- Treating physicians
 - Limited in number, 168
 - Procedure for limiting, 168
- Unreasonable actions of doctor, 258
- Unreasonable interference: doctor-patient relationship, 614
- Weight reduction program, 506

MEDICALLY STATIONARY

- Chiropractor vs. orthopedist, 190
- Psychological condition, 249
- Required for closure, rating PPD, 543
- Retrospective determination, 11
- Subsequent reopening, 732
- Worsening required, 487

MEMORANDUM OPINIONS See PAGE 922

NON-COMPLYING EMPLOYER

- Conflicting communications re termination of coverage, 222
- Doctrine of equitable estoppel, 222

NON-SUBJECT/SUBJECT WORKERS

- See also: EMPLOYMENT RELATIONSHIP
- Circuit Court employees, 522,833
- Household exemption, 256
- Jail inmate work crew member, 816
- Out of state worker, 586
- Temporary work out of state, 784

OCCUPATIONAL DISEASE CLAIMS

See also: AGGRAVATION (WELLER); PSYCHOLOGICAL CONDITIONS
& FACTORS

Apportionment between concurrent employers, 57

Causation

Greater susceptibility theory, 467

Major contributing cause test, 132,143,162,192,278,285,
318,346,467,470,501,509,520,
547,550,714,716,736,777,853

Significant predominant test, 76,192

Degree of work exposure, 442

Distinguished from injury, 363,659,664,689

Identification of disease necessary, 162

Last injurious exposure rule, 264,470,558,618,868,884

Responsibility vs. compensability, 467,470

Successive employment exposures, 264

Successive insurers, 176

Successive claims, 646

Time for filing, 646,859

OCCUPATIONAL DISEASE, CONDITION, OR INJURY

See also: HEART ATTACKS, HEART DISEASE

Alcoholism, 318

Asbestosis, 58,859

Asthma, 456,868

Atopic eczema, 50

Bronchiolitis obliterans, 84

Cardiomegaly, 285

Carpal tunnel, 209,499,501

Chronic obstructive pulmonary disease, 853

Chronic pain syndrome, 595

Dermatitis, 50

Epicondylitis, 264

Esophageal reflux, 16

Headaches, 130

Hearing loss, 467,470,560

Hemiparesis, 130

Hemochromatosis, 435

Hepatitis, 353

Hernia, 39,435,779

Herniated disc, 514

Hypertension, 15

Intercostal neuritis, 10

Interstitial fibrosis, 58

Kidney dysfunction, 736

Meat wrapper's asthma, 868

Mesothelioma, 884

Obstructive lung disease, 19,853

Plantar fasciitis, 2, 520

Restrictive lung disease, 19,853

Rheumatoid arthritis, 766

Spondylolysis, 11

Spondylolisthesis, 42

Thrombophlebitis, 39,192

Tinnitus, 560

Ulnar nerve palsy, 648

Vasomotor rhinitis, 346

OFFSETS

Approved

Overpayment of TTD, 38,100,249,267,458,487
TTD erroneously ordered

Authorized by administrative rule, 655

Disapproved

Insufficient evidence, 473

No evidence presented, 510

Two injuries, two awards, 489

No unilateral offset, 796

Prohibited, 661

TTD

Against PPD, 655,661

ORDER ON REVIEW

Abated, 9,96,127,512,551

Amended, 448

ORDER TO SHOW CAUSE

Why not pay TTD, 458

OWN MOTION RELIEF

(A listing of the unpublished decisions of the Board under
Own Motion Jurisdiction appears on page 926.)

Aggravation claim, 769

Attorney's fees, 109,433

Clear & convincing evidence required, 128

Medical services dispute: subject to request for hearing, 591

No relief while litigation pending, 123,124,434,440,441,442,444,445

No time loss benefits when retired, 88,243,443

Order to Show Cause re contempt, 89

Order vacated pending hearing, 123,124,284

Order vacated for submission to Evaluation Division, 594

Reconsideration, 88,109,131,227

Reconsideration denied, 89

Redetermination of PTD, 748

Relief denied, 127

Reopen only if time loss due, 88

Reopened PTD, 748

Reopening date, 109

Surgery following lump sum award, 227

PAYMENT

PENALTIES

Board's expertise, 342

Definition: not compensation, 484

Delay accept/deny

Reasonable, 342,784

Unreasonable, 163,258,378,558,724

Delay payment

Reasonable, 57,744,

Unreasonable, 1,3,14,281,308,477,551

Denial

Reasonable, 746

When 60 days starts to run, 145

PENALTIES (continued)

Excessive penalty

Awarded, 17

Reduced, 3

Failure to issue denial, 140

Failure to pay pending appeal, 1

Medical report

Failure to provide, 746

Untimely disclosure of, 612

Mental anguish, 522

Must be subject employee, 784

Premature closure, 483

Refusal of payment

No refusal found, 125

Reasonable, 11,141,176,205,267,367,483,497,506,654,667,674,700

Unreasonable, 24,114,135,145,247,254,290,375,378,662,700,724,763

Unreasonable claims processing, 551

Worker's failure to submit to exam, 258,367

PPD (GENERAL)

Cause of permanent impairment must be proven, 647,650

Determination during vocational rehabilitation, 584

Hip: scheduled vs. unscheduled, 212,481,512

Increased award since last arrangement without worsening, 489

Medical evidence of permanent impairment required, 167,224,647,773

No determination if reopened, 543

OAR 436-65 binding on Board, referees, 703

Payments

Suspend while receiving TTD, 149,584

Pre-injury awards, 805

Psychological factors, 450

Unrelated condition causing impairment, 787

Unscheduled award flowing from scheduled injury, 178

When to rate

At time of hearing, 543

Prior to subsequent injury, 568,703

PPD (SCHEDULED)

Administrative guidelines to impairment applied retroactively, 167

Arm vs. finger award, 686

Hand vs. finger award, 22

Hemiparesis, 130

Impaired area

Arm, 17,39,45,130,288,482,516,535,686,703,707

Foot, 30,53,86,130,289

Hand, 22,477

Hearing loss, 125,560

Hip, 481

Leg, 25,38,48,54,150,166,167,231,283,527,634

Thumb, 53

Medical evidence of permanency required, 17

Subjective award improper, 25

Previous injury, 283

Rating hearing loss, 125, 560

Rating more than one radical, 150

Woodman test, 178

PPD (UNSCHEDULED)

Back (low)

No award, 42,271,773

5-25%, 10,47,53,87,145,172,213,277,279,280,495,506,537,539,
540,571,572,671

30-50%, 7,66,183,201,304,496,702,741,769

55-100%, 8,80,510,529,568

Back (upper)

No award

5-25%, 39,776,805

Factors discussed

Applicability of OAR 436-65, 100,671

Aptitudes/adaptability, 183

Complex question requires medical support, 42

Employments precluded, 50

Gaps in administrative guidelines, 34

Headaches, 130

Impairment, 8

Improvement possible, 304

Motivation, 172,183,353

Multiple body parts, 279

Pre-existing conditions, 87,271,304,769

Pre-injury awards, 805

Psychological reaction to occupational disease, 353

Recommendation of job change, 228

Testimony of claimant, 840

Two injuries, both preclude regular work, 840

Treating vs. consultant chiropractor

Wage earning capacity, 560

Wages, 183,277

Head, 840

Hip, 211

Neck, 499

Psychological

Arising from injury, 93

Respiratory condition, 19,84,228

Shoulder, 773

Unclassified, 38,130,353,717

PERMANENT TOTAL DISABILITY

Award

Affirmed, 40,73,373,576,595,742

Made, 382,566,626,687

Reduced, 54,450,504,799

Refused, 3,19,151,679,741

Computation of benefits, 473

Death benefits, 135

Effective date, 373,815

Factors considered

Causal relationship, 154

Communication difficulties, 151

Current vs. future conditions, 91

Futile to attempt work, 566,687

"Gainful & suitable occupation", 626

Job availability in area, 576

Medical evidence, 55,66,504

PERMANENT TOTAL DISABILITY (continued)

Factors discussed (continued)

Medically stationary: all related conditions, 679
Motivation, 55, 382, 450, 595, 741
Objective vs. subjective physical condition, 595
Pre-existing progressive disability, 568, 799
"Reasonable efforts," defined, 576
Refusal of recommended treatment, 679
Scheduled injury, 3
Subsequent, non-compensable injury, 568
Subsequent, unrelated conditions, 742
Psychological component, 450

Reevaluation

Burden of proof, 111, 387
Finding of PTD not res judicata, 111
Material change
 Proven
 Not proven, 111, 387
Passive income, 387
Procedure, 748

PSYCHOLOGICAL CONDITIONS & FACTORS

Arising from injury, 242, 573
Compensability
 Major contributing cause test, 132, 318, 563, 716
 Significant preponderance of causation test, 18
 Work & nonwork causation, 18, 68, 318
Compensation neurosis, 573
Pre-existing, not worsened by injury, 799
Unscheduled disability, 93, 450

RECONSIDERATION

Denied, 22, 37, 103, 122, 129, 246, 438, 440, 466, 741, 755, 776
Order on, 5, 99, 201, 228, 639

REMAND

By Board

For further evidence, 154, 162
Request denied, 21, 44, 180, 182, 445, 472, 494, 528, 534, 619, 688,
723, 754

By Court of Appeals

For clarification, 805
For new evidence, 803
For reconsideration, 18, 563
Modified Board, 20, 455
Request denied, 787
Reversed Board, 3, 5, 9, 50, 51, 54, 69, 92, 95, 148, 237, 240, 443,
459, 466, 565, 584, 611, 633, 727

REOPENING CLAIM WITHIN ONE YEAR OF DETERMINATION ORDER

See also: MEDICALLY STATIONARY
Claim for, compared with aggravation, 621
No longer possible relief, 621
Precludes determination of PPD, 543
Referee's authority, 194

REQUEST FOR HEARING

- Denial issued after, 145
- Dismissal
 - For abandonment, affirmed, 64
 - Order denying motion for not final order, 631
 - Premature, 677
 - With vs. without prejudice, 645
- Good cause, late filing
 - Shown, 170,582
 - Not shown, 170,632
- Issue not ripe at hearing not precluded later, 158
- Production of medical, vocational reports, 502
- Time for filing, 225,646,710

REQUEST FOR REVIEW--BOARD See also: JURISDICTION

- Abandoned, 434
- Briefing, docketing procedure, 749
- Extension of time for brief, 180
- Issues must be stated, 738,749
- Motion to dismiss denied
 - Failure to notify all parties, 17,726
 - Failure to timely request review, 9,28,44,730
- Order of Dismissal, 114,120,125,434,466,477,645,646,747
- Service on parties, 90
- Timeliness, 125,477,730
- Withdrawn, 3,7,21,33,103,119,231,244,247,255,443,459,592,703,715,741,742,747,749,755

RES JUDICATA

- Burden of proof, 290
- Compensability of condition, 258
- Duty to exhaust alternative theories at one hearing, 520
- Entitlement to aggravation relief must be determined at one proceeding, 490
- Final order not appealed, 93
- Protects correct and incorrect orders, 93
- PTD order not res judicata, 111
- Stipulation: effect, 672
- Successive aggravation claims, 290

SETTLEMENTS & STIPULATIONS

- Approval denied, 556
- "Bona fide dispute" defined, 556
- Disputed Claim Settlement
 - Approved upon Remand from Court of Appeals, 46,119
 - Attorneys' fee for two firms, 45
 - Effect on aggravation claim, 541
 - Set aside, 669
- Not final until approved by referee, 669
- Referee's authority at post-settlement hearing, 194
- Referee monitoring of negotiations, 205
- Res judicata
 - On aggravation denial, 672

