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34 Van Natta ____ (1982)

TIMOTHY D. BLASER, Claimant
James O'Neal, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-00137
October 7, 1982
Order on Review

Reviewed by Board Members Lewis and Ferris.

The SAIF Corporation seeks review of that portion of Referee McCullough's order which remanded claimant's claim for psychiatric treatment recommended by Dr. Hughes. SAIF contends that the psychological issue was neither raised nor litigated at the hearing.

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

SAIF argues that the Referee incorrectly ruled on an issue not raised by the parties. We agree.

At the beginning of the hearing the following conversations were held between the parties and the Referee:

> "The Referee: Okay. As I understand it, the sole issue is extent of unscheduled permanent partial disability, is that correct?
>
> "Mr. O'Neal: That is correct.
>
> "Mr. Nyberg: There is an overpayment."
>
> * * *
>
> "The Referee: . . . The only issue we will deal with today though is extent of unscheduled permanent partial disability."

The sole issue, as noted above, was extent of permanent partial disability from an appeal of the July 13, 1981 Determination Order. The Board has previously stated in Michael Petkovich, 34 Van Natta 98 (1982):

> "Referees (and the Board, too), should concentrate on making the best possible decision on the issues raised by the parties without the distraction of volunteering decisions on issues not raised."

No issue was raised or evidence presented regarding claimant's claim for aggravation of a psychological condition. Only a medical report was received after the hearing from Dr. Hughes which indicated he was recommending psychological treatment. The effect of the Referee's order is to make compensable a condition which has never been asserted by the claimant, not accepted or denied by the insurer and, in fact, never litigated as an issue at a hearing. That portion of the Referee's order is, therefore, reversed.

Turning to the issue raised at the hearing, extent of claimant's unscheduled permanent partial disability, we find that the medical evidence indicates that claimant has sustained no physical impairment. However, the medical evidence is clear that claimant has work restrictions placed upon him, which include no repetitive heavy lifting, bending or stooping. All of these motions are necessary in the only real occupation (body and fender repair) that claimant has ever performed. Claimant had 12 years of schooling but did not get a diploma. He is only 23 years of age. He has achieved the skills required of an auto body and fender repairman, and, therefore, has the ability to learn. We feel that claimant would be adequately compensated for his loss of wage earning capacity arising out of this industrial injury by an award of 16° for 5% unscheduled disability.

ORDER

The Referee's order dated May 19, 1982 is reversed.

Claimant is hereby granted an award of 16° for 5% unscheduled disability.

Claimant's attorney is granted as a reasonable attorney's fee 25% of the increased compensation granted by this order.

THELMA JAQUES, Claimant — Own Motion 82-0217M
Pozzi, Wilson et al., Claimant's Attorneys — October 7, 1982
SAIF Corp Legal, Defense Attorney — Own Motion Determination

The above entitled claim was reopened pursuant to a Referee's order of June 29, 1982. The claimant's physician requested reopening of the claim approximately three months after expiration of claimant's aggravation rights. The first Determination Order on this claim issued August 22, 1975; the aggravation period expired August 22, 1980; and the request for reopening was made November 13, 1980. It was inappropriate for the Referee to consider the "aggravation claim" and SAIF's "denial." Cf Claude Allen, 34 Van Natta 769 (1982).

In any event, this claim is now in open status, and it is ready for closure. Claimant has no right to closure pursuant to ORS 656.268. We close the claim pursuant to ORS 656.278. Claimant is hereby granted compensation for temporary total disability from November 13, 1980 through December 31, 1980 and no additional award for permanent partial disability.

IT IS SC ORDERED.

LEE M. KIGHT, Claimant — WCB 81-11508
Myrick, Coulter et al., Claimant's Attorneys — October 7, 1982
SAIF Corp Legal, Defense Attorney — Order on Reconsideration

The Board has received a Motion for Reconsideration from the SAIF Corporation of its Order of Dismissal dismissing SAIF's Request for Review as having not been timely filed. Having considered the motion and the affidavit attached hereto, SAIF's Motion for Reconsideration is granted and upon reconsideration, the Board's Order of Dismissal is set aside and SAIF's Request for Review is hereby accepted.

IT IS SO ORDERED.

ANTHONY SHOULDERBLADE, Deceased
GLADYS SHOULDERBLADE, Claimant
Phil Studenberg, Attorney

Claim No. CV0090300
October 7, 1982
Crime Victims Act--
Order of Remand

Claimant, Gladys Shoulderblade, apparently on behalf of her herself and on behalf of her deceased husband, Anthony Shoulderblade, has requested a hearing concerning claims made for victims of crime compensation following the issuance of an Order and an Order on Reconsideration by the Department of Justice. The Department found the claim or claims not to be compensable on the ground that the cause of the decedent's death was uncertain, and on the further ground that Mr. Shoulderblade failed to cooperate fully with law enforcement officials in the apprehension and prosecution of his alleged assailant.

Our preliminary review of the record in this matter indicates that the record is incompletely developed. The Department of Justice's Order and Order on Reconsideration refer to evidentiary matters not properly developed in the record. For example, there are references to statements attributed to the Office of the District Attorney and the Medical Examiner, an allegation that Mr. Shoulderblade may have died of pneumonia and an allegation that Mr. Shoulderblade may have fallen out of his hospital bed and sustained further head injuries which may have caused his death. These matters have little or no foundation in the record forwarded to us by the Department.

In her request for a hearing, Mrs. Shoulderblade alleges that, subsequent to an interview with a police officer during which her husband refused to name his assailant, her husband changed his mind, decided to cooperate with law enforcement officials and named his assailant. Mrs. Shoulderblade further alleges that efforts were made to contact law enforcement officials but that her husband died before law enforcement officials could interview him again. Mrs. Shoulderblade further alleges that the decedent was under a court order declaring him incompetent, that she was his duly appointed guardian, that she was aware of the identity of the assailant and that she was ready at all times to cooperate with law enforcement officials.

The Department of Justice's Order and Order on Reconsideration do not reflect a consideration of whether and to what extent the decedent's alleged incompetency provided good cause for failure to cooperate as provided in ORS 147.015(3); whether as the alleged guardian of the deceased person, Mrs. Shoulderblade's readiness and ability to identify the assailant satisfied the requirements of ORS 147.015(3); whether and to what extent the District Attorney's alleged unwillingness to prosecute is obviated under ORS 147.125(1); whether the alleged fall in the hospital was within the chain of causation from the original injuries and whether notwithstanding other potential contributing factors to the decedent's death the injuries arising from the assault were a material cause of his death. Lastly, it needs to be clarified whether Mrs. Shoulderblade is prosecuting a claim in her own right as the dependent or relative of a victim under ORS 147.015(1) or 147.025, as the legal guardian of the decedent, or as the legal representative of the decedent's estate under ORS 147.335.

For these reasons, we remand this matter to the Department of Justice for a more complete development of the record and consideration of the legal implications of the matters discussed above.

IT IS SO ORDERED.

ROBERT DELEPINE, Claimant
Marcy Leskela, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-05413
October 8, 1982
Interim Order

Claimant requested review of the Referee's order herein and thereafter moved the Board to remand the case to the Referee for further evidence taking pursuant to ORS 656.295(5). The Board deferred ruling on claimant's motion for remand until the time of Board review. The briefs have been filed and the case has been docketed for Board review. In reviewing claimant's motion for remand, it appears that, although claimant has described the additional evidence, the proffered evidence has not been appended to or otherwise submitted with claimant's motion for remand.

In order to determine whether the proposed additional evidence could have been obtained in the exercise of due diligence and whether it is relevant material or could possibly change the result reached by the Referee (i.e., whether the case has been "improperly, incompletely or otherwise insufficiently developed or heard by the referee"), the Board directs that claimant's counsel submit the additional medical reports within five days of the date of this order, with a copy of the reports provided to counsel for SAIF. The proffered additional evidence will be examined solely for purposes of determining whether claimant's motion for remand has any merit and will not be reviewed as part of the record on Board review.

IT IS SO ORDERED.

ROBERT D. FARANCE, Claimant
Roll et al., Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Wolf, Griffith et al., Defense Attorneys

WCB 78-04137,79-08194,
80-01028 & 79-11112
October 8, 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.

ERMA GRAHAM, Claimant
Roger D. Wallingford, Claimant's Attorney
Wolf, Griffith et al., Defense Attorneys
SAIF Corp Legal, Defense Attorney
William Stockton, Defense Attorney

WCB 81-00622,81-07908 & 81-09041
October 8, 1982
Order on Reconsideration

The Board issued an Order on Review on September 14, 1982, affirming the Referee's Order of January 15, 1982. Prior to the date that this case was docketed for Board review, claimant moved the Board for remand to the Referee for further evidence taking, pursuant to ORS 656.295(5). We reserved ruling on claimant's motion until the time of Board review. However, we made no reference to claimant's motion in our Order on Review, and claimant subsequently requested a ruling thereon. We regard this request as one for reconsideration of our Order on Review.

The Board denies claimant's motion for remand. In Robert A. Barnett, 31 Van Natta 172 (1981), aff'd. on other grounds, 59 Or App 133 (1982), we held that "[t]o merit remand it must be clearly shown that material evidence was not obtainable with due diligence before the hearing." 31 Van Natta at 173. Subsequent Court of Appeals decisions have not altered this due diligence requirement. See Egge v. Nu-Steel, 57 Or App 327 (1952); Muffett v. SAIF, 58 Or App 684 (1982).

The evidence which claimant now seeks to have considered by the Referee, which claimant contends was not obtainable prior to the hearing, consists of the results of a myelogram performed by a neurological surgeon who apparently had not previously examined claimant prior to the time of the hearing on January 4, 1982. The evidence tendered by claimant in support of her motion for remand is a report from this physician, dated April 19, 1982, indicating that the myelogram he performed indicates a protruding disc at L4-L5, as does a CAT scan. In a letter report to claimant's attorney, this physician states: "After reviewing her extensive history that you have provided, I would state that historical facts from this lady are apparently not reliable. Therefore, I am unable to relate her back problem to any particular incident since, after reading this review you provided me with, I do not feel the patient's history is reliable."

Claimant has also submitted a statement from an orthopedic surgeon who previously examined claimant and whose reports were made a part of the record before the Referee. The proffered statement, dated June 11, 1982, indicates that in this physician's opinion, "based on reasonable medical probability, this patient sustained a disc protrusion secondary to her initial injury. . . ." This physician had performed a CAT scan approximately one year earlier which reflected a possible disc herniation at the L5-S1 level on the left side. This diagnostic report was considered by the Referee, who found that it "did not contribute much."

The Referee's order states:

> "Claimant has been seen, treated or considered by about 25 medical practitioners, many of whose detailed histories are included among the nearly 100 exhibits.* * * These medicals reveal

claimant is not a good historian, neither is she a very convincing witness. Thus the medicals and claimant's testimony are both suspect."

As was the case in Barnett, we here find that claimant's motion for remand to the Referee for further evidence taking is "simply an effort by the side that lost at a hearing to get additional evidence to strengthen its case." 31 Van Natta at 174. Furthermore, in reviewing the tendered additional evidence solely for the purpose of ruling on claimant's motion for remand, we find that the proffered additional evidence does not indicate that this case has been "improperly, incompletely or otherwise insufficiently developed or heard by the Referee. . . ." ORS 656.295(5), see Muffett v. SAIF, supra, 58 Or App at 687.