SUBJECT WORKERS See NON-SUBJECT/SUBJECT WORKERS

SUCCESSIVE INJURIES See AGGRAVATION/NEW INJURY

TEMPORARY TOTAL DISABILITY

See also: MEDICALLY STATIONARY

Computation

Based on actual wages, 5
Overtime, 675
Two jobs at time of injury, 473

Death benefits, 135

Due

Beginning date, 564
During vocational rehabilitation, 655
Following Opinion & Order, 753
Insurer's delay in obtaining treatment, 254
Entitlement under vocational rehabilitation, 213
Interim compensation
Aggravation claim vs. claim in first instance, 664
Claimant retired, 859
Deny or pay, 378
Due after 14 days unless accept/deny, 710,859
Intervening, non-industrial injury, 30
No proof of entitlement needed, 724
Notice vs. date of disability, 574, 664,700,859

Medical verification

Defined, 308
Required, 14,70,551,621,652

None due

No treatment, 267
Stationary, not in vocational rehabilitation, 72
Stationary, released to regular work, 6

Own Motion cases See OWN MOTION RELIEF

Release for regular work, not second job, 244

Simultaneous benefits

PPD and TTD, 738

Stationary date discussed, 11,252

Termination

Date of doctor's letter, 584
Deference to treating doctor, 650
Determination Order, 114
Generally, 551
Medically stationary, 375,584,661,670
Refusal of doctor-approved work, 589
Return to regular work, 244
Suspension order, 674
Unilateral, 655,661,670
Vocational rehabilitation, 655,738

THIRD PARTY CLAIM

Board's authority limited, 728

Hearing before Board, 615

Malpractice (medical)

Consequences of, 615,739

Attorney's fee, 615

Reimbursement to carrier, 615,739

Statutory Distribution, 734,739

TORT ACTION

VOCATIONAL REHABILITATION

Date of injury determines applicable rules, 183,213
Eligibility: effect of discharge for misconduct, 213
Eligibility vs. participation, 183,240
Injury during authorized program, 287
Moving expenses, 761
Placement decisions
 Retroactivity, 183
 Scope of review, 183,240
Remand to FSD, 213
Work skills improvement program, 183

CASE CITATIONS

Volume 34

page

Adams v. SAIF, 43 Or App 899 (1979)---183
Adamson v. The Dalles Cherry Growers Inc., 54 Or App 52 (1981)---165
Anfilofieff v. SAIF, 52 Or App 127 (1981)---256,499,676
Anlauf v. SAIF, 52 Or App 115 (1981)----531
Atwood/Christensen v. SAIF, 30 Or App 1009 rev den 280 Or 521 (1977)
---367,824
Audas v. Galaxie, 2 Or App 520 (1970)---211
Austin v. SAIF, 48 Or App 7 (1980)---543
Autwell v. Tri-Met, 48 Or App 99 (1980) rev den 290 Or 211---298

Bailey v. Morrison-Knudsen, 5 Or App 592 (1971)---6,824
Barnhardt v. Louisiana Pacific Corp., 50 Or App 329 (1981)---576
Batdorf v. SAIF, 54 Or App 496 (1981)---845
Bauder v. Weyerhaeuser, 51 Or App 77 (1981)---742
Beaudry v. Winchester Plywood, 255 Or 503 (1970)---143,298,318,853
Bell v. Hartman, 44 Or App 21 (1980) 289 Or 447 (1980)---314,378,724,784

Bentley v. SAIF, 38 Or App 473 (1979)---111,127,387
Bowser v. Evans Products Co., 270 Or 841 (1974)---168
Bracke v. Baza'r Inc., 51 Or App 627 (1981) 293 Or 239 (1982)---264,618,
689,884
Bradley v. SAIF, 38 Or App 559 rev den 287 Or 123 (1979)---327
Brady v. General Accident Assurance Co., 29 Or App 357 (1977)---183
Briggs v. SAIF, 36 Or App 709 (1978)---799
SAIF v. Broadway Cab Co., 52 Or App 689 rev den 291 Or 662 (1981)---314
Brooks v. D & R Timber, 55 Or App 688 (1982)---490,642,738,749
Brown v. EBI, 289 Or 905 (1980)---367,556,632

Brown v. Portland School Dist. #1, 291 Or 77 (1981)---864
Brown v. SAIF, 51 Or App 389 (1981)---21,141,787
Buckner v. Kennedy's Riding Academy, 18 Or App 516 (1981)---225
Burkholder v. SAIF, 11 Or App 334 (1972)---579
Butcher v. SAIF, 45 Or App 313 (1980)---382,566,687
Button v. SAIF, 45 Or App 295 rev den 289 Or 107 (1980)---342

Calder v. Hughes & Ladd, 23 Or App 66 (1975)---105
Calvin v. Calvin, 6 Or App 572 (1971)---864
Carlston v. Greenstein, 256 Or 145 (1970)---884
Carter v. SAIF, 52 Or App 1027 (1981)---252,769
Cassady v. SIAC, 116 Or 656 (1926)---135
Cavins v. SAIF, 272 Or 162 (1975)---710

Christensen v. SAIF, 27 Or App 595 (1976)---331,543,718,820
Clark v. U.S. Plywood, 288 Or 255 (1980)---48
Clayton v. SCD, 253 Or 397 (1969)---547,845
Clemons v. Roseburg Lumber Co., 34 Or App 135 (1978)---258,679
Clinkenbeard v. SAIF, 44 Or App 583 (1980)---672
Colwell v. Trotman, 47 Or App 855 (1980)---57

Coombs v. SAIF, 39 Or App 293 (1979)---252,769
Cooper v. SAIF, 54 Or App 659 (1981)---298,636
Cox v. SIAC, 168 Or 508 (1942)---824
Crosby v. General Distributors, 33 Or App 543 (1978)---109,290,582,732
Cutright v. Amer. Ship Dismantler, 6 Or App 62 (1971)---868

Davidson Baking v. Ind. Indemnity, 20 Or App 508 rev den (1975)---868
Davis v. Wasco IED, 286 Or 261 (1979)---816
Dean v. Exotic Veneers, Inc., 271 Or 188 (1975)----520
Dimitroff v. SIAC, 209 Or 316 (1957)---543,703,840
Eber v. Royal Globe, 54 Or App 940 (1981)---298
Edwards v. SAIF, 30 Or App 21 rev den (1977)---338,576,743,766,787
Elford v. SIAC, 141 Or 284 (1932)---547

Emmons v. SAIF, 34 Or App 603 (1978)---568
Ferguson v. Birmingham Fire Ins., 254 Or 496 (1969)---676
Fields v. WCB, 276 Or 805 (1976)---127
Finley v. SAIF, 34 Or App 129 (1978)---258
Fisher v. Consolidated Freightways Inc., 12 Or App 417 (1973)---387
Foley v. SAIF, 29 Or App 151 (1977)---173

Ford v. SAIF, 7 Or App 549 (1972)---111,277
Forest Grove Brick v. Strickland, 277 Or 81 (1977)---833
Fossum v. SAIF, 45 Or App 77 (1980)/289 Or 777 (1980)---387,868,884
Francoeur v. SAIF, 17 Or App 37 (1974)---350
Frasure v. Agripac, 41 Or App 7 (1979)/290 Or 99 (1980)---62,667
Friesen v. Gould Inc., 18 Or App 120 (1974)---318

Garcia v. Dept. of Motor Vehicles, 253 Or 505 (1969)---703
Gas-Ice Corp. v. Newbern, 263 Or 227 (1972)---815
Gettman v. SAIF, 289 Or 609 (1980)---92,111,387,543
Gibson v. SAIF, 288 Or 45 (1979)---636
Giese v. Safeway Stores, 10 Or App 452 (1972)---6,824
Gilroy v. General Distributors, 35 Or App 361 (1978)---664

Giovanini v. SAIF, 35 Or App 352 (1978)---318
Grable v. Weyerhaeuser, 47 Or App 1 (1980)/2910r 387 (1981)/55 Or App 627 (1982)
---173,203,219,331, 453,459,543,629,639,689,820,868
Gray & Co. v. McKenzie, 56 Or App 394 (1982)---815
Green v. SIAC, 197 Or 160 (1952)---805
Gumbrecht v. SAIF, 21 Or App 389 (1975)----448
SAIF v. Gygi, 55 Or App 570 (1982)----132,143,162,192,278,285,346,467,
470,501,509,520,547,550,563,592,664,688,714,716,736,777,853

Hamel v. SAIF, 54 Or App 503 (1981)----514
Hamlin v. Roseburg Lumber Co., 30 Or App 615 (1977)---173

Hammons v. Perini Corp., 43 Or App 299 (1979)---15,58,450,766
Hampton v. SAIF, 23 Or App 74 (1975)---576
Hanna v. McGrew Bros. Sawmill, 45 Or App 757 (1980)---357,782
Hannan v. Good Samaritan Hosp., 4 Or App 178 rev den (1971)---805
Harmon v. SAIF, 54 Or App 121 (1981)---247,543
Harris v. SAIF, 55 Or App 158 (1981)---304

Harris v. SAIF, 292 Or 683 (1982)---626
Harris v. SIAC, 191 Or 254 (1951)---522,833
Held v. Product Manufacturing Co., 286 Or 67 (1979)---327
Helton v. SIAC, 142 Or 49 (1933)---543
Henry v. SAIF, 39 Or App 795 (1979)---359
Hewes v. SAIF, 36 Or App 91 (1978)---308

Case Citations

Higgins v. Med. Research Foundation, 48 Or App 29 (1980)---342
Hill v. SAIF, 38 Or App 13 (1979)---304,679
Hill v. U.S. Plywood Champion Co., 12 Or App 1 (1972)---387
Hillman v. North Wasco Co. PUD, 213 Or 264 (1958)---864
Hisey v. SIAC, 163 Or 696 (1940)---387
Hoag v. Duraflake, 37 Or App 103 rev den (1978)---851
Hoffmeister v. SIAC, 176 Or 216 (1945)---387

Holden v. Willamette Industries, 28 Or App 613 (1977)---484
Hubble v. SAIF, 56 Or App 154 (1982)---824
Hubble v. SAIF, 57 Or App 513 (1982)---831
Hunt v. Whittier Wood Products, 52 Or App 493 (1981)---228
Hutcheson v. Weyerhaeuser, 288 Or 51 (1979)---336,342,799,853

Industrial Motor Transport v. Faulk, 54 Or App 77 (1981)---109
Inkley v. Forest Fiber Products, 288 Or 337 (1980)---105,176,264,342,
387,467,470 ,558,618,689,868
Jackson v. SAIF, 7 Or App 109 (1971)---589,661
Jackson v. Tillamook Growers Co-Op, 39 Or App 247 (1979)---784
James v. SAIF, 290 Or 343 (1981)---15,18,68,278,285,318,363,442,563,
592,714,853
Jentzen v. SCD, 254 Or 65 (1969)---703
Johns v. Utility Trailer & Equip. Co.---55 Or App 431 (1981)---556
Johnson Lumber Co. v. SAIF, 20 Or App 419 (19)--820
Johnson v. SAIF, 18 Or App 152 (1974)---543
Johnson v. SAIF, 29 Or App 255 (1977)---543
Johnson v. SAIF, 54 Or App 620 (1981)---636

Johnson v. Star Machinery Co., 270 Or 694 (1974)---864
Jones v. Compensation Dept., 250 Or 177 (1968)---679
Jones v. Emanuel Hosp., 280 Or 147 (1977)---378,664,700,724,859
Jones v. Flannigan, 270 Or 121 (1974)---676
Jones v. Herr, 39 Or App 937 rev den (1979)---833
Jones v. SAIF, 49 Or App 543 (1980)---72

Jordan v. Western Electric, 1 Or App 441 (1970)---96
Joseph v. Lowery, 261 Or 545 (1972)---327
Josephs v. Burns & Bear, 260 Or 493 (1971)---859
Kinney v. SIAC, 245 Or 543 (1967)---173
Kolar v. B & C Contractors, 36 Or App 65 (1978)---586,784
Korter v. EBI, 46 Or App 43 (1980)---51,367,547,563,824

Kosanke v. SAIF, 41 Or App 17 (1979)---573,664
Krugen v. Beall Pipe & Tank Corp., 19 Or App 922 (1974)---859
Langston v. K-Mart, 56 Or App 709 (1982)---586,724
Larson v. Brooks-Scanlon, 54 Or App 861 rev den (1982)---831
Leaton v. SAIF, 27 Or App 669 (1977)---183
Leedy v. Knox, 34 Or App 911 (1980)---543,584

Lemons v. Compensation Dept., 2 Or App 128 (1970)---331,820
Likens v. SAIF, 56 Or App 498 (1982)---763
Livesay v. SAIF, 55 Or App 390 (1981)---543
Logue v. SAIF, 43 Or App 991 (1979)---543
Lohr v. SAIF, 48 Or App 979 (1980)---304

Mansfield v. Caplener Bros., 10 Or App 545 (1972)---387,679,787
Mathis v. SAIF, 10 Or App 139 (1972)---176,558,618,868
Maumary v. Mayfair Markets, 14 Or App 180 (1973)---787
McDowell v. SAIF, 13 Or App 389 (1973)---810
McGarry v. SAIF, 24 Or App 883 (1976)---338
McIntyre v. Wright, 292 Or 784 (1982)---864
McPherson v. Employment Div., 285 Or 541 (1979)---556,576,632
Meaney v. SIAC, 115 Or 484 (1925)---135
Mikolich v. SIAC, 212 Or 36 (1957)---135
Million v. SAIF, 45 Or App 1097 (1980)----490,520
Miner v. City of Vernonia, 47 Or App 393 rev den (1980)---816
Minor v. Delta Truck Lines, 43 Or App 29 (1979)---710
Moe v. Ceiling Systems, 44 Or App 429 (1980)---76,338
Morgan v. Stimson Lumber Co., 288 Or 595 (1980)---367,551
Morris v. Denny's Restaurant, 53 Or App 863 (1981)---37,48,373,382,
510,595,614,687
Muncy v. SAIF, 19 Or App 783 (1974)---79
School Dist. 1 Multnomah Co. v. Bingham et al, 204 Or 601 (1955)---864
Multnomah County v. Hunter, 54 Or App 718 (1981)---522,833
Neathamer v. SAIF, 16 Or App 402 (1974)---652
Neely v. SAIF, 43 Or App 319 rev den (1980)---375
Nelson v. SAIF, 49 Or App 111 (1980)---258
Newell v. Taylor et al, 212 Or 522 (1958)---787
OSEA v. WCD, 51 Or App 55 (1981)---211,283
Ohlig v. FMC Rail & Marine Equip. Div., 291 Or 486 (1981)---710
Olson v. SIAC, 222 Or 407 (1960)---363,689,845
O'Neal v. Sisters of Providence, 22 Or App 9 (1975)---363,689
Ore-Ida Foods v. Indian Head, 290 Or 909 (1981)---739
Oremus v. Oregonian Pub. Co., 3 Or App 92 (1970)---314
Otto v. Moak Chevrolet, 36 Or App 149 (1978) rev den (1979)---359
Paresi v. SAIF, 290 Or 365 (1981)---318
Patitucci v. Boise Cascade, 8 Or App 503 (1972)---68,363
Peeples v. Kawasaki Heavy Industries, Ltd., 288 Or 143 (1979)---833
Penifold v. SAIF, 49 Or App 1015 (1980)---787
Rhode v. SIAC, 108 Or 426 (1923)---222
Pratt v. SAIF, 29 Or App 255 (1979)---543
Pumpelly v. SAIF, 50 Or App 303 (1981)---573
Reynolds-Croft, Inc. v. Bill Morrison Co., 55 Or App 487 (1981)----439
Rivers v. SAIF, 45 Or App 1105 (1980)---744
Robb v. Employment Div., 54 Or App 471 (1981)---318
Robinson v. Omark Industries, 46 Or App 263 rev den (1981)---816
Rogers v. SAIF, 289 Or 633 (1980)---359
Rosell v. SIAC, 164 Or 173 (1940)---135
Russell v. A & D Terminals, 50 Or App 27 (1981)---375,787
SAIF v. Gysi, 55 Or App 570 (1982)---132,143,162,192,278,285,346,467,470,
501,509,520,547,550,563,592,664,688,714,716,736,777,853
SAIF v. Mathews, 55 Or App 608 (1982)----469
Sahnow v. Fireman's Fund Ins. Co., 260 Or 564 (1971)---387,868
Satterfield v. Compensation Dept., 1 Or App 524 (1970)---342
Satterfield v. Satterfield, 292 Or 780 (1982)---867
Sauer v. Pioneer Adjustment, 44 Or App 503 (1972)---363
Saunders v. SAIF, 40 Or App 169 (1979)---183
Saxton v. Lamb-Weston, 49 Or App 887 (1980)---667

Case Citations

Schartner v. Roseburg Lumber Co., 20 Or App 1 (1975)---824
Schriendl v. SAIF, 48 Or App 127 (1980)---183
Seaberry v. SAIF, 19 Or App 676 (1974)---595
Sekermestrovich v. SAIF, 280 Or 723 (1977)---632
Shaw v. Zabel, 267 Or 557 (1974)---859
Sheffield v. SAIF, 50 Or App 427 (1981)---476
Silsby v. SAIF, 39 Or App 555 (1982)---308,573,664,700
Smith v. Amalgamated Sugar Co., 25 Or App 243 (1976)---710
Smith v. Brooks-Scanlon, 54 Or App 730 (1981)---298
Smith v. Chase Bag Co., 54 Or App 261 rev den (1981)---350
Smith v. Ed's Pancake House, 27 Or App 361 (1976)---295,331,543,820,868
Smith v. SAIF, 51 Or App 833 (1981)---304

Soderback v. Townsend, 57 Or App 366 (1982)---833
Standley v. SAIF, 8 Or App 429 (1972)---331,820
Stevens v. Champion International, 44 Or App 587 (1980)---621
Stupfel v. Hines Lumber Co., 288 Or 39 (1979)---298
Suell v. SAIF, 22 Or App 201 (1975)---258,679
Syphers v. K-W Logging Co., 51 Or App 769 (1981)---158,225,252,646,764

Thompson v. SAIF, 51 Or App 395 (1981)---15,346,359,853
Tooley v. SIAC, 239 Or 466 (1965)---168
SAIF v. Turley, 52 Or App 839 (1981)---289
Urban Renewal v. Swank, 54 Or App 591 (1981) rev den (1982)---816
Uris v. WCD, 247 Or 420 (1967)---6
Valtinson v. SAIF, 56 Or App 184 (1982)---689

Vandehey v. Pumilite Glass & Bldg. Co., 35 Or App 187 (1978)---710
Vandre v. Weyerhaeuser, 42 Or App 705 (1979)---342,792
Vester v. Diamond Lumber Co., 21 Or App 587 (1975)---338
Wait v. Montgomery Ward, Inc., 10 Or App 333 (1972)---168
Walker v. WCD, 248 Or 195 (1967)---308
Weller v. Union Carbide, 288 Or 27 (1979)---58,176,202,278,298,318,
 460,476,512,550,636,660,667,720,853,868

Wetzel v. Goodwin Bros., 50 Or App 101 (1981)---168,536
White v. SIAC, 227 Or 306 (1961)---689,868
J.R. Widmer, Inc. v. Dept. of Revenue, 261 Or 371 (1972)---703

Williams v. SAIF, 22 Or App 350 (1975)---470
Williams v. SAIF, 31 Or App 1301 (1977)---367,484
Williams v. SAIF, 36 Or App 211 (1978) rev den (1978)---318
Wilson v. SAIF, 48 Or App 993 (1980)---473,796

Wilson v. SIAC, 189 Or 114 (1950)---308
Wilson v. Weyerhaeuser, 30 Or App 403 (1977)---151,353,382,387,595,
 679

Wimer v. Miller, 235 Or 25 (1963)---237,615,739
Wisherd v. Paul Koch Volkswagen, 28 Or App 513 (1977)---327
Wood v. SAIF, 30 Or App 1103 (1977) rev den (1978)---287,298
Woodman v. Georgia-Pacific, 42 Or App 899 (1979)/289 Or 551 (1980)---
 178,679

Youngren v. Weyerhaeuser, 41 Or App 333 rev den (1979)---359

VAN NATTA CITATIONS

Volume 34

page
Angel B. Alvarez, 33 Van Natta 598 (1981)---111,748
Edward M. Anheluk, 34 Van Natta 205 (1982)---558
Zelda Bahler, 31 Van Natta 139/33 Van Natta 478 (1981)---3,5,17
145,205,281,478,484,588,700, 724
Larry J. Barnett, 33 Van Natta 655 (1981)---747
Robert A. Barnett, 31 Van Natta 172 (1981)---19,21,44,176,180,
248,445,472,494,513,528,534,619,688,723,755
David Bartell, 29 Van Natta 876 (1980)----466
Barbara Beattie, 34 Van Natta 484 (1982)----493
Cecil Black, Jr., 30 Van Natta 746 (1981)---632

Esperanza Blanco, 15 Van Natta 167 (1975)---543
Edwin Bolliger, 33 Van Natta 559 (1981)---652
Edwin T. Bosworth, 33 Van Natta 487 (1981)---153
W. Leonard Bradbury, 32 Van Natta 246 (1981)---571,632
Wilma Kim Buhman, 34 Van Natta 252 (1982)---536
William Bunce, 33 Van Natta 546 (1981)---11,621

John Byers, 1 Van Natta 25 (1967)---703
Leonard Cain, 33 Van Natta 660 (1981)---679

John Cameron, 34 Van Natta 211 (1982)----481
Jess Campbell, 15 Van Natta 146 (1975)---543
Minnie K. Carter, 33 Van Natta 574 (1981)---669
Richard A. Castner, 33 Van Natta 662 (1981)---708
Chester Clark, 31 Van Natta 10 (1981)---211,481

Florence M. Clark, 32 Van Natta 153 (1981)---632
Gunnar Davidson, 20 Van Natta 234 (1977)---211
Jon D. Day, 34 Van Natta 123 (1982)---241
Ada C. DeI Rio, 32 Van Natta 138 (1981)---35, 493
Marvin DeVoe, 34 Van Natta 141 (1982)---189,439,522
Ray D. Dezellum, 34 Van Natta 213 (1982)---240

Terry Dorsey, 31 Van Natta 144 (1981)---145
Gloria Douglas, 32 Van Natta 139 (1981)---460,646
Ronny L. Dozier, 32 Van Natta 68 (1981)---158
Don Emrich, 27 Van Natta 416 (1979)---211
Robert Farance, 30 Van Natta 51 (1980)---116
Jimmy Faulk, 34 Van Natta 109 (1982)---582,732

Herb Ferris, 34 Van Natta 470 (1982)----467
Michael Fiddelke, 34 Van Natta 30 (1982)----501

William J. Frame, 34 Van Natta 183 (1982)---240
Gary Freier, 34 Van Natta 543 (1982)---679,710
Gordon Fritz, 26 Van Natta 215 (1978)---256
John Galanopoulos, 34 Van Natta 615 (1982)---739
Richard Gallagher, 34 Van Natta 90 (1982)---592
Dennis Gardner, 31 Van Natta 191 (1981)---167,283

Christine Nelson Givens, 29 Van Natta 21 (1980)---258
Frank R. Gonzales, 34 Van Natta 551(1982)---753
Robert L. Green, 31 Van Natta 54 (1981)---105, 203
James Griffin, 30 Van Natta 593 (1981)---632
Ralph F. Guerra, 33 Van Natta 680 (1981)---290,556
Rebecca Hackett, 34 Van Natta 460 (1982)---512,636