ORDER

On reconsideration of the Board's Order on Review dated September 14, 1982, the Board denies claimant's motion for remand and adheres to its former order.

JOE HOLMES, JR., Claimant
Peter Hansen, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

Own Motion 81-0034M
October 8, 1982
Own Motion Order

Claimant has requested that his claim for an injury sustained on May 25, 1973 be reopened for surgery recommended by Dr. Kiest. Claimant's aggravation rights have expired. SAIF Corporation has authorized the surgery. The only issue before us is claimant's entitlement to compensation for temporary total disability. The evidence before us indicates that claimant has been on full social security benefits since 1976. There is no evidence that claimant is ready and available for work, but rather that he has retired from the labor market. Although the medical expenses will be paid, claimant's request for reopening of his claim must be denied. Vernon Michael, Own Motion No. 81-0201M, 34 Van Natta 1212, (September 15, 1982).

KATHRYN P. ENGLISH, Claimant
Harold Adams, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-08287
October 12, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

The SAIF Corporation requests review of those portions of Referee Danner's order which: (1) set aside the Determination Order dated August 26, 1981 as premature; (2) granted claimant compensation for temporary total disability from March 25, 1981 through August 15, 1981, less time worked; (3) granted claimant 25% of compensation due for temporary total disability from January 18, 1982 through March 5, 1982 and an attorney's fee of $250 pursuant to OAR 436-83-460 and ORS 656.262(9); and (4) granted claimant's attorney 25% of the additional temporary total disability made payable by the order and an additional 25% of any additional permanent partial disability claimant may receive upon closure.

Claimant was employed, at the time of injury, as a crab shaker and developed right wrist pain on December 8, 1980. Dr. Rennick diagnosed acute tenosynovitis. Dr. Meyers became the treating physician. Claimant underwent surgical release on February 6, 1981. Dr. Meyers released claimant to regular work on March 25, 1981.

Thereafter Dr. Meyers' reports reflect that he saw claimant in April, in June and August. He indicated that claimant had not returned to work because she felt she could not do the work. Dr. Meyers kept reiterating that in his opinion claimant was physically capable of returning to her job. On August 15, 1981 Dr. Meyers performed minor surgery to remove a wire suture. The claim was closed on August 26, 1981 by a Determination Order which granted compensation for temporary total disability through March 24, 1981 and an award of 5% loss of the right hand.

Claimant worked as a bartender from July to November of 1981. Soon thereafter she was hospitalized for about 59 days for unrelated problems.

On February 17, 1982 Dr. Melgard reported that claimant's wrist condition was not stationary and he did not know when she became unstationary but he knew she was unable to work since his first examination on January 18, 1982. The diagnosis was entrapment of the median nerve. EMG's, however, were mostly normal. On March 10, 1982 Dr. Nathan reported that claimant's condition was not medically stationary but she was capable of gainful employment. Although the matter is far from clear, the parties apparently treated this information as something in the nature of an aggravation claim and the Referee relied upon it in ordering time loss paid from January 18, 1982 to March 5, 1982. It is also unclear, but we conclude that SAIF does not challenge this portion of the Referee's order on review.

Initially, Dr. Meyers was claimant's treating physician. After the February 6, 1981 surgery Dr. Meyers released claimant for full duty work as of March 25, 1981. Although claimant testified that she continued to experience pain in her right hand, Dr. Meyers' reports indicate that claimant should have been able to return to her regular employment. There is no contrary medical evidence relating to the period March 25 through August 15, 1981.

We find that claimant's failure to return to her regular employment was not the result of her medical problem; rather, it was due to the fact that her regular job was not available at the time she was released to work. Furthermore, claimant has failed to prove that she was not medically stationary after March 25, 1981, in spite of the fact that it was subsequently necessary to remove from her hand a subcuticular metal suture. See ORS 656.005(7). Accordingly, the Referee's award of additional temporary total disability for the period March 25, through August 15, 1981 was error. Cf. Humphrey v. SAIF, 58 Or App 360, 364-365 (1982); Hedlund v. SAIF, 55 Or App 313, 318 (1981).

Although the Referee found that claimant became medically stationary August 15, 1981, and awarded time loss up until that date, he set aside the August 26, 1981 Determination Order as premature. We find no basis in the record for this conclusion and, therefore, reverse this portion of the order.

SAIF also contends that the Referee erred in awarding penalties and attorney fees. The Referee awarded penalties and fees based upon a finding that SAIF failed to comply with OAR 436-83-460, which requires an insurer to provide copies of medical reports to a claimant or his attorney within 15 days of demand. Under the circumstances of this case, where there is a continuing obligation to furnish reports received after a demand has been made, we interpret this rule to mean that the insurer is obligated to provide such copies within 15 days of the insurer's receipt of the reports.

The reports in question are Exhibits 22, 23 and 24. No penalty for failing to disclose Exhibits 22 and 24 is warranted because we find it has not been established that they were ever in SAIF's possession. SAIF received Exhibit 23 on March 2, 1982. That report was furnished to claimant's attorney the same day as the hearing, March 17, 1982. Although it obviously would have been more courteous for SAIF to have sent claimant's counsel a copy of Exhibit 23 as soon as possible after receiving it and as long as possible before the hearing date, the fact remains that Exhibit 23 was furnished to claimant's counsel on the fifteenth day after SAIF received it. SAIF's actions did not violate the requirements of CAR 436-83-460 and, therefore, no penalty for noncompliance with that rule is warranted. There is no issue concerning OAR 436-83-400(3), inasmuch as these documents were not documents upon which SAIF intended to rely or did rely at hearing.

ORDER

The Referee's order dated April 13, 1982 is affirmed in part and reversed in part. Those portions that awarded temporary total disability compensation for the period March 25, 1981 through August 15, 1981, set aside the Determination Order dated August 26, 1981 as premature and awarded penalties and attorney fees are reversed, and the Determination Order dated August 26, 1981 is reinstated and affirmed. Those portions that awarded compensation for temporary total disability from January 18, 1982 to March 5, 1982 and allowed an attorney fee payable from the increased compensation awarded are affirmed.

PAUL S. GILL, Claimant
Hugh Cole, Claimant's Attorney
Schwabe, Williamson et al., Defense Attorneys
Wolf, Griffith et al., Defense Attorneys

WCB 80-09492 & 81-08254
October 12, 1982
Order on Reconsideration

Insurer EBI Companies requested review of that portion of Referee McCullough's order which assigned to it responsibility for claimant's surgery and resulting time loss. The sole issue is insurer responsibility. On July 30, 1982, the Board issued its Order on Review herein. EBI Companies requested reconsideration and on August 12, 1982, we abated the Order on Review to allow the Board more time to consider EBI's contentions. On reconsideration, we are not persuaded to reach a differerent result, but believe that a discussion of our rationale is justified. Accordingly, we withdraw our previous Order on Review and substitute the following in its stead.

We adopt the facts as set forth in the Referee's order, and adopt his conclusions subject to the following comments.

In January 1981 claimant had wrist fusion surgery. The surgery was necessitated by degenerative arthritis of the wrist. The arthritic condition, in turn, was caused by a series of wrist fractures claimant sustained between 1975 and 1980. The dispute here is between the insurer on the risk at the time claimant sustained a fractured wrist in April, 1979 (Truck Insurance Exchange) and the insurer on the risk at the time claimant again fractured his wrist in June, 1980 (EBI Companies). Claimant's treating physician testified that the 1975 fracture was the precipitating factor in the onset of the arthritis, that each of the successive fractures contributed equally and materially to the arthritis that ultimately required surgery in 1981, and that there was insufficient arthritic spurring prior to the 1980 fracture to justify a wrist fusion at that time. However, the medical evidence also establishes that arthritis is a condition that takes years to develop, and that surgery was first mentioned less than three months after the last injury and the need for it confirmed based on x-rays taken four months after the last injury.

With respect to the treating physician's testimony to the effect that the last fracture was an equal and material contributing cause of the need for wrist fusion surgery, we believe we are not bound by that conclusion even if the evidence is uncontroverted. Edwin A. Bolliger, 32 Van Natta 559 (1981), aff'd. without oppinion, 58 Or App 222 (1982). The need for surgery in this case followed so closely on the heels of the last injury that it is entirely possible that the degree of contribution attributable to the last injury was less than material. However, it does not follow that the insurer on the risk at the time of the last fracture is absolved of responsibility.

EBI Companies cites the last injurious exposure rule in support of its position that it is not liable for the surgery in question here.

> "'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.'"

Smith v. Ed's Pancake House, 27 Or App 361, 365 (1976), quoting from 4 Larson, Workmen's Compensation Law, 95.12 (1976).

Strictly speaking, rules employed to distinguish a new injury from an aggravation of a previous injury are not applicable here because EBI Companies has already accepted responsibility for the last fractured wrist as a "new injury". However, where there are multiple prior accepted injuries and subsequent need for medical services, policy considerations similar to those used to determine new injury versus aggravation are relevant to determine responsibility for subsequent medical services.

The last injurious exposure rule refers to whether the second incident contributes "even slightly" to causation of the condition. There can be no doubt that in this case the last wrist fracture contributed at least slightly, although perhaps not materially, to the arthritic conditon which ultimately required surgery. We are not entirely sure that the last injurious exposure rule creates a new standard of "slight causation" which is different from "material contribution". In another portion of Larson's description of the last injurious exposure rule, he states:

> "[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 of the final condition." Larson, Id.

Larson may have contemplated that "slight" causation ends were "major" causation leaves off. Under Oregon law, of course, it is entirely possible for one injury to be a major cause and another injury to be a material cause of a condition, and liability for the condition will remain with the employer/insurer on the risk at the time of the injury that was a material contributing cause. Crable v. Weyerhaeuser Co., 291 Or 387 (1981) In such cases, what Larson characterizes as "slight causation" would probably be equivalent under Oregon law to "material causation".

In any event, in this case, we find that the degree of contribution to claimant's condition from the last fracture is sufficient to invoke the rule of Roger Ballinger, 34 Van Natta 732 (1982). In Ballinger, we held that where there are multiple prior compensable injuries to the same body part, responsibility for subsequent medical services and time loss will be assigned to the employer/insurer on the risk at the time of the last injury to that body part. It is implicit in Ballinger that the last injury must have retained some causal relationship to the condition that subsequently required medical servies.

We recognize that in cases where the degree of contribution from the last injury could be characterized as at least slight but less than material, the employer/insurer on the risk at that time

becomes liable where, but for prior industrial injuries, that employer/insurer would not have been liable. To that extent, the last injurious exposure rule and the Ballinger rule are clearly arbitrary. Nevertheless, the Oregon Supreme Court has determined there is a need to impose liability where the degree of contribution from a certain employment exposure is considerably less than material. In Bracke v. Baza'r Inc. 293 Or 239 (1982), the Court discussed the fact that responsibility can be assigned to an employer where that employer's work conditions merely "could have" caused an occupational disease:

> "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." 293 Or At 248.