Mary Ann Hall, 31 Van Natta 56 (1981)---490,551

Charles Hanscom, 34 Van Natta 34 (1982)---703

Doris A. Hari, 18 Van Natta 284 (1976)----473

Orry W. Harmon, 34 Van Natta 247 (1982)---551

Michiel Harth, 34 Van Natta 703 (1982)---687,700,702,714,717

Norman L. Hickman, 32 Van Natta 123 (1981)----520

Hiroshi, George Hitomi, 33 Van Natta 609(1981)---686

David S. Hunter, 32 Van Natta 273 (1981)---72

Garold Hurley, 34 Van Natta 124 (1982)---284

Gary Hunter & Michael Leroy, 30 Van Natta 362 (1981)----522

Lorena Iles, 30 Van Natta 666 (1981)---173,202,435,460,512

Dianne James, 34 Van Natta 6 (1982)---37,103

Arlie H. Johns, 32 Van Natta 88 (1981)---556

Richmond C. Johnson, 33 Van Natta 612 (1981)---619

Donna P. Kelly, 30 Van Natta 715 (1981)---632

Michael J. King, 33 Van Natta 636 (1981)---9,17,44,90,726,730

Telphen Knickerbocker, 33 Van Natta 568 (1981)---473,655,661,770

Evelyn La Bella, 30 Van Natta 738 (1981)---470,621,632,724

Robert Lauber, 21 Van Natta 234 (1977)---211

Patricia Lewis, 34 Van Natta 202 (1982)---278,435,460,550

Benedict Loerzel, 12 Van Natta 223 (1974)----473

Hazel Stanton Lovell, 31 Van Natta 69 (1981)---109,433

Curtis A. Lowden, 30 Van Natta 642 (1981)---170,632

Steven Lundmark, 32 Van Natta 107 (1981)---264

Olive B. Lyons, 33 Van Natta 188 (1981)---224

Vivian MacDougall, 15 Van Natta 117 (1975)----473

John C. May, 34 Van Natta 114 (1982)---661

John A. Mayer, 7 Van Natta 278 (1971)---100

Joe McKenzie, 31 Van Natta 101 aff'd 56 Or App 394 (1981)---576,743,766

Joe Meeker, 30 Van Natta 645 (1981)---675

Harold Middleton, 23 Van Natta 335 (1978)---211

Phyllis J. Moore, 33 Van Natta 703 (1981)---669

Tom Moore, 30 Van Natta 499 (1981)---183

Charles A. Murray, 34 Van Natta 249 (1982)----497

Kay L. Murrens, 33 Van Natta 586 (1981)---15,18,58,68,76,143,192

Donald P. Neal, 34 Van Natta 237 (1982)---615,739

Albert Nelson, 34 Van Natta 573 (1982)---664

Van Natta Citations

Roy D. Nelson, 30 Van Natta 672 (1981)---48,51,80
Bill Painter, 33 Van Natta 704 (1981)---747
Kristie Paresi, 34 Van Natta 37 (1982)---103
Robert A. Parker, 32 Van Natta 259 (1981)---734
Evelyn M. Partlow, 32 Van Natta 746 (1981)---632
Clara M. Peoples, 31 Van Natta 134 (1981)---100,205,249,254,493,522,652

Dock Perkins, 31 Van Natta 180 (1981)---566
John M. Powell, 33 Van Natta 714 (1981)---203
Marlo Rediske, 14 Van Natta 74 (1975)---116
Lesley L. Robbins, 31 Van Natta 208 (1981)---72
Barbara Rupp, 30 Van Natta 556 (1981)---9,17,44,726,730
Robert Sanchez, 32 Van Natta 80 (1981)---30,278,499,501,509,550,648

Lucile Schaffer, 33 Van Natta 511 (1981)---196,249
Leroy R. Schlecht, 32 Van Natta 261 (1981)---734
Henry A. Schmidt, 34 Van Natta 582 (1982)---727,732
Richard L. Schonnoehl, 31 Van Natta 25 (1981) aff'd 51 Or App 998 (1981)
---30,766

Mark L. Side, 34 Van Natta 661 (1982)---670,753
Elizabeth Simmons, 11 Van Natta 282 (1974)---116

Jimmy A. Smith, 29 Van Natta 182 (1980)---111
Ilene Stevenson, 34 Van Natta 192 (1982)---520
Richard Stinton, 29 Van Natta 469 (1980)---100
William P. Stultz, 34 Van Natta 170 (1982)---632
Charles C. Tackett, 31 Van Natta 61 (1981)---149,584,655,738
Millie Thomas, 34 Van Natta 40 (1982)---612,634,655
Mike Toskovich, 34 Van Natta 125 (1982)---560

Gordon D. Turley, 30 Van Natta 211 (1980)---289
Lewis Twist, 34 Van Natta 52/34 Van Natta 290 (1982)---759

William Valtison, 31 Van Natta 213 (1981)---514
Mildred Way, 15 Van Natta 31 (1975)---211
Alfred West, 10 Van Natta 232 (1973)---621
Charles L. West, 31 Van Natta 106 (1981)---5
Cecil B. Whiteshield, 4 Van Natta 203 (1970)---621
Jack Yoes, 14 Van Natta 19 (1975)---116

ORS CITATIONS

Volume 34

<u>page</u>	<u>page</u>
ORS 3.280(3)-----833	ORS 656.206-----387
ORS 8.070-----522,833	ORS 656.206(1)(1965)-----135,679
ORS 8.070(4)-----833	ORS 656.206(1)(a)-----304,382,387,
ORS 8.110-----833	568,595,626,742
ORS 8.310(4)-----522	ORS 656.206(2)(b)-----473
ORS 41.360(6)-----470	ORS 656.206(2)(a)(b)(1965)-----135
ORS 41.360(15)-----687,700,702,	ORS 656.206(3)-----54,66,353,382,
703,714,717,772	387,450,566,576,595,741
ORS 82.010-----469	ORS 656.206(5)-----387
ORS 144.410 to .525-----517	ORS 656.208(1965)-----135
ORS 144.480-----517	ORS 656.210-----473
ORS 144.490-----517	ORS 656.210(1965)-----135
ORS 144.490(1)-----517	ORS 656.212-----589
ORS 147.-----579	ORS 656.214-----178
ORS 147.015(6)-----579	ORS 656.214(4)-----679
ORS 147.015(6)(a)-----579	ORS 656.214(5)-----304,353
ORS 147.345-----579	ORS 656.218-----327
ORS 147.355(1)(2)(3)-----579	ORS 656.222-----805
ORS 147.365(1)-----579	ORS 656.236-----864
ORS 169.170-----816	ORS 656.245-----88,131,140,190,194,
ORS 169.320-----816	196,218,243,490,582,661,679,754,764
ORS 174.020-----864	ORS 656.245(1)-----163,168,338,350
ORS 183.315(1)-----290	ORS 656.245(2)-----168,350,490,591,710
ORS 183.450(2)-----387	ORS 656.248(2)-----258
ORS 183.482(6)-----290	ORS 656.262-----378,664
ORS 205.110-----833	ORS 656.262(a)-----367
ORS 421.305 to .340-----517	ORS 656.262(2)-----163
ORS 421.405(1)(b)-----517	ORS 656.262(3)-----689
ORS 421.405 to .420-----517	ORS 656.262(4)-----453,478,859
ORS 421.450 to .480-----517	ORS 656.262(5)-----158,163,308,478,621,784
ORS 655.505 to .550-----517	ORS 656.262(6)-----621,782,859
ORS 656.002(4)-----135	ORS 656.262(7)-----782
ORS 656.003-----484	ORS 656.262(8)-----89,163,308,367,378,784
ORS 656.005(7)-----163,710	ORS 656.262(9)-----205,375,484,551,558,
ORS 656.005(8)-----868	661
ORS 656.005(8)(a)-----48,359,689,	ORS 656.263(6)-----453
868	ORS 656.265(1)-----225,342,357,792
ORS 656.005(9)-----163,327,484	ORS 656.265 (2)-----225
ORS 656.005(27)-----473	ORS 656.265(3)-----225
ORS 656.012-----864	ORS 656.265(4)(a)-----342
ORS 656.012(2)-----824	ORS 656.268-----69,81,116,201,218,234,
ORS 656.027-----816	242,252,278,543,564,594,669,674,703,
ORS 656.027(2)-----256	714,718,751
ORS 656.031-----816	ORS 656.268(1)-----375,543
ORS 656.041-----816	ORS 656.268(2)-----114,375,551,661
ORS 656.041(1)(a)-----816	ORS 656.268(3)-----375,773,796
ORS 656.041(2)-----816	ORS 656.268(3)(1977)-----655
ORS 656.126(1)-----586	ORS 656.268(4)-----116,655,738
ORS 656.128-----318	ORS 656.268(4)(1977)-----655
ORS 656.201(1)(a)-----92	ORS 656.268(5)-----655,738
ORS 656.202(2)-----213,327,679,	ORS 656.271-----116
689,810	ORS 656.271(1)-----536,621
ORS 656.205(5)-----111	ORS 656.271(2)-----536
ORS 656.206(1965)-----135	ORS 656.273-----267,543,734,738,820

page
ORS 656.273(1)-----70,194,290,
541,543,621,710,820
ORS 656.273(2)-----308,490,710
ORS 656.273(3)-----70,258,453,
521,629
ORS 656.273(3)(a)(b)(c)-----116
ORS 656.273(4)-----114,252
ORS 656.273(4)(b)-----116
ORS 656.273(6)-----14,70,281,490,
551,573,621,664,710
ORS 656.273(7)-----140,145,252,
621,820
ORS 656.278-----88,243,254,434,440,
441,442,443,444,445,536,734,769,
810
ORS 656.278(5)(a)---127
ORS 656.282(8)---205
ORS 656.283-----183,252,703,761
ORS 656.283(1)-----183,387
ORS 656.283(1)(a) to (d)---240
ORS 656.283(3)-----710
ORS 656.283(6)-----90,634
ORS 656.284-----810
ORS 656.284(6)-----810
ORS 656.286(1)-----810
ORS 656.286(2)-----80
ORS 656.288(3)(pre-1966)-----810
ORS 656.289(3)-----9,17,44,730
ORS 656.289(4)-----45,46,114,556
ORS 656.294-----532
ORS 656.295-----196,387,531,703,749
ORS 656.295(2)-----9,17,44
ORS 656.295(4)-----213
ORS 656.295(5)-----445,513,528,534,
619,787
ORS 656.298(6)-----787,799,803,853
ORS 656.307-----81,116,141,295,357,
558,884
ORS 656.307(1)-----314,439
ORS 656.310(1)(a)-----792
ORS 656.313-----1,247,327
ORS 656.313(1)---327
ORS 656.313(3)-----163
ORS 656.319-----225,252,868
ORS 656.319(1)-----582,646
ORS 656.319(1)(b)-----632
ORS 656.319(2)-----114,621,645
ORS 656.325-----258,674
ORS 656.325(1)-----367
ORS 656.325(5)-----589,661
ORS 656.381(1)-----181
ORS 656.382(1)-----5,163,202,205,
551,558,700
ORS 656.382(2)-----6,51,57,80,202,232,
241,357,441,484,493,588,661,723,
738,782

page
ORS 656.386-----338
ORS 656.386(1)-----6,205,357,367,
824,831
ORS 656.386(2)-----47,48,51,824
ORS 656.388(2)-----531
ORS 656.410-----810
ORS 656.456(1)(1965)-----135
ORS 656.578-----739
ORS 656.580(2)-----615
ORS 656.587-----728
ORS 656.593-----615
ORS 656.593(1)-----734
ORS 656.593(1)(a)-----728
ORS 656.593(1)(c)-----734,739
ORS 656.593(1)(d)-----728,734,739
ORS 656.593(3)-----728
ORS 656.704-----531,532
ORS 656.704(1)-----387
ORS 656.704(2)-----73,314,439
ORS 656.708-----810
ORS 656.708(3)-----314
ORS 656.726-----810
ORS 656.726(3)-----258
ORS 656.726(3)(f)-----211
ORS 656.726(3)(g)-----314
ORS 656.726(5)-----634
ORS 656.728-----213
ORS 656.728(6)-----761
ORS 656.794(3)-----258
ORS 656.802(1)-----68,77
ORS 656.802(1)(a)-----318,359,689,
853,868
ORS 656.804-----868
ORS 656.807(1)---646,859
ORS 656.807(3) & (4)---859