It follows that the Referee correctly assigned responsibility to EBI Companies, Inc., the insurer on the risk at the time claimant most recently fractured his wrist. This injury contributed at least slightly to the causation of the arthritic condition which ultimately required surgery.

ORDER

On Reconsideration of the Board's Order on Review dated July 30, 1982 the Board's former order is withdrawn and the foregoing Order on Reconsideration is substituted therefor.

The Referee's order dated November 5, 1981 is affirmed. Claimant's attorney is awarded $350 for services rendered on Board review, payable by EBI Companies.

REX L. HARRIS, Claimant
Charles Paulson, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 79-07093
October 12, 1982
Order Denying Motion to Remand

This case is currently before us on remand from the Supreme Court. Harris v. SAIF, 292 Or 683 (1982). The SAIF Corporation has moved that this case be further remanded to the Referee for the taking of additional evidence.

SAIF has submitted several medical reports generated after the closure of the record following the April 10, 1980 hearing. SAIF contends that one of these reports documents that claimant did not suffer irreversible organic brain damage, contrary to the findings or assumptions in prior proceedings, and that such information was unknown to the parties at the time of the hearing in April of 1980.

We conclude that Dr. Colistro's report dated April 28, 1982 is not an adequate basis for remanding. SAIF acknowledges that it made no effort at or before the prior hearing to contest the presence of organic brain damage. Moreover, we find Dr. Colistro's report to be merely argumentative on that issue.

This case will proceed to reconsideration on remand from the Supreme Court on the record made before the Referee and SAIF's Motion to Remand is denied.

IT IS SO ORDERED.

JOHN H. HAWKINS, Claimant
Karol Kersh and Associates, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-10702
October 12, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

SAIF Corporation requests review of Referee Galton's order which set aside a vocational training program termination order issued by the Field Services Division of the Workers Compensation Department. SAIF asserts that claimant's training program was properly terminated. Should we agree with that contention, the parties alternatively argue the extent of claimant's permanent disability.

Claimant injured his low back on January 19, 1976 while working as a roofer. Following the injury, he was treated conservatively but eventually had to undergo a bilateral posterior spinal fusion in October of 1977. He has continued to have low back pain and is now restricted to light work. Claimant was 36 years old at the time of the hearing.

Over the last few years claimant has participated in three vocational rehabilitation programs through the Field Services Division. He was first placed into a program to be trained as a building inspector through classes at Chemeketa Community College. After about a month and a half, claimant quit going to the classes because the prolonged sitting increased his back pain and because he lacked sufficient reading and writing skills to keep up with the program.

In the fall of 1980, claimant was referred to the Callahan Center for evaluation. He was examined by Dr. Henry, a psychologist, on September 30, 1980. Dr. Henry noted that claimant was at less than a fifth grade reading and vocabulary level and stated that "[i]t is possible that he exhibits a specific learning disability though this possibility was not thoroughly evaluated." A change in his vocational training was recommended but no further testing to determine whether or not claimant had a specific learning disability was done prior to his entering into the next training program.

Claimant's second training program was to become a roofing estimator and salesman. As part of the program, a roofing company had agreed to hire claimant as a salesman upon completion of his three months of training. Claimant completed the training classes but was still unable to write up a contract because of his inability to spell. The roofing company that had agreed to hire claimant would only hire him to work as a roofer and not a salesman. He went back to work as a roofer but was physically unable to do the work.

Claimant then began taking classes on his own at Chemeketa to try to obtain a GED certificate. In July of 1981 he returned to the Callahan center for another evaluation. Claimant was diagnosed as having dyslexia and possibly a lesion in his brain. Claimant would not be able to perform jobs that require more than minimal spelling and reading abilities. With the value of hindsight, it is now obvious that the two earlier training programs were inappropriate because of claimant's dyslexia.

As the third effort, claimant was placed in an on the job training program working as a gunsmith's apprentice. He began work at a gun shop on September 29, 1981. The proprietor was to receive $100 per month to train claimant and did not have to pay him any wages. Claimant was very interested in learning this trade and apparently was able to do the work required of him in the gun shop. It appears from the record that there was some difference of opinion between the employer and claimant as to what type of work he should be performing. The employer seemed to want claimant to learn the inventory and counter sales part of the business before he began learning to repair guns. Claimant, on the other hand, was anxious to begin learning the actual gunsmithing part of the employer's business. However, the employer reported that he was optimistic that claimant would be able to learn the trade.

On October 10, 1981, claimant fell in his back yard, reinjuring his back. He was treated at a Hospital emergency room and sent home to rest. Claimant's wife telephoned claimant's employer and told him of the injury and that claimant would not be able to work the next day, Monday. Claimant tried to go to work on Tuesday but only worked a half day because of a doctor's appointment and stayed home for the rest of the week at his doctor's direction. Claimant gave his vocational counselor a note from Dr. Poulson, his physician, stating that claimant would be off work Monday, October 12, until further notice due to his fall.

Claimant's wife called the employer again on Wednesday. There is conflicting evidence concerning the conversation that took place. The employer contended that claimant's wife told him only that claimant would be in late on Wednesday, with no discusion about the rest of the week. Claimant contends that his wife told the employer that he would be home the rest of the week. Claimant's wife testified that "...when I talked to Gene [the employer] Wednesday morning, he gave no indication of being upset or anything else. Just told him to take care of himself and get well so he could come back to work." Claimant was fired by his employer the following Monday, October 19, when he returned to work. The Referee found both claimant and his wife to be credible witnesses.

Claimant's vocational counselor contacted the employer to see if it would be possible for claimant to return to work at the gun shop. In her October 22, 1981 report to the vocational coordinator at the Field Services Division, the counselor stated:

> "This counselor contacted Mr. Small [the employer]...Mr. Small does not believe that Mr. Hawkins [claimant] is motivated enough to be successful in the program. Mr. Small states that Mr. Hawkins is not grasping the information fast enough to learn this trade. Mr. Small was greatly disappointed that Mr. Hawkins did not show up at work the week of October 12 and felt that Mr. Hawkins should have called every day that he would be out. Mr. Small states that he greatly depends on his employees to be at work on time, as he, at time, is greatly busy and has to depend on his employees, specifically Mr. Hawkins, to take care of any counter work."

* * * * *

> "Mr. Hawkins felt that he was learning adaquately and was disappointed when Mr. Small would not show him how to dismantle and work on the guns. Mr. Hawkins believed that Mr. Small was 'using him' to run the shop and not interested in training him as a gunsmith."

On November 4, 1982 Field Services terminated claimant's gunsmith training program. The reason for the termination as stated on the form sent to claimant was: "you are no longer involved in your on the job training." The only additional assistance offered claimant was participation in a job hunting skills program known as the "Job Club".

OAR 436-61-160(5) sets out the circumstances under which a training program may be terminated. Subsection (g) states that the division may terminate a program if: "The worker is not enrolled or actively engaged in the authorized training program."

On November 13, 1982 Field Services sent another letter to claimant indicating that he was being cut off from all vocational training and his file was being closed. This letter explained the action by saying that, although claimant had participated as required:

> "Recent review of your file indicates that in spite of services provided you have not been successful in returning to employment.
>
> "The services furnished should provide you with sufficient job seeking skills to enable you to find suitable employment.
>
> We are therefore closing your file and hope you can return to employment in the near future."

Contrary to the statements made in this letter, we find claimant had not been provided with any skill that would enable him to secure employment.

At the hearing, the Field Services Vocational Coordinator explained her decision to terminate the claimant's training, stating:

> "[I] [d]iscussed the case with Ali Savage, the rehab. counselor. Asked her if she talked with the employer, what the decision was in the employer's estimation, reviewed our case and saw that we had attempted twice before in training situations with Mr. Hawkins. And decided at that time sufficient training services had been provided, and that any more training would not be beneficial to the client."

The Vocational Coordinator had not reviewed the most recent report from the vocational counselor explaining the circumstances of claimant's termination. She was not aware that claimant had reinjured his back and that this was the reason for his absence from work. Field Services apparently made no effort to contact claimant prior to taking action. Claimant's training program was terminated without the benefit of the facts necessary to properly make such a decision.

At the hearing, claimant's vocational counselor testified that claimant probably could learn to be a gunsmith or locksmith and that she believed that claimant could benefit from additional vocational services. She also stated that she agreed with the decision to terminate the gunsmithing program. However, this opinion was not based on claimant's performance or his need for training. Rather, she felt that the primary problem was the inherent lack of control underlying this type of on-the-job training.

ORS 656.283(1) establishes different standards of review in vocational rehabilitation cases depending upon whether the issue is eligibility or participation in a program. That distinction is subtle in many cases. See John Davidson, 34 Van Natta 240 (1982); William V. Frame, 34 Van Natta 183 (1982). Assuming without deciding that our review is here the more limited standard of abuse of discretion under ORS 656.283(1)(d), we find the Department's termination of claimant's training program was an abuse of discretion. No reasonable person would terminate participation in a program because, due to an injury, the claimant was unable to participate in the program. Field Services did not even properly investigate the circumstances surrounding claimant's dismissal from the gunshop program. Moreover, concern about "lack of control" with on-the-job training programs should be confronted before an injured worker is placed in a program, rather than offered as an after-the-fact reason to terminate a program.

We will not direct that Field Services provide any specific service or training to this claimant. Rather, we remand to Field Sercices in the belief, based on this record, that it must have something to offer this claimant.

Since we find the termination of vocational training was in error and therefore the Determination Order dated November 18, 1981 was premature, we do not reach the issue of extent of disability at this time other than to note that the Referee's alternative finding on that issue is doubtful at best.

ORDER

Those portions of the Referee's order dated April 12, 1981 that set aside the Termination of the Authorized Training Program entered by the Field Services Division, set aside the Determination Order dated November 18, 1981, ordered SAIF to resume payment of compensation for temporary total disability and remanded this claim to the SAIF Corporation for further processing are affirmed. In addition, the Field Services Division is directed to further investigate claimant's situation and to provide any available and appropriate vocational assistance. The remainder of the Referee's order is vacated.

Claimant's attorney is awarded $600 for services rendered on Board review, payable by the SAIF Corporation.

WARD C. NEIHART, JR., Claimant
Malagon & Velure, Claimant's Attorneys
Cowling, Heysell et al., Defense Attorneys

WCB 81-00136
October 12, 1982
Order on Review

Reviewed by Board Members Lewis and Ferris.

The claimant seeks Board review of Referee Brown's order which granted claimant an additional award of 10% for a total award of 25% unscheduled low back disability. Claimant contends that the award is inadequate and that he was entitled to a reasonable attorney's fee for prevailing at the hearing.

We affirm the conclusion reached by the Referee that claimant would be adequately compensated for his loss of wage earning capacity by the award of 25% unscheduled disability. It appears that the Referee inadvertently failed to grant claimant's attorney an attorney's fee. We will modify accordingly.

ORDER

The Referee's order dated April 7, 1982 is affirmed regarding the extent of disability issue; and claimant's attorney is hereby granted as and for a reasonable attorney's fee the sum of 25% of the increased compensation granted by the Referee, not to exceed the sum of $2,000.

LEVI M. SPINO, Claimant
Pozzi, Wilson et al., Claimant's Attorneys
Foss, Whitty & Roess, Defense Attorneys

WCB 81-07181
October 12, 1982
Order on Reconsideration

The employer, by letter of September 24, 1982 has requested reconsideration of the Board's order in the above entitled case. Specifically, the employer now argues that if the claimant was entitled to any unscheduled permanent partial disability, a minimal award would be appropriate.

Having considered the employer's argument, the Board has determined that it will not change its position from that stated in its Order on Review.

ORDER

On reconsideration of the Board's Order on Review dated September 22, 1982, the Board adheres to its former order.

THOMAS S. CORSEY, Claimant
Emmons, Kyle et al., Claimant's Attorneys
Cowling, Heysell et al., Defense Attorneys

WCB 81-04711
October 13, 1982
Order on Review

Reviewed by Board Members Lewis and Ferris.

Claimant and the self-insured employer request Board review of Referee Danner's order which granted claimant increased compensation for an award equal to 64° for 20% unscheduled disability for injury to his low back. Claimant contends he is entitled to an increased award. The employer contends claimant has been over compensated and also asks that the Board remand this matter to the Referee for a ruling on the overpayment issue. No brief was filed by the self-insured employer.

We accept the facts as recited by the Referee in his order. With respect to the issue of claimant's extent of permanent disability, we conclude that claimant has been adequately compensated for his disability and affirm the Referee's order.

We do not find a remand is indicated on the overpayment issue. The dates in question, raised by the self-insured employer at the hearing, include the week of February 11, 1980 and four holidays between July 1979 and February 11, 1980. Claimant's attorney agreed at the hearing that claimant should not have been paid during the week of February 11, 1980. No proof or stipulation was offered on the four holidays in question.

ORDER

The Referee's order dated February 26, 1982 is affirmed.

The offset requested for the week of February 11, 1980 is allowed.

JERRY COURTNEY, Claimant
Ferder, Ogdahl et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-09945
October 13, 1982
Order on Review

Reviewed by the Board en banc.

The SAIF Corporation requests review of Referee Mannix's order which directed it to reimburse claimant for expenses incurred due to medical treatment for his hearing problems, which include hearing loss and tinnitus.

The facts of this case are simple. Claimant sustained a compensable head and neck injury on November 11, 1966. While hospitalized for this condition he complained of a ringing in his ears. Prior to this injury, claimant had no noticeable hearing problems. Not only does he now complain of tinnitus, but claimant gave credible testimony that his hearing has deteriorated since the 1966 injury.

Dr. Mooers, who examined claimant in 1966 and 1967, indicated he felt claimant's symptoms of tinnitus were sustained as a result of the 1966 injury. He gave no explanation for this conclusion. Dr. Shepard, in December 1966, indicated claimant was complaining of tinnitus and that an audiogram showed perceptive hearing loss. Dr. Schleuning examined claimant in May 1979. He felt the majority of claimant's hearing loss was due to loud noise exposure. He could not render an opinion as to the cause of claimant's tinnitus. Based on these medical reports, the Board previously issued an Own Motion Order denying relief because ". . . the medical reports are insufficient to establish that claimant's current hearing loss problems are related to his industrial injury."

Only two additional medical reports have been included in the record since that prior decision. Dr. Schleuning, in January 1982, merely reiterated what he had said earlier. Dr. Stoner examined claimant in November 1981 and made the following statement: "If the patient's history is correct, at least some of the tinnitus and hearing loss may be attributed to his injury which occurred in 1966." This somewhat weak statement was followed by his finding

that claimant's audiogram was ". . . more suggestive of a noise induced hearing loss, which could be related to any of the noise exposures noted in his history although it does not rule out the possible aggrevation [sic] by head trauma."

We do not find that this evidence changes our earlier decision made under ORS 656.278. A mere possibility that claimant's hearing problems may be related to his 1966 industrial injury is not sufficient. Although his case for tinnitus is stronger than the case for hearing loss, we do not find that claimant has sustained his burden of proof.

ORDER

The Referee's order dated April 1, 1982 is reversed.

Claimant's request for medical services for hearing loss and tinnitus is denied.

Board Member Lewis Dissenting:

I respectfully dissent and would affirm the Referee's Opinion and Order. I would also award an attorney's fee of $400.

MAX D. CUTLER, Claimant
SAIF Corp Legal, Defense Attorney

Own Motion 82-0224M
October 13, 1982
Own Motion Interim Order

Claimant, by and through his treating physician, requested the insurer to authorize medical treatment that in the physician's opinion is causally related to claimant's April 16, 1970 industrial injury. The insurer submitted all of the medical information to the Board by a memorandum dated August 23, 1982. The insurer contends that claimant's current condition and the need for surgery is not related to the 1970 compensable injury, but instead to degenerative lumbar disc disease.

The materials submitted by the insurer indicate a dispute over entitlement to medical benefits under ORS 656.245. Subsection (1) of that statute provides in part: "The duty to provide such medical services continues for the life of the worker." ORS 656.245(2) provides in part: "If the claim for medical services is denied, the worker may submit to the Board a request for hearing pursuant to ORS 656.283." Although it is thus quite clear that claims for medical services must be formally accepted or denied notwithstanding the expiration of a claimant's aggravation rights, it would appear that this claim for medical services has neither been accepted nor denied.

We, therefore, construe the material that has been submitted to us ostensibly under our own motion authority pursuant to ORS 656.278 to actually be a request for hearing under ORS 656.283. The docket clerk is directed to set a preferential hearing and the Referee is directed to take evidence on the issues of entitlement to medical services and penalties/attorney's fees for failure to accept or deny this claim for medical services. The Referee shall issue an order on those issues pursuant to ORS 656.289, with a copy to the Board, and the Board will then consider whether to grant claimant compensation for temporary total disability under its own motion authority.

IT IS SO ORDERED.

DANIEL J. LEATON, Claimant
Emmons, Kyle et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-02186
October 13, 1982
Order on Review

Reviewed by Board Members Lewis and Ferris.

Claimant and SAIF Corporation seek Board review of Referee McCullough's order which granted claimant compensation for 10% unscheduled disability and ordered SAIF to comply with the terms of a February 11, 1981 Referee's order which, according to Referee McCullough, required SAIF to pay interim compensation from March 18, 1980 to June 6, 1980, and 25% of that amount of compensation as and for a penalty. Referee McCullough also ordered SAIF to pay a penalty in the amount of 15% of the compensation due claimant from March 18, 1980 to June 6, 1980, for SAIF's refusal to comply with the Referee's order.

Claimant requested review contending that the award of permanent disability is inadequate. SAIF cross-requested review contending that it was not obligated to pay compensation for the period March 18, 1980 to June 6, 1980, and that the Referee's finding that SAIF failed to comply with the earlier Referee's order was erroneous. SAIF also requests that the Referee's award of permanent disability be reversed.

We accept as our own the facts as recited by Referee McCullough. The factual error pointed out in claimant's brief is not sufficiently significant to warrant rewriting the facts.

We are persuaded by the testimony and the claimant's medically documented restrictions that the permanent partial disability award granted by the Referee is proper. We affirm that portion of the order.

This claimant's request for an enforcement hearing is another example of the problems that arise from ambiguities in a Referee's order. See Frank R. Gonzales, 34 Van Natta 551 (1982); Lewis Twist, 34 Van Natta 52, 34 Van Natta 290 (1982); Albert Nelson, 34 Van Natta 1077 (1982); Kathie L. Cross, 34 Van Natta 1064 (1982).

The earlier Referee's order (February, 1981) set aside a June 6, 1980 denial issued by SAIF and remanded the claim for "acceptance and payment to claimant of all benefits due him under the law." That Referee's order also directed SAIF to pay claimant a penalty equivalent to "25% of the disability benefits due him up to the June 6, 1980 denial." An issue at that hearing (held January 15, 1981) was SAIF's failure to pay interim compensation prior to its June 6, 1980 denial, and claimant's request for imposition of a penalty therefor. In reliance upon Jones v. Emanuel Hospital, 280 Or App 147 (1977) and ORS 656.262(4), the Referee found that SAIF had an obligation either to pay interim compensation or issue a denial within 14 days of notice or knowledge of the worker's claim, that SAIF had failed to do either and that, therefore, a penalty was appropriate. The Referee's order states: "Such penalty applies to the compensation due the claimant up to the June 6 denial."

Neither party requested review of this Referee's order. SAIF paid temporary total disability benefits from February 15, 1980 through March 18, 1980. SAIF's position is that it has complied with the Referee's February, 1981 order to pay claimant "all benefits due him under the law" by payment of temporary total disability compensation from February 15, 1980 through March 18, 1980, and a penalty equivalent to 25% of that amount of compensation.

Although the "Order" portion of the Referee's order, which is quoted above in pertinent part, is ambiguous, the most reasonable reading of the Referee's February, 1981 order as a whole is that SAIF was required to pay interim compensation for the period preceding its June 6, 1980 denial, as well as a 25% penalty calculated on that interim compensation which was due but unpaid.

Instead of paying the interim compensation which should have been paid commencing 14 days after notice or knowledge of the claim and until the June 6, 1980 denial, SAIF determined the period in which claimant was temporarily totally disabled, according to the information available to it after the Referee's February 1981 order, and paid these benefits to claimant. A subsequent Determination Order, dated April 6, 1981, awarded claimant temporary total disability for the same period (February 15, 1980 through March 18, 1980) as determined by SAIF.

After the Referee's February 1981 order remanding the claim to SAIF for acceptance and payment of benefits, SAIF believed its obligation to be the determination of the period in which claimant was temporarily and totally disabled. SAIF fulfilled its perceived obligation by paying temporary disability benefits for this period. We agree with Referee McCullough's assessment of the situation: "Claimant's claim for the injury sustained on February 15, 1980 was remanded to SAIF to pay claimant all benefits due him under law * * *. This includes payment for interim compensation from date of injury to the date of the denial less any payment for the T.T.D. paid until claim is closed pursuant to ORS 656.268."

The Referee was incorrect in stating that termination of temporary total disability payments may be based upon a determination that claimant's condition is medically stationary. See Mark L. Side, 34 Van Natta 661 (1982); Paine v. Widing Transportation, 59 Or App 185 (1982). When a worker is medically stationary, it is the duty of the employer or insurer to submit the claim for closure to the Evaluation Division. ORS 656.268(2). In any event, this case does not present the question of termination of temporary total disability benefits; rather, it presents the problem of what benefits must the insurer pay pursuant to a Referee's order when a claim is remanded for acceptance and payment of benefits. It is clear to the Board that if interim compensation was owing but not paid, and the Referee orders it paid, the insurer should pay the interim compensation that was due pursuant to ORS 656.262(4) and Jones v. Emanuel Hospital, supra. It is clear that when the claim is remanded, if the worker is at that time medically stationary, the employer or insurer has an obligation to submit the claim for closure to the Evaluation Division. ORS 656.268(2). There may be cases in which the period for which interim compensation is claimed does not coincide with the period in which temporary total disability payments are due. See Ronald D. Brown, 34 Van Natta 1004 (1982). We do not decide whether this is such a case.