ADMINISTRATIVE RULE CITATIONS

Volume 34

	<u>page</u>		<u>page</u>
OAR 436-29-210(2)-----	367	OAR 436-65-600 to 608----	84,495
OAR 436-54-212-----	5	OAR 436-65-601(1)-----	66
OAR 436-54-212(2)(f)-----	473	OAR 436-65-601(3)-----	66
OAR 436-54-212(3)(a) & (3)(i)---	675	OAR 436-65-601(4)-----	19
OAR 436-54-270-----	350	OAR 436-65-602-----	19,66,671,702 717,772,776
OAR 436-54-281-----	367	OAR 436-65-603-----	19,66,671, 702,717,772,776
OAR 436-54-281(1)(a)-----	367	OAR 436-65-604-----	19,671,702, 717,776
OAR 436-54-281(5)-----	367	OAR 436-65-604(4)-----	66
OAR 436-54-283-----	283	OAR 436-65-605-----	19,66,280, 702,717,772,776
OAR 436-54-283(2)(a) & (c)---	367	OAR 436-65-605(2)(a)-----	145
OAR 436-54-283(3)-----	367	OAR 436-65-606-----	19,66,717
OAR 436-54-283(5)-----	367	OAR 436-65-607-----	717
OAR 436-54-286-----	674	OAR 436-65-607(6)-----	66
OAR 436-54-310(6)-----	163	OAR 436-65-608-----	19,66,671, 702,717,772,776
OAR 436-54-320-----	100,249, 267,655	OAR 436-65-620-----	671
OAR 436-54-222-----	589	OAR 436-65-630(2)-----	211
OAR 436-54-222(1)(2)(3)(5)(6)---	589	OAR 436-65-675-----	19,84
OAR 436-54-310(7)-----	764	OAR 436-65-680 <u>et seq</u> -----	88
OAR 436-54-320-----	796	OAR 436-65-700-----	595
OAR 436-54-332-----	868	OAR 436-65-700(4)-----	387
OAR 436-61-004(4)-----	183	OAR 436-65-700(5)-----	387
OAR 436-61-010(13)(c)-----	213	OAR 436-69-003-----	258
OAR 436-61-050(4)-----	149	OAR 436-69-101(1)-----	741
OAR 436-61-060-----	183	OAR 436-69-130-----	11
OAR 436-61-100(3)-----	213	OAR 436-69-210-----	367
OAR 436-61-100(6)(b)-----	183	OAR 436-69-210(1)-----	367
OAR 436-61-110(2)-----	183	OAR 436-69-401 <u>et seq</u> -----	168
OAR 436-61-150(2)-----	655	OAR 436-69-501-----	227,258
OAR 436-61-410-----	655	OAR 436-69-510-----	258,612
OAR 436-61-410(1)(2)-----	655	OAR 436-69-610(1)-----	367
OAR 436-61-410(3)-----	149	OAR 436-69-801-----	258
OAR 436-61-410(5)-----	655	OAR 436-83-010-----	387
OAR 436-61-420-----	655	OAR 436-83-120-----	163
OAR 436-61-420(1)-----	655	OAR 436-83-310-----	677
OAR 436-61-998(1) & (2)---	761	OAR 436-83-315-----	90
OAR 436-65-225(2)-----	387	OAR 436-83-400-----	634
OAR 436-65-501 thru 532----	17	OAR 436-83-400(3)-----	25,40,612, 634,655
OAR 436-65-520-----	531	OAR 436-83-400(5)-----	90
OAR 436-65-530(5)(a)-----	17	OAR 436-83-460-----	502,612,679
OAR 436-65-532(4)-----	150,686	OAR 436-83-480(2)-----	803
OAR 436-65-535 <u>et seq</u> -----	283	OAR 436-83-700(2)-----	730
OAR 436-65-549-----	150	OAR 436-83-720(1)-----	21
OAR 436-65-550-----	54	OAR 438-22-100-----	283
OAR 436-65-550(1)-----	25	OAR 438-47-010-----	232
OAR 436-65-550(1)(c)-----	634	OAR 438-47-010(2)-----	35,181,531
OAR 436-65-550(2)-----	211		
OAR 436-65-555-----	54		
OAR 436-65-555(4)(5)-----	634		
OAR 436-65-558-----	150		
OAR 436-65-559-----	231		
OAR 436-65-565(3)-----	125,560		
OAR 436-65-600 <u>et seq</u> -----	7,8,34,66, 99,100,145,172,183,213,223,228,267, 277,279,280,496,504,506,527,529, 537,539,549,558,572,647,671,700,702,742,769,772,776		

Administrative Rule Citations

	page
OAR 438-47-020-----	196,531,564
OAR 438-47-020(1)(a)-----	531
OAR 438-47-025-----	80
OAR 438-47-030-----	700
OAR 438-47-040(2)-----	614
OAR 438-47-045-----	37,47,51
OAR 438-47-045(1)-----	48,510,584,614
OAR 438-47-050-----	255
OAR 438-47-055-----	51,80
OAR 438-47-070(1)-----	127
OAR 438-47-070(2)-----	433
OAR 438-47-090(1)-----	123,723
OAR 438-47-095-----	615
OAR 438-65-501 to 532-----	477,482

LARSON CITATIONS

1 Larson, <u>Workmen's Compensation Law</u> , Section 19.24-----	448
1B Larson, <u>Workmen's Compensation Law</u> , Section 37.20-----	689
2 Larson, <u>Workmen's Compensation Law</u> , Section 57.21-----	387
2 Larson, <u>Workmen's Compensation Law</u> , Section 61.31(c)(1980)---	473
2A Larson, <u>Workmen's Compensation Law</u> , Section 72.70 (1982)-	615
2A Larson, <u>Workmen's Compensation Law</u> , Sections 71.10, 71.20 (1981)----	739
3 Larson, <u>Workmen's Compensation Law</u> , Section 81.33 (1976)--	387
4 Larson, <u>Workmen's Compensation Law</u> , Section 95.12-----	158,868,884

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.

AFFIRMATION OF MEDICAL RIGHTS (Jan.-March)
W.B. Hickman, 82-20-S

AMENDMENT (Jan.-March)
J.L. Grover, 81-0309M
P. Holmstrom, 81-0277M
H.C. Jones, 81-0233M
H.S. Lovell, 81-0037M
G. Moore, 81-0196M
G. Reynolds, 81-0312M
W. Slater, 82-0008M
J. Stockton, 81-0296M

DENIED (Jan.-March)
D. Anderson, 82-0033M
N. Bird, 82-0022M
W. Burton, 81-0280M
B. Casper, 82-0005M
J. Connor, 81-0097M
M.A. Gotchall, 81-0003M
H.H. Hay, 82-0007M
D. Jamison, 82-0018M
L. Johnson, 82-0036M
J.L. Kammerzell, 82-0026M
R. Lee, 81-0188M
N. Leno, 82-0031M
D. McMahon, 81-0156M
G.L. Miller, 82-0030M
J. Mull, 82-0037M
G. Reynolds, 81-0312M
(Dec. 7, 1981)
A.V. Smith, 82-0029M
M. Stutters, 82-0001M
W. Sullivan, 82-0002M
E. Wendlandt, 82-0055M

DETERMINATION (Jan.-March)
M. Barr, 82-0020M
T. Beacham, 81-0272M
A. Bice, 82-0044M
W. Buckley, 81-0329M
K. Chace, 81-0251M
I. Cornelius, 82-0049M
C. Crutchfield, 82-0048M
W. Donovan, 82-0014M
J.F. Eby, 81-0249M
N. Espinoza, 81-0146M
R. Gerlitz, 81-0114M
E. Grady, 81-0248M

DETERMINATION (Continued)
J.L. Grover, 81-0309M
J. Helm, 81-0274M
J. Holmes, Jr., 81-0034M
B. Jones, 82-0043M
A. Landers II, 81-0265M
H.S. Lovell, 81-0037M
A. Lozano, 82-0028M
P. Lunsford, 81-0322M
G. Males, 82-0013M
S. Mattie, 81-0328M
R. McLaughlin, Jr., 81-0063M
J. Melcher, 81-0041M
G. Moore, 81-0196M
J.J. Oxford, 82-0004M
R. Rahm, 81-0287M
W. Ritchie, 82-0053M
D. Sharp, 81-0126M
W.M. Slater, 82-0008M
M. Smith, 82-0021M
J. Stockton, 81-0296M
J.C. Stone, 82-0034M
W. Vanderpool, 81-0211M
B.E. Wallace, 81-0104M
L.M. White, 81-0247M

REFERRED FOR HEARING (Jan.-March)
L.O. Bernardi, 81-0302M
R.C. Earl, 82-0009M
D. Kearns, 82-0016M
R. Mintz, 81-0332M
E. Nixon, 81-0230M
P.W. Terrell, 82-0024M
W.J. Thomas, 82-0040M
R.A. Young, 82-0017M

REOPENED (Jan.-March)
D. Bass, 82-0056M
L.W. Bruce, 81-0044M
W.H. Donovan, 82-0014M
M.E. Epley, 82-0006M
J. Faulk, 81-0217M
D. Franke, 82-0039M
E. Imbler, 82-0010M
R.R. Lee, 81-0142M
K. Nuse, 81-0271M
L. Seehawer, 81-0331M
H. Shaffer, 82-0015M
T. Taskinen, 81-0283M
C.J. Turner, 81-0325M
A. Wirfs, 82-0027M

Own Motion Jurisdiction (continued)

APRIL-JUNE

Amendment

Blacketer, Kenneth R., 81-0294M
Helm, Jacob, 81-0274M
Hutchinson, James W., 82-0052M
Landers II, Arthur, 81-0265M
Martin, James A., 82-0054M
Stockton, Jack, 81-0296M
Younts, Thomas, 81-0299M

Deferred Action

Hubbard, Ray, 82-0100M
King, Randy, 82-0134M
O'Halloran, John J., 82-0051M

Denied

Amato, Joe, 82-0120M
Anderson, Milton, 82-0111M
Armstrong, Ray A., 82-0072M
Ball, Clinton, 82-0109M
Berry, Dan, 82-0075M
Bowman, Leighton, 82-0133M
Carter, Verla, 82-0096M
Cejka, Edwin, 82-0092M
Chytka, Lawrence, 82-0057M
Cornelius, Irene, 82-0049M
Crowder, Wallace E., 81-0179M
Deaton, Dennis G., 82-0139M
Fields, Verna R., 81-0168M
Fivecoats, Raichard, 82-0099M
Gadberry, Carl, 82-0091M
Garrison, Susan, 82-0090M
Golden, Nancy, 82-0119M
Harris, Leslie, 82-0076M
Hendrickson, Roland, 82-0062M
Huizenga, Andrew C., 82-0114M
Hutchcroft, Lorna, 82-123M
Jackson, Howard W., 82-0132M
Jerome, David E., 82-0137M
Kopplin, Glen, 82-0059M
Lewis, Russell, 81-0295M
Lindsay, Edward, 82-0113M
Martin, LaVelle G., 81-0028M
McComb, Florence G., 82-0081M
Merritt, Alfred, 81-0289M
Minor, Ted, 82-0047M
Osborne, Alvy, 82-0023M
Ozan, Fred, 81-0001M
Richards, Herb, 82-0084M
Scramstad, Kathleen, 82-0045M
Seibt, Charles, 82-0066M
Stinnett, Judith, 82-0058M
Tall, Donald, 82-0095M
Toews, Viola

Denied (continued)

Townsend, Randall, 82-0078M
Van Dehey, Richard, 82-0110M
Volz, Theodore, 82-0061M
Watson, Alex, 81-0209M
Weiss, Morris, 81-0306M