The record is ambiguous as to whether claimant actually returned to his regular employment after February 15, 1980. It is similarly unclear whether he was released to regular work. Dr. Whitman released claimant to regular work as of March 18, 1980; however, on March 19, 1980 he indicated that claimant would not be permitted to perform any heavy lifting. We interpret this as meaning that claimant's regular job would need to be modified in order to suit his physical capabilities. We resolve this ambiguity in favor of claimant. John R. Daniel, 34 Van Natta 1020 (1982).

For the foregoing reasons, we affirm Referee McCullough's conclusion that, pursuant to the Referee's February 1981 order, SAIF was obligated to pay claimant temporary disability compensation from February 15, 1980 to June 6, 1980 and a penalty in the amount of 25% of that compensation. SAIF paid compensation only for the period February 15, 1980 through March 18, 1980 and the associated penalty. We, therefore, affirm that portion of the Referee's order directing SAIF to pay claimant compensation for the period March 18, 1980 to June 6th, 1980 and a penalty in the amount of 25% of that compensation.

We do not agree, however, with the Referee's imposition of a penalty for SAIF's failure to pay the compensation due claimant for the period March 18, 1980 to June 6, 1980. We find that the Referee's February 1981 order was sufficiently ambiguous in its directive that SAIF pay claimant "all benefits due him under the law", as were the medical records which formed the basis of SAIF's calculation and payment of temporary total disability benefits, to excuse SAIF's failure to pay claimant all those benefits which he was entitled to receive pursuant to the Referee's February 1981 order. Although SAIF's action was wrong, it was not unreasonable under the circumstances of this case.

Although we do not agree with the Referee's imposition of a penalty, we find that the $250 awarded claimant's attorney as an attorney's fee pursuant to ORS 656.382(1) is appropriate. Mary Lou Claypool, 34 Van Natta 943 (1982).

ORDER

The Referee's order of December 30, 1981 is reversed in part and affirmed in part. That portion of the order requiring SAIF to pay claimant a penalty in the amount of 15% of the compensation due from March 18, 1980 to June 6, 1980 is reversed. The remainder of the Referee's order is affirmed.

DARLINETTE RICHARDSON, Claimant
Doblie & Francesconi, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-08418
October 13, 1982
Order on Review

Reviewed by Board Members Lewis and Ferris.

The SAIF Corporation requests review of that portion of Referee Pferdner's order which reversed its denial and remanded claimant's occupational disease claim to it for acceptance and payment of benefits as required by law. The Referee also imposed a penalty for unreasonable delay in the payment of interim compensation, but SAIF has not requested review of that portion of the order.

We adopt the Referee's findings of fact as our own.

It was the Referee's opinion that the only described activity which could be a causative factor resulting in a herniated nucleus pulposus was work activity of cradling the telephone while recording data. He based his conclusion of compensability on his expertise and experience and the medical opinion of Dr. Berkeley, which stands alone in this case.

There is no traumatic event in this case and the claim represents an occupational disease allegedly arising from continuous use of the telephone cradled on claimant's shoulder, or stretching and using her neck in various positions while performing her work, thereby leading to a herniated nucleus pulposus.

Drs. Short, Silver and Reilly find no causal relationship between claimant's work activities and the herniated nucleus pulposus. Dr. Short felt that ruptured cervical discs with no specific injury are not occupational diseases in office workers. He also opined that claimant's work activities did not cause a material worsening of her preexisting condition. Dr. Reilly felt claimant had degenerative joint disease in the cervical spine, she was obese and had a history of cervical trauma from a 1976 motor vehicle accident. Claimant's problem, he felt, was primarily degenerative joint disease unrelated to her work. Dr. Silver was of the opinion, based on claimant's history, that she was not justified in filing a workers compensation claim and he told her he would not support such a claim.

On the other hand, Dr. Berkeley opined that within a reasonable medical probability claimant's work activities "have been a significant factor in aggravating this patient's symptoms and causing disability." Just how the cradling of the phone caused herniation is not explained.

Only Dr. Berkeley supports claimant's claim. Claimant has the burden of proving by a preponderance of the evidence that her work activities were the major contributing cause of her disability. Claimant has not met that burden. We are more persuaded by the medical opinions of the three other physicians, particularly that of Dr. Reilly.

ORDER

The Referee's order dated May 5, 1982 is reversed in part and affirmed in part. That portion of the order reversing SAIF's October 9, 1981 denial is reversed, and the denial is reinstated and affirmed.

DONALD M. VANDINTER, Claimant
Roll, Westmoreland et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-05303
October 13, 1982
Order of Abatement

SAIF Corporation has requested review of Referee Fink's June 7, 1982 order which determined, among other issues, that claimant sustained a new injury on April 13, 1981 as opposed to an aggravation of his April 22, 1980 industrial injury. SAIF's sole request for relief on review is that the Board remand this case to the Referee pursuant to ORS 656.295(5) in light of the fact that on the date of claimant's new injury, SAIF did not insure the employer. This fact was not discovered by SAIF until after issuance of the Referee's order. SAIF requested reconsideration of the Referee's order prior to requesting review, but the Referee denied SAIF's request.

The Board's records indicate that SAIF has now issued a denial of claimant's aggravation claim by denial letter of August 13, 1982. Claimant has requested a hearing on this denial, which has been assigned WCB Case No. 82-06302. The Board's records also indicate that Fireman's Fund Insurance Company, which provided workers compensation insurance for the employer, Trailer Equipment Distributors, on the date of claimant's "new injury" has denied claimant's new injury claim, raising compensability as well as responsibility as an issue. Claimant has requested a hearing on this denial, which has been assigned WCB Case No. 82-07084. These two cases have been consolidated for hearing together with a request for hearing in WCB Case No. 82-09038 which has been generated by a denial dated September 29, 1982 issued by SAIF in behalf of Columbia Battery Mfg. concerning an incident which occurred on or about December 2, 1981.

In its request for remand, SAIF seeks to have these proceedings in WCB Case No. 81-05303 consolidated with the above referenced proceedings presently pending in the Hearings Division. The Board does not deem remand to be the solution to the procedural quagmire presented by SAIF's mistake of fact.

The Board finds it appropriate to abate these proceedings on Board review until such time as a Referee issues an order in WCB Case Nos. 82-06302, 82-07084 and 82-09038, which have been consolidated for hearing. Upon resolution of the cases pending in the Hearings Division, the parties to this Board review shall so notify the Board, and these proceedings on review will be reinstated at that time.

ORDER

SAIF Corporation's motion for remand is denied. These proceedings on Board review are abated and held in abeyance until further order of the Board.

MARJORIE ARNESON, Claimant
Roger Wallingford, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-06817
October 15, 1982
Order on Review

Reviewed by Board Members Ferris and Lewis.

The claimant requests review of that portion of Referee James' order which awarded claimant an additional 80° making a total of 240° for 75% unscheduled permanent disability compensation. The claimant contends she is permanently and totally disabled due to her low back impairment in combination with social and vocational factors. The insurer offered no brief and relied on the Referee's opinion and order to support its position.

We affirm and adopt the Referee's order. Although claimant's low back injury has caused her considerable disability, the major part of her present disability is her subjective pain. The record includes reports that the claimant exaggerates her complaints of pain and that her disability should only be based on objective findings. As the claimant urges, there is a considerable basis for some objective findings in that, as a result of her injury, she has undergone three laminectomies, two fusions, and a discectomy, and has experienced psuedoarthrosis from incomplete fusions. However, we find that these objective findings when combined with those factors found at OAR 436-65-600 et seq. and when compared with similar cases, merit the disability rating awarded at hearing.

ORDER

The Referee's order dated April 21, 1982 is affirmed.

KIM M. GRIFFIN, Claimant
Fallgren/McKee Associates, Claimant's Attorneys
Wolf, Griffith et al., Defense Attorneys

WCB 82-00564
October 15, 1982
Order of Dismissal

The employer has requested review of the Referee's order dated August 31, 1982. The request for review was filed with the Board on October 4, 1982, more than 30 days after the date of the Referee's order. It is not timely filed.

ORDER

The employer's request for review is hereby dismissed as being untimely filed.

ROBERT HEILMAN, Claimant
Bischoff & Strooband, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney
Wolf, Griffith et al., Defense Attorneys

WCB 81-02750 & 81-02751
October 15, 1982
Order on Review

Reviewed by Board Members Lewis and Ferris.

EBI Companies requests review of that portion of Referee Johnson's order which found claimant's post-January 10, 1981 upper back injury to be the responsibility of Far West Reforesters, Inc., and EBI, its workers compensation insurer.

On October 4, 1980, claimant injured his upper back and left shoulder when he fell to the ground from a roof he was shingling, landing on some building materials. At the time, he was working for Mitchell and Sons, Inc. which is insured by the SAIF Corporation. He was released for regular work on November 10, 1980, and was found to have recovered with no permanent impairment as of December 4, 1980. However, the claimant continued to take it easy and avoid strenuous activity during this time. Claimant did not return to work until January 10, 1981 when he started working for Far West Reforesters, Inc. as a tree planter. He planted in excess of 600 trees a day using a hoedad. The first day at work his upper back became painful and sore. The pain increased to the point that by the fourth day the claimant could no longer work. He returned to his doctor for treatment a day later. He testified that the pain occurred in the same place as it had from his October 4, 1980 injury. Claimant testified he had never experienced upper back problems prior to the October injury although he had planted trees for five seasons, three or four months at a time, planting up to 875 trees a day.

Depending on the weight given the consulting doctor's medical report and emphasis put on specific sentences in both doctors' medical reports, the reports could support either an aggravation claim or a new injury claim.

EBI contends that there was no specific incident of new trauma on the job as a tree planter, only a gradual worsening of pain of the same type and to the same body area as that caused in October, 1980. EBI cites cases for the proposition that a recurrence of symptoms while performing normal work activity supports a claim for aggravation rather than a new injury claim. They contend that the claimant had not completely recovered from the traumatic October, 1980 back injury, and that the additional disability precipitated by claimant's normal tree planting activities should be characterized as an aggravation rather than as a new injury.

Claimant and SAIF cite Smith v. Ed's Pancake House, 27 Or App 361 (1978), to support their position that EBI is the responsible insurer. In cases of responsibility between employers/insurers, the employer at the time of the last incident that independently contributed even slightly to the causation of the disabling condition is the responsible party. There is no apportionment of responsibility under Oregon law.

In his job as a tree planter, the claimant was required to swing an axe-like hoedad two to six times to dig a hole at least 12 inches deep over 600 times a day. Although he had performed this type of activity in previous years without pain, the evidence supports a finding that this time the repetitive trauma acted in concert with the resolving October, 1980 injury to cause the January, 1981 disability and need for medical treatment. We agree with Referee Johnson that the tree planting activity contributed at least slightly, to the January, 1981 disability, making EBI the responsible insurer.

Although the only question on review is the responsibility for payment of compensation benefits to claimant as between two workers compensation insurers, we find that claimant's attorney is entitled to an attorney's fee for services rendered on Board review. The Workers Compensation Department issued an order designating a paying agent pursuant to ORS 656.307. In this context, attorney's fees are governed by OAR 438-47-090, which provides in pertinent part: "[Claimant's] attorney will receive no fee unless he/she actively and meaningfully participates at the hearing in behalf and in defense of claimant's rights."