Determination

Barrows, John, 82-0067M
Bess, John, 82-0071M
Blacketer, Kenneth, 81-0294M
Bogard, Larry, 82-0140M
Branson, James R., 82-0094M
Burke, Muriel M., 82-0060M
Cantu, Maria, 82-122M
Caudell, Leonard, 82-0131M
Cole, Norma, 82-0068M
Cook, Dalta, 82-0106M
Davis, Dorothy, 80-0004M
Dickerson, Ruby Lee, 82-0098M
Fanger, Herman, 81-0318M
Gatchell, Floyd, 82-0115M
Getman, Gary, 82-0070M
Graham, Eldridge, 82-0035M
Gregor, Robert, 82-0125M
Hewitt, Robert, 82-0086M
Hopkins, David C., 82-0082M
Howell, William B., 81-0074M
Huggins, Weldon, 82-0088M
Hutchinson, Charles, 82-0101M
Jackson, W. Stonewall, 82-0124M
Jacob, Peter D., 82-0104M
Johns, Joseph, 82-0065M
Johnson, Cordy A., 82-0093M
Kaser, Steven, 80-0002M
Lee, Ralph, 81-142M
Martin, LaVelle G., 81-0028M
McGrory, Thelma, 82-0130M
Mehl, William, 82-0135M
Molchanoff, Ethel, 81-0196M
Monroe, Dean C., 81-0245M
Nash, Robert A., 81-0011M
Owen, Charlie, 82-0050M
Phipps, Ivan, 81-0014M
Radley, Louise, 82-0136M
Smith, Tony H., 81-0025M
Sylvester, Leroy, 81-0094M
Taylor, Greg, 82-0129M
Tila, Raimo K., 81-0057M
Todd, Marvin, 81-0033M
Van Mechelen, Gene, 81-0225M
Walden, James, 82-0077M
Wortman, Stanley, 82-0118M
Young, Bryan, 82-0102M
Younts, Thomas M., 81-0299M

Own Motion Jurisdiction (continued)

APRIL-JUNE

Dismissed

Fevec, Ruth, 81-0153M

Reopened

Buckingham, William, 81-0270M

Creamer, Eugene, 80-7555

Dillworth, William, 81-0116M

Durlam, Eugene, 82-0079M

Hamm, James E., 81-0303M

Hutchinson, James W., 82-0052M

Owen, Charlie, 82-0050M

Kirchoff, Rex, 82-0089M

McMahon, Betty J., 81-0059M

Peoples, Charles O., 82--0012M

Stearns, James, 82-0127M

Woock, Robert F., 82-0126M

Zeiger, Fritz, 82-0064M

Vacated Determination

Yates, Thomas, 81-0076M

MEMORANDUM OPINIONS

The following Memorandum Opinions are not published in this volume. These decisions may be ordered from the Workers' Compensation Board using the numbers provided.

JANUARY-MARCH

Aquillon, Felipe, 80-06118
 Axe, Lorraine, 80-08840
 Beeler, James, 80-01489 &
 80-08544
 Berry, Charles, 81-03132
 Bierly, Barbara, 80-03436
 Black, Edwin G., 80-10781

Blair, Robert A., 81-01557
 Bloom, Charles R., 80-09340
 Brinkley, Tami, 81-02491
 Brockett, Ettis R., 80-09003
 Brockman, Peggy, 80-05693
 Buffum, William, 80-04188

Burnett, Vicki L., 80-10608
 Candelaria, Gayle, 80-07773 &
 80-10743
 Cappoen, Suzanne, 81-00244
 Carr, William R., 80-00053
 Cate, Zella, 80-06750
 Chokoiski, Dragan, 80-08064

Cioch, Jirina, 78-07111
 Clement, Clyde E., 81-02494
 Clemons, Marilyn J., 80-09256 &
 80-09255
 Colbert, Mike L., 81-02042
 Cole, Wiley F., 81-00474
 Cook, Violet Martin, 79-06445

Cooper, Jacob F., 81-00389
 Cooper, Robert, 81-05809 &
 80-07211
 Crabtree, Edd, 81-01690
 Dane, Louise L., 80-07705
 Davis, Gary E., 79-05671 &
 79-06617
 Davis, Lieselotte, 78-10137

Day, Jon D., 80-11371 &
 81-01192
 Day, Ray O., 80-09190
 Decker, Mike A., 80-00110
 Dobyns, Randy D., 80-09834
 Ellis, David W., 80-09715 &
 80-10863
 Eisenhart, Adrian E., 81-04689

Faas, Robert, 80-04354 &
 79-09238
 Fagan, Timothy G., 81-00135
 Farnham, Gino A., 80-11361
 Felix, Neva M., 81-01885
 Fenwick, Robert J., 81-02777 &
 81-00061
 Findlay, Anita, 80-08803
 Findlay, Donald W., 79-06547-E
 Fleming, Donna M., 80-03816
 Freeman, Winona L., 80-09718
 French, Desiree W., 80-10700
 Frink, Warren, 81-00822 &
 80-09070
 Geisert, Robert C., 79-00157 &
 79-08218
 Gibson, Rex D., 81-1682

Giles, Randy R., 79-10990
 Gobel, Barbara, 80-10319
 Gordon, James, 80-01931
 Grayson, Nancy, 80-11273
 Hammons, Olen R., 80-1827-E
 Hanson, Harris, 80-07459

Harper, Carole B., 81-01259
 Harris, Jr., Rex A., 80-10517
 Harrison, Jerry L., 80-04028
 Henn, Brenda L., 80-05494
 Henry, Lucinda, 80-04260
 Hill, Ralph J., 80-09032

Hoffman, Harry, 80-04503
 Hoogendoorn, Terry, 80-11367
 Horning, Dennis E., 80-05757
 Howard, George, 81-00549
 Huff, Arthur R., 78-07035
 Humphrey, Jr., Ivan, 80-10865

Hunter, Earl A., 78-09365 &
 80-11030
 Ivory, Marshall, 80-09354
 Johnson, Robert D., 80-03867 &
 80-03866
 Johnston, Flora I., 79-03320
 Jones, Jeffrey D., 81-00200
 Jones, Rita K., 77-06725

Memorandum Opinions (cont.)

Keepers, Michael R., 81-02229
Kinney, Robert, 81-01571
Lane, Roger W., 80-11456
Lane, Russell T., 81-00795
Lewis, J. Colleen, 80-07414
Lively, Albert E., 80-10995

Long, Benjamin J., 80-01837 &
80-09037-E & 80-08477
Loving, Vesia, 80-08433
Lowe, John W., 80-08200
Maker, Harold L., 79-10936
Malone, Charleen, 80-11272

Mansfield, Michael G., 80-07477
Marling, Ida M., 80-01891
Maxwell, Leonard B., 80-10823
McAllister, Michael A., 80-11646 &
81-00891
McClain, Thomas, 80-02174
McConnell, Elise, 81-03534

McDaniel, Sam, 80-00897
McDuffy, Elsie R., 81-01770
McIntosh, Rodney C., 80-02604 &
80-02605
McKie, Rick A., 81-00558
McMahon, Dennis, 81-01435 &
81-03440
Mecum, Donald, 80-02027 &
81-00631

Meredith, Richard K., 80-07229
Merkle, Jr., Gilbert, 81-00768
Mignot, Earnest W., 80-00504
Minnick, Nellie M., 81-04575 &
80-05163
Miville, Roland, 80-07483 &
80-09287
Moon, Gary C., 80-08252

Mork, Charles A., 80-08253
Mullins, Daniel, 80-09638
Nagy, John G., 80-04807
Nevera, Ronald, 81-02710
Newsome, Rosalie A., 80-04087
Nisbet, William E., 81-01238

Odell, Kenneth, 81-05929
Olson, Robert E., 79-09226
Patterson, Cheryl, 80-11201
Patton, May M., 80-10795
Perez, Jose G., 80-01797
Perry, Alan L., 81-3847

Perry, Carl, 80-10761 &
80-10762
Pickard, Linda, 80-08481 &
80-08482 & 80-08483
Pinkham, Berkley J., 80-05719
Prall, Anna M., 78-05418
Pratt, Dwight C., 80-11302
Provins, Elmer C., 80-03381

Quinn, Diedre, 79-07240
Quintero, Jose, 79-04021
Reburn, Merrick D., 81-00235
Reed, John, 81-05471
Reinier, Daniel, 80-06602
Rhinehart, June, 81-01924

Richards, Tony E., 80-10483
Riha, Robert E., 79-05568
Rindt, Carol A., 80-05465
Riske, Timothy, 80-07993
Robinson, Patrick, 80-08126
Robison, Cecil, 78-09640

Rogers, Thelma, 80-09378
Rook, Stanley R., 80-02739
Russell, Raymond S., 80-09600
Saleen, Jim L., 79-02329
Simons, Lawrence, 80-07095
Smith, Frank W., 80-10486

Smith, Lois E., 80-03780
Smith, William H., 81-00767
Sommer, Mary, 80-11220
Spangler, Jon M., 80-01856 &
81-01992
Stacks, Denise K., 81-02216
Steinbach, Nicholas, 81-01501

Stewart, Thomas H., 80-05207
Sullivan, Sandra K., 79-02674
Szabo, Leslie A., 81-06877
Terry, Joyce C., 80-02044
Thompson, Joe A., 80-06396
Tippin, Ronald D., 79-03645

Townsend, William, 79-08826
Travis, Richard, 80-09911
Vasquez, Celestino, 81-03248
Wallace, Samuel, 81-02577
Watts, Rickey A., 79-10016
Weinhold, Otto, 80-06298
Welch, Richard, 81-0640
Wellbaum, Gary D., 80-11289
Williams, Starling, 80-3151
Wimber, Larry, 81-01441
Woodcock, Mary, 80-04654
Ziebert, Larry, 80-06500

Memorandum Opinions (continued)

APRIL-JUNE (continued)

Shay, Atzira B., 80-08911	Tunheim, Jeani L., 81-07114
Short, Allen Lee, 80-09179	Tyree, Alan D., 81-02802
Siller, Fernando G., 81-06788	Vojta, Joseph L., 81-03436
Simonsen, Jens P., 81-03912	Walker, James, 81-03449
Smith, Jerrell D., 81-03103	Walters, Wayne A., 81-02105
Smith, Joyce C., 81-01901	Wathen, Teresa, 80-06296
Smith, Robert E., 81-03317	Wattenbarger, Charles, 80-03922
Snider, Nancy A., 81-03822	Weaver, Ethel, 81-04691
Stevenson, David A., 81-02137	Wells, Ruth G., 80-11011
Struttman, Joseph G., 79-10083	West, Alice F., 80-11021
Tano, Sammy, 80-08215	Youngfellow, Eric S., 79-01149
Tarver, George, 80-09944	Zapata, Eloisa, 80-08003
Thompson, Alvin, 80-10682	Zuercher, Cindy L., 80-11062
Treadwell, Timothy, 81-00093	

CLAIMANTS INDEX

Volume 34

(A list of unpublished Own Motion decisions appears on page 923.
On page 926 there is a list of unpublished Memorandum Opinions.)

NAME	NUMBER	PAGE
Ackerson, Dorothea	80-07162	496
Adair, Joyce F.	81-01035	203
Adams, Robert W.	80-08402	529
Allen, Claude	78-09801	769
Allen, Edgar	80-07105	497
Anderson, Donald R.	80-3165 57 Or App 770 (1982)	853
Anfilofieff, Juan	78-03801 & 81-06685	499,676
Anheluk, Edward M.	80-08613	205
Anlauf, Norman	78-00431	531
Arnberg, Bruce	78-10043	446
Ayres, Frank	81-07960	730
Baer, Fred	80-06842	687
Bailey, Catherine	77-07554	534,688
Bailey, Luther	79-03803	95
Baker, Wylie H.	80-03210	731
Bales, Orville A.	80-03397 57 Or App 621 (1982)	24,845
Ball, Daniel	80-05133	100
Ballinger, Roger	80-09824 & 80-08724	732
Ballweber, Steven E.	80-05310	535
Banks, Clarice	79-08983 & 79-09538	689
Bardell, Joseph W.	80-01014	10
Barger, George H.	79-09291	53
Barnes, Diane Lee	82-0042M	440
Barrera, Gabe	80-03611 & 81-01660	120
Barrett, Phillip	79-09391 56 Or App 371 (1982)	367
Barrett, Philip J.	81-03112	450
Barrett, Robert O.	79-09096	536
Batdorf, Wayne R.	79-05894	3
Bauman, Steven J.	80-04870	667
Beattie, Barbara	80-05477	483,484
Beery, John L.	81-04931	501
Beiser, William A.	81-03846	231
Berkland-Horn, Judith	81-7606	636
Berliner, Dennis	79-09454	9
Berov, Valentin	79-00674	48
Berry, Charles	81-03132	44,438
Bidwell, Marilyn	79-09674	25
Bienert, Gregory C.	80-08546	537
Blanche, Mary	79-05195 & 79-05196	132
Blauvelt, Merrie J.	81-01768	21
Bohnke, Pauline	80-02336	353,611
Bold, Berlie O.	79-07213	244

Claimants Index

NAME	NUMBER	PAGE
Bond, Walter T.	81-03727	592
Bonner, Bruce C.	80-05193	22
Boomhower, James W.	80-02766	647
Boyeas, Clarence	80-10456	10
Bracke, Sharon	77-6938	
	51 Or App 627 (1981)	868
	293 Or 239 (1982)	
Bradbury, Leonard	80-06805	3
Brannon, Robert G.	77-8011	135
Brasky, George	81-00844	453
Brazille, James H.	81-06841	645
Brewer, Alice S.	81-00687	209,246
Brill, Gary W.	81-02570	487,489
Brock, Joel	80-08753	502
Bronski, Ronald	80-08410	612
Brooks, Michael A.	79-10425	
	55 Or App 688 (1982)	338,455
Brown, Gary O.	82-0046M	441
Brown, Patricia A.	81-00636	592
Brownell, Donald M.	80-06509	435,588
Bruce, Larry W.	80-09781 & 80-11106	101,189
Buckner, Harold	80-04310	11
Buhman, Wilma Kim	79-10746	252
Burke, Leroy	80-09828,80-04543 &80-04544	675
Cam Construction Co.	78-03801	676
Cameron, John	80-11124	211,441
Campbell, Jack W.	80-3479, 80-3808 & 81-00533	54
Campuzano, Larry	81-11628	734
Canepa, Patrick J.	81-06342	103
Carey, Richard J.	79-01602	467
Carlson, Orville L.	81-07257 & 81-07256	726,750
Carpenter, Clea B.	79-00913	456
Carter, James A.	80-04400 & 81-07602	45
Casteel, Katherine	80-01021 & 80-04530	
	55 Or App 474 (1981)	304,614
Castor, Melvin R.	79-09160	504
Castro, Ralph	80-02536	1
Catron, Woodrow Sr.	79-09282	736
Chaffee, Alvin	82-0032M	243
Chambers, Steve	80-08882	700
Charlton, Elzie	80-01396	26
Chavez, Efren	81-00817	504
Christensen, Gary T.	80-10356 & 81-0268M	254
Clark, George E.	76-06736	48,103,122
Clay, Kristi	78-04129	447
Claypool, Mary Lou	81-04210	28

(A list of unpublished Own Motion decisions appears on page 923.
On page 926 there is a list of unpublished Memorandum Opinions.)

NAME	NUMBER	PAGE
Clemens, Beulah C.	81-00898	104
Close, Robert	81-0080M	123
Coats, Thomas	82-0041M	442
Colbert, Ayre Nell	79-07258	54
Colton, Darrell A.	80-09344	54
Colwell, Barbara	79-00022	57
Cook, Herland E.	80-04018	58
Covely, Darla K.	79-06288	741
Cox, Gordon	78-09762	255
Cowdrey, Ruth	80-04667	772
Crawford, Charles	80-04194	62
Culwell, Edward L.	81-04538	700
Curry, Harold	81-0251M	458,614
Dahlgren, Gordon E.	80-00589	140
Dale, William J.	81-04193	747
Daugherty, Michael W.	80-10215	141
Davidson, John	80-10913	240
Davis, Jeffry	80-07657 & 80-10422	702
Day, Jon D.	80-11371 & 81-01192	123
DeGraff, Robert	78-07405 & 78-09173	669,751
DesJardins, Juanita M.	80-04796	595
Dethlefs, Walter J.	79-04604	346
	55 Or App 873 (1982)	
DeVoe, Marvin	80-06033 & 80-10625	141
DeWolfe, James	80-05575	195
Dezellum, Ray D.	80-10560	213
Dickerson, Michael	81-00672	14
Disbrow, Rodney A.	81-01110	539
Dizick, Paul	80-04716	255
Dobb, Michael	80-06514	105
Dorn, Clarice G.	80-08734	506
Dozier, Ronny L.	80-02053 & 80-02054	782
	56 Or App 627 (1982)	
Drake, Richard C.	81-02615	477
Dukatz, David	81-02174	442
Duyck, Gary	79-08798 & 79-02624	30
Dysinger, Wanda M.	81-04771	540
Eber, James	79-04969 & 79-04048	50
Edwards, Victoria	80-10862	143
Edwardson, Maurice	80-10509	469
EGge, Lance David	79-07880	803
	57 Or App 327 (1982)	
Ekstrand, Earl E.	80-06410	742
Engom, Darla	81-06678	747
Engstrom, Raymond	81-02512	541
Erickson, Charlotte	82-0063M	443
Evans, Willard B.	80-11378	490

Claimants Index \

NAME	NUMBER	PAGE
Evensizer, Edwin C.	81-01047 & 80-10727	719,720
Evers, Grace	79-02451	64
Faulk, Jimmy	81-0217M	109
Fellner, Joanne	81-10282	723
Ferris, Herb	80-05978	470
Fevac, Ruth	81-03461	443
Fiddelke, Michael	80-04761 & 80-06985	30
Fincham, Guy	81-04246	256
Fisher, Roy A.	81-02641	648
Florence, A.L.	79-00860 & 79-00966 55 Or App 467 (1981)	237,298
Folmsbee, Dana L.	80-06123 & 80-06259	508
Fossum, James	77-3475,77-6112, 78-958, 78-959 & 78-957 52 Or App 769 (1981) 293 Or 252 (1982)	884
Foster, Rose M.	81-03992	458
Foutch, Robert R.	79-06638	33
Fowler, Alfred	80-08626	509
Fox, Wayne O.	80-07068	33
Foy, Dorothea M.	81-01011	650
Frame, William J.	80-07617	183
Freier, Gary A.	79-07952	543,738
Frey, Esther	80-06584	66
Fuller, Gary E.	81-02309	459
Fuller, Mark D.	80-10512	15
Galanopoulos, John	81-04249	615
Gallagher, Richard L.	80-04447 & 80-01980	90,127,246
Gallea, Cindy	80-07747 56 Or App 763 (1982)	787
Gallino, Samuel E.	81-03006 & 80-01822	645
Garcia, Jesus	81-00374 & 80-08510	773
Garcia, Sandra Atwell	79-09729	244
Gardner, Billie	80-11276	218
Gaule, James L.	80-06041	3
Gibbons, Millard A.	79-08953	15
Gibbs, Marvin K.	80-01789	510
Gibson, Mary	81-01219 & 81-01220	143
Giger, Jess	78-09716	196
Gilbert, John	81-06744	677
Gilbert, William S.	78-09362 & 79-05397	756
Gilbert, William S.	81-05084	759
Ginter, John P.	80-00793	547
Givens, Christine Nelson	80-07341 & 80-05753	258
Givigliano, Nancy	81-03786	550
Glahn, Kimberly	82-00491	703
Godell, Donald A.	80-05378	50
Gonzales, Frank R.	81-01630	551,639

(A list of unpublished Own Motion decisions appears on page 923.
On page 926 there is a list of unpublished Memorandum Opinions.)

NAME	NUMBER	PAGE
Gotchall, Mary A.	80-09494, 80-09957, 80-10393 80-10494 & 81-00011	234
Grable, Michael	79-00866 55 Or App 627 (1982)	331,459
Graves, Dillard	80-09411	639
Green, Terry L.	79-07224	96
Greening, Delbert	80-04633	145
Guerra, Ralph F.	80-08629	556
Gumm, Robert	79-08489	16
Gupton, David	81-03320	264
Gygi, Robert	79-9683 55 Or App 570 (1982)	318
Hackett, Rebecca	80-04498	460
Hadaway, Jack R.	80-05835	669
Halligan, Isla M.	81-06804	594
Hamel, Frank A.	79-00690	5
Hamel, Joseph E.	80-7173	68
Hammond, Sherman	80-06042	111
Hammons, Kenneth	81-00648	69
Hampton, Melba D.	81-01908	493
Hanks, Avis L.	80-02460	219
Hanna, Beverly J.	81-03776	747
Hanscom, Charles	80-00403	34
Hargens, Clyde M.	80-09628	751
Harmon, Orry W.	80-07664	247
Harrell, Thomas C.	81-06296	589
Harris, Margaret L.	80-02418 & 80-06627	558,618
Harris, Miner Lee	79-09167	148
Harris, Rex	79-7093 52 Or App 233 (1981) 292 Or 683 (1982)	387
Hart, Ruby M.	81-02292	737
Harth, Michiel M.	78-3561	703
Hedlund, Robert	79-09967 & 80-10221	149,443
Hendrickson, Jacquelyn	81-03517	652
Hicks, Vida	79-00920 57 Or App 68 (1982)	796
Hildebrandt, Russell	81-00100	510,512
Hines, Hazel A.	78-05355	87
Hoffman, Harry	80-04503	17
Holcomb, Donald	80-01090	92
Holder, Barbara	80-00244	5
Holub, Roy F.	79-04003 57 Or App 571 (1982)	840
Holzwarth, Richard	79-10965	743
Hoogewerff, Nicolette L.	81-03693	247
Hubbard, Alvah	81-05865	727,776

Claimants Index

NAME	NUMBER	PAGE
Hubble, Walter	79-10883	
	56 Or App 154 (1982)	359,824
	57 Or App 513 (1982)	
Huckabay, Albert E.	79-06485	45
Huff, Arthur	78-07035	201
Hughes, Carl E.	80-06856	17
Hughes, Vernon W.	79-09361	560
Hulbert, David L.	81-06893	761
Hunter, Gary	79-04980, 79-10169 & 79-10606	92
Hurley, Garold	81-0134M	124
Hurtienne, Ann	81-05841	646
Hutchinson, Delbert	79-07340	267
Inter-Cable Utilities	80-08298	222
Ivie, Kenneth	80-04388	69
Jackson, Allen D.	81-00683	654
Jaglieski, Vincent	80-06471 & 79-05262	723
James, Dianne L.	77-06474	6
Janes, Michael K.	80-09355	464
Jensen, Betty J.	79-06217	743
Johns, Arlie H.	80-8634	46
Johnson, Jack	80-09455	70
Johnson, John	79-03695	271
Johnson, Merle	81-02188 & 80-09738	125
Johnson, Michael W.	80-11350	277
Johnson, Norman C.	80-02886	763
Johnson, Shirley B.	79-7925	
	55 Or App 638 (1982)	336
Johnson, Valerie	80-07074	655
Jones, Bill E.	79-00924	72
Jones, Billy Joe	81-06159	655,738
Jones, Jeffery D.	81-00200	466
Jones, Laura	80-04455	196
Katzenberger, Karl	81-01960	747
Keller, Warren W.	80-08294	150,231
Kelley, Derral D.	79-03359	73
Kelly, John J.	80-01608	221
Kemple, Dennis	78-07534	
	57 Or App 733 (1982)	851
Kephart, Karen K.	81-00587	707
Kester, Dwayne	80-07576	151
Kim, Tae	80-05266 & 81-04723	472
Kimbrel, Sadie M.	81-0317M	591
King, Michael J.	80-07413	153
Kintz, John N.	80-05709	34
Kiser, Virginia A.	80-08295	434
Kleist, Ron	81-04207	190
Knight, Marlene L.	80-06474	278
Kociemba, Leroy	81-06016	679,727

(A list of unpublished Own Motion decisions appears on page 923.
On page 926 there is a list of unpublished Memorandum Opinions.)