While the reference in the rule is to active and meaningful participation at the hearing level, we think the same standards should be applied on Board review. We conclude that active and meaningful participation at this level means arguing a position that is adverse to one of the potentially responsible employers or insurers. Although in some responsibility cases claimant is merely a nominal party, taking no position on whether an incident constitutes a new injury or an aggravation of a previous injury, in this case, claimant's attorney submitted a brief on review in defense of the Referee's finding that claimant's January 1981 disability was the result of a new injury rather than an aggravation. Accordingly, claimant's attorney is entitled to a reasonable attorney's fee on Board review pursuant to ORS 656.382(2).

ORDER

The Referee's order dated December 30, 1981 is affirmed.

Claimant's attorney is awarded $350 as a reasonable attorney's fee for services rendered on Board review, payable by EBI Companies.

IRVEN G. NEWTON, Claimant
Pozzi, Wilson et al., Claimant's Attorneys
Minturn, VanVoorhees et al., Defense Attorneys

WCB 81-01249
October 15, 1982
Order on Review

Reviewed by Board Members Lewis and Ferris.

The SAIF Corporation requests review of Referee Daron's order which granted claimant an additional award of 30% for a total award of 60% unscheduled shoulder and back disability. In its brief SAIF makes two contentions: (1) That there is no evidence in the record to make a finding of permanent disability to the shoulder; and (2) that the award granted was excessive.

Claimant, now 36 years of age, has been employed most of his adult life in the logging industry. He sustained a compensable injury on December 7, 1978 when a tree flipped and struck his right shoulder, right side of his head and back. The injury caused a compression fracture of T8 and a non-compression fracture of the right scapula.

By June 1979 the back fracture was healed but claimant had severe continuing symptoms. The shoulder fracture was healed but was symptomatic. A fusion was performed and a Harrington rod was inserted from T7 through T10.

On April 23, 1980 the Orthopaedic Consultants examined claimant. Claimant told the physicians that his right shoulder pain occurred several days before when he was trying to fly fish but "otherwise he hasn't had much trouble with his shoulders." The diagnoses were: (1) post-traumatic compression fracture of T8; (2) post-operative Harrington rod instrumentation with bone graft from the left iliac crest; (3) comminuted non-displaced right scapular fracture, healed; and (4) long thoracic nerve injury on the right, resolving. The physicians found claimant was nearly stationary and left closing up to the treating physician, Dr. Mahoney. They rated total impairment of the above diagnoses as moderate for numbers 1 and 2; felt there was no physical impairment for diagnosis number 3; and found minimal impairment for diagnosis number 4.

The Referee concluded claimant was not permanently and totally disabled but was significantly disabled and granted an award of 60% unscheduled disability to shoulder and back.

We find the award granted excessive. The medical evidence indicates no physical impairment to the shoulder and, in fact, there is really no evidence of shoulder complaints or treatment throughout 1980. Claimant is not entitled to any permanent award for that body area.

Claimant is 36 years of age with a ninth grade education and a GED. He is now precluded from working in the woods. Since the injury claimant cuts fence posts and fire wood for money, but has not sought any retraining from Vocational Rehabilitation personnel although the record reflects that they have contacted him. At one point he told them that medically he could not return to work. We urge claimant to get in touch with Field Services Division and to seek some form of rehabilitation or retraining in a field within his physical capabilities.

Utilizing the guidelines set forth in OAR 436-65-600 et seq., we find that claimant has moderate impairment to his back (+40 value). He is 36 years of age (0 value). He has a ninth grade education but has obtained his GED (0 value). The work experience impact factor is +8. The adaptability factor is +10. Claimant's mental capability is average (0). The emotional and psychological findings are unremarkable. The labor market impact factor is -9. Combining these factors and applying the mathematical computation, and based on the record before us, we find the Referee's order should be modified to 45% unscheduled disability.

ORDER

The Referee's order dated May 17, 1982 is modified.

Claimant is hereby granted 144° for 45% unscheduled mid back disability. This award is in lieu of all prior awards.

LUTHER R. NOBLE, Claimant
Malagon & Velure, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-09439
October 15, 1982
Order on Review

Reviewed by the Board en banc.

The insurer seeks review of Referee Mulder's order which found claimant's low back condition to be a compensable occupational disease.

Claimant has worked as a brand inspector for the Oregon Department of Agriculture for 15 years. He worked part-time until approximately two years prior to the hearing and then full time. Claimant worked as a logger and a long-haul truck driver when he was not working for the Department of Agriculture.

Claimant is required to do a considerable amount of driving in the course of his work for the State. In June of 1981, he was assigned a Datsun pickup truck to replace the four-door sedan he had been using. Claimant testified that he began experiencing pain in his low back whenever he drove the new pickup truck. Sometime in June, apparently prior to being assigned the new vehicle, claimant strained his back while getting out of the cab of a "dragline" excavating machine on his farm. Claimant could not recall at the hearing the exact date of this incident.

On August 11, 1981, claimant was admitted to a hospital for treatment of severe low back pain. The following history was taken by his treating physician, Dr. Conn:

> "The patient had onset of pain approximately three months ago when he was climbing from a dragline cab, it was not bad and was not persistent or continuous. He merely noted that he had a low back ache with some discomfort into his left leg. Shortly after this the patient who is a

> brand inspector got a new Datsun pickup, the seat of which was quite low. He found that driving this pickup back from Salem where he procured it was most uncomfortable and as he rode in it in his work it became progressively more uncomfortable with more frequent and more continuous low back and left leg pain."

Dr. Conn diagnosed claimant's problem as nerve root compression syndrome but made no statement at that time as to the cause of the condition.

During his stay in the hospital, claimant was also examined by Dr. Klump who diagnosed his problem as a herniated disc at the L5, S1 level. Dr. Klump's report states that on August 10, 1981, claimant experienced increased pain in his back and left hip after sitting on a bench during a non-work related meeting at a local fire station. Dr. Klump made no finding of causation for claimant's condition.

Claimant filed an occupational disease claim dated August 18, 1981. On this form, claimant stated:

> "I was driving my pickup to inspect some brands around Langoll Valley, on Aug 9th when I got home I could hardly get out of the pickup due to back pain. On Aug. 10, I went to Dr. Conn who sent me to Dr. Klump."

Claimant was also examined by Dr. Scheer, a chiropractor, on September 18, 1981 who also diagnosed nerve root pressure at the L5, S1 level but did not make any statement as to the cause of claimant's back trouble.

The only medical evidence in the record to support claimant's contention that his low back problems are related to his work is a February 15, 1982, two paragraph letter from Dr. Conn to claimant's lawyer which states:

> "It is my opinion that, in all medical probability, Mr. Noble had a minor low back strain incurred when he climbed from the drag line cab. However, this was not disabling and was relatively minor until the time that he started using the Datsun pickup.
>
> In answer to your second question, it is the opinion of the undersigned that, in all medical probability, the aforementioned vehicle was the cause of aggravation of a pre-existing minor low back strain."

Claimant presents no convincing explanation of how riding in a new pickup truck could cause a herniated disc, nerve root compression or a disabling back strain. If the disc problem was from the earlier injury, there is no medical evidence indicating

that driving the pickup truck caused a worsening of the claimant's underlying condition and not merely an increase in pain. In addition, Dr. Conn's later report is vague as to exactly what the claimant's problem is. He states that claimant has suffered a worsening of the earlier off-the-job back strain, but does not explain what involvement there is, if any, with the L5, S1 disc.

In Douglas S. Chiapuzio, WCB No. 80-01301, 34 Van Natta 1255 (September 28, 1982), the Board recently discussed the methodology that is to be applied in cases such as the one at hand. First, one must determine whether there has been a worsening of the underlying disease, applying the rule established in Weller v. Union Carbide, 288 Or. 27 (1979). Second, if there has been a worsening, the claimant must prove that the work activity was the major cause of the worsening. SAIF v. Gygi, 55 Or. App. 570 (1982). Claimant has not met the burden of proof at either level of this test.

While it is apparent that claimant has suffered deterioration of the L5,S1 area of his back and that he has pain in this area, there is not sufficient evidence to causally connect his condition with the driving on his job. Additionally, if an underlying back condition pre-existed the alleged injurious exposure, no competent evidence was presented to show exactly what the underlying condition was or how it had been worsened by driving. Thus, we find the Referee's order to be in error.

ORDER

The Referee's order dated May 4, 1982 is reversed.

SAIF Corporation's denial dated October 7, 1981 is reinstated and affirmed.

Board Member Barnes dissenting:

I agree with the majority that the medical evidence in this case does not contain a definitive diagnosis of claimant's back condition. I also agree that the medical evidence contains little support for the conclusion that work activity caused claimant's back condition, whatever it is. However, I find the evidence in this case as substantial in support of this claimant's position as was the evidence in Valtinson v. SAIF, 56 Or App 184 (1982), and Hamel v. SAIF, 54 Or App 503 (1981). Since the claims in Valtinson and Hamel were found compensable, I would find this claim to be compensable. I would affirm the Referee and therefore respectfully dissent.

WAYNE PATTERSON, Claimant
Pozzi, Wilson et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-09179
October 15, 1982
Order on Review

Reviewed by the Board en banc.

The SAIF Corporation requests review of Referee Knapp's order which set aside its denial of claimant's back injury claim.

In light of the Referee's credibility findings, with which we agree, we find the facts to be as follows. On August 18, 1981, in the course of his work as a security guard at the University of Oregon Health Science Center, claimant was instructed to remove one Hennon from the hospital grounds. When Hennon resisted, claimant and his partner, Turner, handcuffed Hennon and placed him in a patrol car. The employer's standing instructions, which had previously been specifically communicated to claimant, were that in such situations a person was only to be transported to the edge of the hospital grounds. Notwithstanding those instructions, claimant transported Hennon to downtown Portland. There, after getting out of the patrol car, Hennon became verbally abusive and started to walk away. Claimant then violently attacked Hennon, who was still handcuffed, kicking him repeatedly. Claimant injured his back in the course of his attack on Hennon.

Based upon these findings of fact, the question is whether claimant's injury arose out of and in the course of his employment.

It is a question that almost answers itself. Employers have a right to define their employes' duties and the expected means in which those duties will be performed; injuries sustained while engaged in activity in violation of the employer's instructions are not compensable. Clark v. U.S. Plywood, 288 Or 255 (1980); Frosty v. SAIF, 24 Or App 851 (1976).

In this case, claimant first deviated from his employer's instructions by transporting Hennon to downtown Portland, rather than just to the edge of the employer's premises. Claimant then grossly deviated from what he had to understand to be his job duties by physically attacking a person in his custody and to whom he had at least some duty of care. In short, claimant's injury was sustained in a place he had no authority to be in connection with his employment and while doing something he had no right to do in connection with his employment or anything else.

ORDER

The Referee's order dated February 17, 1982 is reversed and the SAIF Corporation's denial dated September 17, 1981 is reinstated and affirmed.

Board Member Lewis, dissenting:

I respectfully dissent. I agree with the Referee's conclusion that claimant's injury arose out of and in the course of his employment. I would, therefore, affirm the Referee's order and award claimant's attorney a fee of $500 for services rendered on Board review.

JIM F. ADAMS, Claimant
Malagon & Velure, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-09274
October 18, 1982
Order on Review

Reviewed by Board Members Ferris and Lewis.

The claimant requests review of Referee McCullough's order which found claimant had not established that an on-the-job accident occurred. The Referee found claimant's credibility lacking because of the conflicting histories he gave to his two doctors and due to other discrepancies and uncertainties contained in claimant's testimony at hearing.

The claimant alleges he injured his back about August 4, 1981 while rigging up heavy cable to a tree at a logging site. He sought chiropractic treatment on August 5, 1981. The claimant contends he falsely told his chiropractor, Jack Clark, D.C., that he hurt his back off-the-job carrying wood because he was told by a co-worker, Gary Miller, that he would be fired if he reported a work injury to the employer.

On August 12, 1981 he sought treatment from K. K. O'Fallon, M.D. He told Dr. O'Fallon he hurt his back "while setting lines high in trees" on the job. Claimant testified he told Dr. O'Fallon the truth because "when my back kept hurting, I had to do something because I can't pay for doctor bills myself when I did it on the job."

The insurer responds that there are several inconsistencies that cast doubt on the claimant's credibility. First, the claimant testified he had not been carrying any firewood around the time of the work incident. Later, he testified to cutting about a half a pickup load of firewood and unloading it after work with Gary Miller. He could not remember whether this wood cutting occurred before or after the work incident. Second, upon being asked why he was no longer working for the employer, the claimant testified:

> "A. I don't know. Just on account of I can't work [because of my back], I guess. He wouldn't want me, anyway, on account of I went to a doctor.
>
> "The Referee: Well, have you been terminated? Given any discharge notice or anything?
>
> "The Witness: Well, I figured I was since he denied this."

Later, the claimant testified there was a general layoff of employes about the second week of August. In other words, there was no individual layoff of the claimant, but rather a general layoff about the same time Dr. O'Fallon told him not to work due to his back. Third, the claimant testified he returned to work after seeing Dr. Clark on August 5, and that he did not cease work until August 13, when Dr. O'Fallon told him he should not work. However, Dr. O'Fallon's initial report indicates that the claimant

had not worked since August 4. Finally, Dr. O'Fallon noted that the probable date of injury was August 4, but that the history was of "developing pain" with "no one definite injury"; whereas the claimant testified, "Well, I was just pulling the line up a tree and I heard the pop in my back and that's when it happened." Thus, at hearing the claimant indicated the accident happened suddenly at a distinct moment, while at the time of initial treatment Dr. O'Fallon noted a history of gradual, developing pain with no distinct injury. Further, though co-worker Gary Miller could have corroborated the claimant's work incident and reason for giving differing histories to the doctors, he was not produced at the hearing although the claimant stated that Miller was willing to testify.

As the Referee concluded, the claimant's explanation for the conflicting histories to his doctors is not unreasonable, but it is just as possible that the claimant told Dr. Clark the truth and provided a false history to Dr. O'Fallon because by that time he was concerned about establishing an industrial basis for his injury so that his bills and disability would be covered. We do not expect every detail of a work accident to be crystal clear in a claimant's mind by the time the hearing takes place, but considering the conflicting histories given by the claimant to his doctors, we expect more clarity in describing the events at the time of the incident than the claimant was able to provide. Likewise, we agree with the Referee that corroboration by Gary Miller would have lent itself considerably to claimant's evidence, and failure to produce it when available casts further doubt on the reliability of the claimant's testimony.

ORDER

The Referee's order dated April 29, 1982 is affirmed.

JAN L. JENSEN, Claimant
Richard O. Nesting, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-06847
October 18, 1982
Order on Review

Reviewed by Board Members Lewis and Ferris.

The SAIF Corporation seeks Board review of Referee Fink's order which remanded claimant's claim to it on the basis of an aggravation claim with compensation commencing May 22, 1981.

Claimant was employed as a warehouseman for the employer and on April 1, 1981 lifted a heavy box and injured his mid-to-low back area. He was taken directly to the emergency room at Providence Hospital. There he was treated and released to work as of April 3, 1981. The claim was accepted as non-disabling.

The medical evidence indicates that Dr. Ralston examined claimant at the emergency room and diagnosed upper lumbar strain and released claimant to work on April 3.

Claimant testified he did not return to work on Tuesday, April 3, because his back still hurt. He did return to work as of Monday, April 6, 1981. Later that day, as related by the evidence, claimant got into a verbal dispute with an official of the company. The next day, upon arriving at work, he was fired and given his paycheck. Claimant testified he then contacted his supervisor to try to patch things up, but was refused a return to work.

Claimant sought medical treatment from a chiropractor, Dr. Ladd, on May 22, 1981. Dr. Ladd diagnosed "thoraco-lumbar structures (possibly sprain)" and found claimant's condition not medically stationary.

On June 23, SAIF had claimant examined by Dr. Gambee, an orthopedist, who reported he found full range of motion of the low, mid and cervical back. He found no muscle spasms and an intact neurological examination with no guarding or rigidity. X-rays were negative. Dr. Gambee stated:

> "I fail to find objective [sic] of locomotor disease. I see no indication for medical management. Indeed, I don't know what one would have to treat."

No further medical report is in evidence from Dr. Ladd from his May 22, 1981 report until a narrative report of November 4, 1981. In that report he concluded claimant had "compression wedging of T11" from either the accident of three years prior or the lifting incident of April 1, 1981. He felt that, whichever, the April 1 lifting incident was an exacerbation and requested a claim reopening. Dr. Ladd testified at the hearing, but his testimony does not add much more than explaining the treatment modalities utilized.

Based on all of the evidence presented, the medical reports from Dr. Ralston, Dr. Gambee and Dr. Ladd, we conclude claimant has failed to substantiate any entitlement to compensation for temporary total disability. The SAIF denial was a denial of compensability for claimant's condition for which he was seeking treatment. The Referee, in error, handled this as an aggravation claim and so remanded. This is not an aggravation claim or denial of aggravation as the claim was accepted as non-disabling and compensability was the issue presented and raised at the hearing.

Although we found that claimant's condition did not warrant any compensation for temporary total disability, we do find that the medical treatment he is and was receiving from Dr. Ladd is related to his April 1, 1981 injury and is the responsibility of SAIF, pursuant to the provisions of ORS 656.245.

ORDER

The Referee's order dated January 21, 1982 is reversed.

JOHN J. KEANE, Claimant
Malagon & Velure, Claimant's Attorneys
Schwabe, Williamson et al., Defense Attorneys

WCB 81-00856
October 18, 1982
Order on Review

Reviewed by Board Members Ferris and Lewis.

The employer requests review of Referee Galton's order which awarded claimant permanent total disability effective November 7, 1981. The employer contends that claimant has not proven entitlement to an award of permanent total disability.

We adopt the Referee's findings of fact as our own.

The claimant has the burden of proving entitlement to permanent total disability and that he is willing to seek regular gainful employment and that he had made a reasonable effort to obtain such employment. ORS 656.206(3).

The medical evidence alone does not justify an award of permanent total disability. Claimant does have significant impairment, but no physician has declared him permanently incapacitated from the residuals of this injury. The weight of the evidence does indicate claimant cannot perform any heavy work but he is physically capable of performing light to sedentary work. Claimant has sought no employment within his physical capacity and limitations and has, in fact, retired from the labor market on his own volition. Claimant has failed to demonstrate any motivation for vocational retraining or reemployment. Therefore, claimant has not satisfied the statutory requirement of CRS 656.206(3) and his physical residuals are not such as to excuse his lack of motivation or his responsibility to reasonably make an effort to find some form of gainful employment. We conclude claimant has not proven that he is permanently and totally disabled by this record.

Utilizing the guidelines set forth in OAR 436-65-600 et seq., we find that claimant's impairment from this industrial injury reflects a +42. Claimant's age is 54 giving him a value of +8. Claimant has an eleventh grade education with a GED which is a zero value. Claimant was employed as a debarker which has a work experience value of +3. This job was medium work and claimant is now only physically capable of light to sedentary work. Sedentary work has a value of +15. Claimant's mental capacity is average which is a zero value and the emotional/psychological findings are unremarkable. The labor market findings indicate claimant has few job openings available to him which represents a value of +15. All of these factors combined give claimant a value of 63%. We conclude claimant would be adequately compensated for his loss of wage earning capacity by an award of 65% unscheduled disability. This case and our conclusion is also consistent with other like cases.

We note that the Referee also utilized the OAR guidelines. We have been assigned impact factors exactly the same with the exception of the impairment factor. The Referee gave claimant a +75, but failed to explain how he arrived at such a high impairment rating based on the record before us. We found claimant's impairment equaled +42. To arrive at this figure, we found that claimant's laminectomies, disc excisions and fusion surgeries give him a

+20. The range of motion findings based on the medical examinations combined for a rating of 15%. Claimant has chronic disabling pain nerve root problems from scarring causing radiculopathy for 15%. These factors combined equal 42% impairment.

ORDER

The Referee's order dated May 24, 1982 is modified. Claimant is hereby granted an award of 208° for 65% unscheduled low back disability. This award is in lieu of all prior awards.

ELGAN E. AMIDON, Claimant
Grant, Ferguson & Carter, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 82-00881
October 20, 1982
Order of Dismissal

On or about January 27, 1982, the SAIF Corporation requested a hearing herein. Claimant thereafter moved to dismiss SAIF's Request for Hearing.

The Board finds that the issues raised by SAIF's Request for Hearing are not issues appropriately heard pursuant to ORS 656.283 but are issues for the Board to resolve pursuant to its own motion authority under ORS 656.278. The Board has this date issued an Own Motion Order referring this matter to the Hearings Division pursuant to OAR 436-83-820.

ORDER

The SAIF Corporation's Request for Hearing is dismissed.

ELGAN E. AMIDON, Claimant
Grant, Ferguson & Carter, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

Own Motion 82-0249M
October 20, 1982
Own Motion Order: Referral for Hearing

On or about January 27, 1982, the SAIF Corporation requested a hearing pursuant to ORS 656.283 designating as the issues for hearing: "(1) The Evaluation Division's refusal of July 16, 1981, to consider reducing claimant's permanent total disability award; (2) Whether claimant remains permanently and totally disabled."

Claimant thereafter moved to dismiss the Request for Hearing on the grounds that: (1) Claimant sustained this accidental injury in 1964 prior to the enactment of the Workmen's Compensation Law, Oregon Laws 1965, Chapter 285; and that the Board lacks jurisdiction to review the finding of a jury that claimant was permanently and totally disabled, due to the fact that prior to the enactment of the 1965 Act, such a jury verdict was subject to judicial review only; (2) The Request for Hearing was not timely filed; (3) The administrative rules do not provide for a hearing absent entry of an order reducing or suspending benefits.

The Presiding Referee subsequently referred this matter to the Board suggesting it appeared to be a proper subject of the Board's own motion authority pursuant to ORS 656.278, as opposed to a subject for hearing pursuant to ORS 656.283.

The Board solicited from the parties statements of their respective positions on whether the issues raised by SAIF's Request for Hearing constitute a question concerning a claim under ORS 656.283 or whether the matter must be pursued under ORS 656.278. The Board is in receipt of a response from the claimant, but none has been forthcoming from SAIF.