NAME	NUMBER	PAGE
Kortner, Robert L.	78-04179	563
Kreutzer, John D.	80-04208	154
Kytola, Allan	82-0142M	748
Lacey, Bud F.	81-02213	564
Lamb, Clinton	80-02549	222
Langston, Olive E.	80-04325	784
	56 Or App 709 (1982)	
Larsen, Kathy	80-00797	375
	56 Or App 404 (1982)	
Larson, Allan L.	79-01776	18
Larson, Daniel R.	81-02974	709
Larson, Ole	79-07895	831
	57 Or App 561 (1982)	
Lathrop, Donald	80-10830	473
Laudahl, Robert M.	81-01815	157
Leary, Thomas	80-10944	6,22
Leroy, Michael	79-04980, 79-10169 & 79-10606	92
Lewis, Patricia L.	80-10226	202
Lewis, Wanda	81-08230	619
Lewis, William C.	81-06783	512
Likens, Diane	80-02647	378,724,763
	56 Or App 498 (1982)	
Lindsay, Timothy S.	80-11455	47
Livesay, Charles	79-10108	565
Logsdon, Joseph E.	81-05284	619
Looper, Harold B.	78-5162	382,727
	56 Or App 537 (1982)	
Lopez, San J.	81-00929 & 81-00930	248
Loving, Vesia	80-08433	96,513
Lucas, Del C.	81-01241	279
Luellen, Shawnee L.	80-09635	280,448
Lyon, Claude	80-03328	93
Maddalone, Vincent A.	80-10282	566
Madril, Ralph S.	79-8024 & 79-00051	805
	57 Or App 398 (1982)	
Maloney, Mike J.	81-01674	44
Manuel, Ione M.	78-07662	466
Martin, James A.	82-0054M	444
Martinez, Isabel D.	79-03053 & 80-06054	114
Mason, Frank	80-02026	568
Mathews, Iona	80-06675	327
	55 Or App 608 (1982)	
Mathews, Thomas W.	81-10754	764
May, John C.	80-10376	114
McAllister, Kevin J.	80-08117 & 80-08118	158
McArthur, Charles G.	80-05966	7
McConnell, Gregory L.	81-03735	224

Claimants Index

NAME	NUMBER	PAGE
McCreery, Leslie A.	81-03231	670
McCuin, William J.	80-08815	74
McFerran, Roy Jr.	79-11077	621
McIntyre	292 Or 784 (1982)	867
McKenzie, Derald W.	81-02287	281
McKenzie, Joe	80-03508	
	56 Or App 394 (1982)	373,815
	57 Or App 426 (1982)	
McKinley, Benetta A.	81-00386 & 80-08575	75
McMahon, Dennis	81-0156M, 81-01435 & 81-03440	248
McMichael, William S.	79-09744	283
Meadows, Mary E.	81-02192 & 81-02193	224
Mendenhall, Mary	81-08099	743
Mendoza, Michelle C.	80-07482	22
Metler, Harold	79-002728 & 79-06944	710
Miller, Richard R.	81-06586	514
Mims, Anthony J.	80-09417	97
Minton, Lorrie A.	80-11134	162
Mobley, David	80-08362	35
Mogliotti, Ronald	81-10963	725
Moore, Geraldine	79-11081 & 80-221	
	55 Or App 480 (1981)	308
Morris, Olive H.	78-06247	47
Morris, Robert M.	80-00077 & 80-11614	571
Morrison, Thomas E.	81-00262	572
Mosquedo, Geraldo	79-08138	182
Moss, Linda	80-04993	571,642
Mullis, James J.	81-05393	671
Murray, Charles A.	80-09364	249
Murrill, Earnest	80-02505 & 80-02506	515
Mustoe, Edwin L.	80-09999	659
Nagy, John G.	80-04807	241
Naughton, Sherryl	81-02045	764
Neal, Donald P.	79-11036	198,237
Neal, Eugene	80-02319	19
Neihart, Ward	81-00136	494
Nelson, Albert L.	80-09749	573
Nelson, Winston	80-09365	714
Newlin, Bambi	80-09128	776
Nicks, Edward	80-05296	163,202
Niemi, Robert E.	80-11652	516
Nixon, Elmer O.	81-03498	749
Noice, Betty V.	81-00667	753
Norris, James A.	81-01383	626
Nuse, Karl	81-0271M	284
Oland, Delmar G.	80-01796 & 80-02840	76
Oliver, Robert Jr.	82-0074M	445

(A list of unpublished Own Motion decisions appears on page 923.
On page 926 there is a list of unpublished Memorandum Opinions.)

NAME	NUMBER	PAGE
O'Neil, Daniel P.	80-11593	165
Orsborn, Raymond	81-03928	576
Osborne, Alvy	82-0023M	127
Ouchinnikov, Ivan	Claim CV 00882200	579
Owen, Albert W.	80-06481	94
Paresi, Kristie	77-06083	37
Parra, Lorenzo T.	81-06394	749
Parker, Verla	80-05945	23
Partridge, Lorene	78-07510	799
	57 Or App 163 (1982)	
Patterson, Steve	79-10402	37
Peoples, Charles O.	82-0012M	434
Petersen, Harold O.	79-07627	51
Peterson, John R.	79-09942	130
Peterson, Marvin	79-05443	820
	57 Or App 476 (1982)	
Petkovich, Michael R.	81-02623	98
Petriello, Susan C.	79-08108 & 80-02990	478
Petshow, David R.	80-08903 & 81-00263	439
Pichette, Donna L.	81-07628	629
Pilaczynski, Robert M.	81-00742	686
Pitner, Hubert J.	81-01211	714
Platz, David R.	79-07758 & 80-08821	23
Poehler, Fred H.	79-02665	76
Potter, Alene E.	81-00249	166
Price, Michael J.	81-02728, 81-02729 & 81-08286	765
Pruett, Timothy B.	79-08459	517
Putnam, Jeri	80-04041	744
Pyle, June	79-07762	350
	55 Or App 965 (1982)	
Queen, Robert J.	79-03862	285
Queen, Ronald	79-09182 & 80-03422	116
Raifsnider, James F.	79-9409, 79-1549 & 78-8036	342,466
	55 Or App 780 (1982)	
Ransom, James D.	80-06002 & 80-11561	672,750
Rappin, Robert	80-08699	38
Rater, Ollie	79-06134 & 81-01464	739
Ravenwood, Minx E.	80-07679	754
Ray, Bessie A.	80-10090	167
Reed, Wallace	78-10329	473
Reedy, Terri	81-08327	180
Reef, Jack R.	81-02391	674
Reitz, Richard D.	81-02533	225
Reust, Jerry J.	80-00038	7,78,201
Reynolds, Geraldine	81-0312M	88,89,227
Reynolds, Lance P.	79-03058	240,314
	55 Or App 487 (1981)	

Claimants Index

NAME	NUMBER	PAGE
Rhoads, Marvin T.	79-02576	766
Rhodes, Eugene C.	80-06781	481
Rich, Ricky	81-01304	660
Richardson, Paul L.	81-4483	629
Richey, Donald W.	80-11143	287
Riddle, Patrick D.	80-08585	167
Riddle, Terry L.	79-08182	48
Robertson, John	80-07423	495
Ross, Bobby Joe	79-04420 & 79-05569	242
Roth, Richard	80-11165	741
Rowton, Harvey W.	80-08991	24
Ruhl, Joda M.	80-05855	2
Russell, Orlando	80-10049	9,99
Ryder, William	80-11518	646
St. Arnold, Patricia	80-10093	79
Salloum, Mouin J.	80-08445 & 80-09601	90
Satterfield	292 Or 780 (1982)	864
Schaffer, Herbert	81-01462 & 81-01461	476
Schmidt, Donald	81-09477	477
Schmidt, Henry A.	80-05040 & 81-01030	582
Schmidt, Virginia M.	80-7561	433
Schneider, William C.	80-10677	520
Schuler, Iris F.	80-08449	716
Scofield, Dale	78-3310 & 78-7638 56 Or App 130 (1982) 57 Or App 23 (1982)	357,792
Scott, Robert A.	80-07284	51
Shaw, Maxine E.	79-01310 & 79-10446	39
Side, Mark L.	81-01240	661
Simons, Linda E.	79-11041	236
Singleton, Thelma	80-02000	79
Skophammer, Juanita	81-0234M	131
Smith, Allan D.	80-08592	119
Smith, Charles R.	79-03919	20
Smith, Gary L.	80-09815	522
Smith, Gavin L.	79-03191	80
Smith, Johnny	77-01889 & 78-01678	584
Smith, Judy M.	80-05861	39
Spangler, Jon M.	80-01856 & 81-01992	232
Sparks, Allen H.	81-00286	526
Starbuck, Terry L.	79-04425	81,181
Stevens, Edith N.	81-01062	642
Stevens, Loren	80-09763	448
Stevenson, Ilene	81-00867	192
Stewart, Thomas H.	80-05207	228
Stone, Sidney A.	79-8878 57 Or App 808 (1982)	859
Strauser, Marlene	81-00819	168

(A list of unpublished Own Motion decisions appears on page 923.
On page 926 there is a list of unpublished Memorandum Opinions.)

NAME	NUMBER	PAGE
Stultz, William P.	80-03388	170
Sullenger, Susan	81-00410	228
Suydam, Jack	80-08595	119
Tamayo, George	79-09895	39
Taylor, Jessie E.	81-07049	715
Teel, Dean D.	80-00757	631
Tesoro, Nicolas E.	80-05277	84
Thayer, James A.	81-01089	527
Thomas, Eula M.	81-05391	687
Thomas, Minnie	80-10097	40
Thompson, Connie L.	80-02230	288
Thornsberry	81-649	810
	57 Or App 413 (1982)	
Thurman, Jimmy Earl	79-09705	644
Toskovich, Mike	80-05727	125
Treadwell, Timothy	81-00093	755
Trevino, Juanita	81-01912 & 80-07954	632
Truitt, Jerry A.	80-11076	86
Tunheim, Jeani L.	81-07114	741
Tuning, Elizabeth	81-01848	664
Turley, Gordon	80-11183	289
Turner, Frank J.	81-00353	584
Twist, Lewis	80-07811	52,96,290
Undercoffer, Carl	80-11357	99,129
University Medical Assoc.	57 Or App 451 (1982)	833
Valtinson, William	80-07387	363,633
	56 Or App 184 (1982)	
Vanderschuere, Victor	82-0025M	444
Vandre, Donald L.	80-11310 & 80-11311	53
Vega, Mary R.	81-06921	528
Vinson, William Z.	81-04119, 81-04118, 81-04117, 81-04116 & 81-04115	295
Wagner, Roy L.	81-04552	746
Wagy, Donald	81-04385	445
Wall, Verda M.	80-09392	172
Wallace, Eula V.	81-01971	777
Warner, Darryl G.	80-03034	634
Wathen, Teresa E.	80-06296	21
Weidman, Brock	81-04440	173
Welch, Wayne E.	80-10619	766
Welcome, Elizabeth N.	80-03201	194
Weldon, Ray E.	80-08493	717
West, Carl F.	80-00288	755,778
Westfall, Thomas	80-01122	816
	57 Or App 459 (1982)	
White, Robert	81-00760	81

Claimants Index

NAME	NUMBER	PAGE
Whitman, Ray	80-03300	182
Whitney, Billie A.	81-01652	482
Wing, Chester L.	80-03506	718
Winchester, William	80-07496	8
Winkler, Karen M.	81-4022	726
Winters, Don	80-05962	586
Wischnofske, Donald	80-00424	664
Wolf, Gordon E.	80-02051	176
Wonsyld, Leonard	80-07736 & 80-09771	230
Wooderson, John D.	80-04056	86
Woodman, Donald	78-5283	178
Woods, Golda J.	81-01194	87
Wooten, David F.	81-01871	42
Wright	292 Or 784 (1982)	867
Wyrick, Melvin T.	79-08788	8
Wyttenberg, Arnold	81-01180, 81-01284 & 81-0050M	9,778,779
Yetter, Deborah	81-01466	728
Zolotas, John	81-00017	87