We find that the issues raised by SAIF's Request for Hearing fall under our own motion authority and that there are no hearing rights under ORS 656.283. We also conclude that it is appropriate to refer this matter to the Hearings Division for a hearing and recommendation on the factual and legal issues raised by the parties.

ORDER

This matter is referred to the Hearings Division in order to conduct a hearing pursuant to OAR 436-83-820. Upon completion of the hearing, the Referee shall provide the Board with all documentary evidence presented, if any, such record of oral proceedings as may be necessary, and proposed findings of fact and law and recommendations based thereon.

IT IS SO ORDERED.

HAROLD W. DAVIS, Claimant
Bedingfield et al., Claimant's Attorneys
Foss, Whitty & Roess, Defense Attorneys

WCB 82-01397
October 20, 1982
Order on Review

Reviewed by Board Members Lewis and Ferris.

The SAIF Corporation requests review of Referee Nichols' order which ordered it to accept claimant's claim as nondisabling.

Claimant was employed as a wastewater operator and alleges that an industrial injury to his right knee occurred on February 9, 1981. On August 12, 1981 claimant quit this employment and went to work for the Forest Protective Association, a job requiring walking and driving. He quit that employment on October 10, 1981.

The medical evidence indicates, by chart notes from Dr. Henke, that claimant was seen by him on January 28, 1981 before the alleged incident of February 9, 1981. On that date claimant's main complaint was "some muscle tension in his legs." Dr. Henke felt the leg symptoms were secondary to tension or metabolic imbalance.

Claimant was next seen by Dr. Henke four days after the alleged injury. Claimant's examination was primarily for hypertension but he complained of right knee pain. Claimant told Dr. Henke that the preceding summer he had knelt on a grate and a couple weeks later noticed pain in his right knee.

Dr. Henke examined claimant on March 13, May 14 and July 20, 1981 with no mention of any leg problems. At the July 20, 1981 examination claimant told Dr. Henke that there was a conflict at work between himself and others and he was being forced to resign. Dr. Henke felt claimant was experiencing a situational reaction.

Claimant saw Dr. Henke solely for the purpose of right knee complaints for the first time on September 28, 1981. At this time he was no longer employed by the employer, having quit on August 12, 1981. Claimant gave a history to Dr. Henke of pain first commencing in February when he was kneeling on a concrete floor. His condition was also aggravated by walking. The diagnosis was prepatellar bursitis or chondromalacia.

Claimant had notified the employer of the alleged incident by a supervisor's report dated February 10, 1981 wherein claimant indicated he had a sore right knee from kneeling while replacing a pump.

By a report of October 14, 1981 Dr. Henke reiterated that claimant's right knee condition, in his opinion, was caused by tension or metabolic imbalance in view of claimant's prior renal disease.

The 801 report of injury was filed October 26, 1981.

On January 26, 1982 Dr. Mann reported upon examination claimant had a full range of motion with only tenderness.

On February 11, 1982 Dr. Freudenberg reported a history from claimant that three weeks prior claimant was kneeling on the roof at school and felt pain. Diagnosis was probable medial patellar shelf syndrome or possible torn medial meniscus. The doctor opined that either of these two conditions could be related to his work.

The Referee states no reason in her order for her finding of compensability. We find, based on this record, that claimant has failed to carry his burden of proof.

Claimant had right knee complaints some two weeks prior to the alleged event. Upon examination four days after the alleged injury claimant gave a history to Dr. Henke of injuring the right knee the summer before while kneeling on a grate. Claimant left this employer in August 1981 and really sought no medical treatment for his knee until September 1981 when he was employed by another employer in a job requiring walking and driving.

Further, there is no medical opinion evidence that claimant's right knee condition arose out of the alleged incident at work on February 9, 1981. The most that was said on the causation issue was from Dr. Freudenberg who only opined that claimant's condition could be related to work. This is insufficient. The claim is, therefore, denied.

ORDER

The Referee's order dated April 21, 1982 is reversed.

The SAIF Corporation's denial of January 22, 1982 is reinstated and affirmed.

ELMER L. ELLSWORTH, Claimant
Emmons, Kyle et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-05578
October 20, 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.

DONNIE HARRISON, Claimant
Allen & Vick, Claimant's Attorneys
Cowling, Heysell et al., Defense Attorneys

WCB 81-04962
October 20, 1982
Order on Reconsideration

Claimant's attorney has requested that the Board reconsider the amount of attorney fees granted in its September 28, 1982 Order on Review.

Attorney fees are based on efforts expended and results obtained in behalf of the claimant. This case involved one issue -- claimant's entitlement to chiropractic services under ORS 656.245. The issue was not complex, nor was the result obtained of significant proportions. Based on a comparison of the numerous attorney fee awards we grant daily, we conclude that claimant's attorney was justly compensated for his efforts in this case.

ORDER

On Reconsideration of the Board's September 28, 1982 Order on Review, the Board adheres to its former order.

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

WCB 80-02689
October 20, 1982
Order on Remand

On review of the Board's order dated October 30, 1981 the Court of Appeals reversed the Board's order and remanded the case to the Board for reinstatement of the Referee's order dated March 9, 1981, as modified by the court's opinion.

Now, therefore, the above noted Board order is vacated and the above noted Referee's order is reinstated and affirmed except as modified as follows: The Referee's award of temporary total disability for the period December 1, 1979 through December 9, 1979 is modified to award claimant temporary total disability benefits for the additional period December 9, 1979 to February 12, 1980.

IT IS SO ORDERED.

SADIE M. KIMBREL, Claimant
Olson, Hittle et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

Own Motion 81-0317M
October 20, 1982
Own Motion Order on Reconsideration

On May 6, 1982 the Board issued an Own Motion Order on Reconsideration vacating an earlier Own Motion Order requiring SAIF to provide medical services. Pursuant to the Board's recommendation in its Own Motion Order on Reconsideration, claimant requested a hearing concerning her entitlement to medical services. By letter of October 13, 1982 claimant's attorney indicated that claimant's request for hearing, which had been assigned WCB Case No. 82-03325, was set for hearing on Wednesday, October 20, 1982, and that because claimant's injury preceded the enactment of ORS 656.245, claimant's request for medical services may be an issue for the Board to consider pursuant to its own motion authority.

On reconsideration of the question concerning claimant's right to medical services pursuant to ORS 656.245 and the attendant right to request a hearing, versus claimant's entitlement to these benefits by exercise of the Board's own motion authority, the Board now concludes that claimant cannot request a hearing as a matter of right on the question of her receipt of medical services allegedly necessitated by her 1962 industrial injury. Claimant's only remedy is by exercise of the Board's own motion authority pursuant to ORS 656.278, and the Board may, in its discretion, award claimant the relief requested.

Accordingly, we modify that portion of the Board's May 6, 1982 order which suggests that claimant has the right to request a hearing pursuant to ORS 656.283 in order to determine her entitlement to medical services. In its stead, we refer claimant's request for medical services, which is a request for the Board to exercise its own motion authority pursuant to ORS 656.278, to the Hearings Division in order to conduct an evidentiary hearing on the issue of the possible causal connection between claimant's industrial injury of 1962 and her present need for medical services. Upon completion of the hearing, the Referee shall provide the Board with all documentary evidence presented, such record of oral proceedings as may be necessary, and proposed findings of fact, conclusions of law and recommendations based thereon.

IT IS SO ORDERED.

RAY H. OAKLEY, Claimant
Brown, Burt et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-04845
October 20, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

The SAIF Corporation seeks review of Referee Wolff's order which set aside its denial of claimant's aggravation claim. The sole issue in this case is whether, since the last arrangement of compensation, claimant's low back condition aggravated as a result of his original injury.

We adopt the Referee's statement of facts as set forth in his order, but we reach a different conclusion and therefore reverse.

Insofar as relevant to our discussion here, the facts of this case are that in 1978 claimant sustained a compensable low back injury while lifting a full garbage can in the course of his employment as a custodian. The last arrangement of compensation was an Order on Review dated August 20, 1980, which reduced the Referee's award from 80% to 55% disability.

In finding that claimant established a worsening of his condition, the Referee relied in large part upon the reports of Dr. DiIaconi, claimant's family physician for 15 years, and Dr. Melgard, claimant's last treating orthopedist. The most that Dr. DiIanconi attests to is that claimant is precluded from returning to his previous occupation as a custodian. We feel that Dr. Melgard's reports establish that claimant is in need of medical services for his compensable low back condition, but we are not persuaded that they establish a worsening of the condition. The nature of claimant's condition and the extent of his impairment as reflected by the previous 55% disability award renders it likely that claimant will occasionally experience flare-ups that will require medical attention. Of course, a need for medical care does not require the claim to be reopened. We assume from the record that medical bills arising from care for claimant's back condition have been paid. If not, they should have been, but that does not mean that claimant has proved increased disability.

With respect to disability, it is to be expected from the extent of claimant's disability as previously recognized that claimant would be unable to engage in janitorial work. Claimant's attempt to return to that line of work does not convince us that he is entitled to a new period of temporary disability.

Dr. Anderson's orthopedic examination of claimant in 1981 revealed some change in claimant's range of motion as compared to 1979. Such findings would support a conclusion that claimant's condition has worsened but for the fact that Dr. Anderson attributes the increased loss of motion to obvious functional disturbance and interference. Considering Dr. Maltby's psychiatric report which indicates that claimant is prone to exaggerate his symptome, we simply are not persuaded that claimant in fact has sustained a worsening of his condition since the last arrangement of compensation.

In summary, we believe that claimant has established entitlement to compensation for medical services arising from his compensable condition under ORS 656.245, but he has failed to prove a worsening of his condition as required by ORS 656.273.

ORDER

The Referee's order dated December 11, 1981 is reversed and SAIF's denial dated May 14, 1981 is reinstated and affirmed.

JOHN J. O'HALLORAN, Claimant
Pozzi, Wilson et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB n/a
October 21, 1982
Interim Order

The Board issued a third party distribution order herein on August 6, 1982 and thereafter abated that order on September 1, 1982 in order to consider a request for reconsideration made by SAIF.

On reconsideration, the Board finds it appropriate to hold this third party distribution proceeding in abeyance until a final order determines the extent of claimant's permanent disability arising out of his May 1979 injury, which is the issue to be determined in WCB No. 80-05999, currently pending in the Hearings Division.

There has been a partial distribution of third party proceedings pursuant to ORS 656.593(1)(a), (b) and (c) to the extent that the paying agency has been reimbursed for its actual claim expenditures, and the only remaining issue for resolution by the Board is whether the paying agency will incur any reasonably to be expected future expenditures, and thus whether the balance of the recovery after partial distribution is to be paid to the worker or retained by the paying agency in whole or in part, it is proper to hold that decision in abeyance when there has not yet been a final determination of the extent of a worker's permanent disability attributable to the industrial injury which gave rise to the third party action. Delaying a decision in this third party distribution proceeding until such time as the worker's permanent disability is finally determined can cause little, if any, prejudice to either party where a partial distribution has been made and, in fact, advances the basic purposes of the third party recovery statutes, which are the payment of the worker's damages by the ultimate wrongdoer and the avoidance of a double recovery by the worker.

Upon final resolution of the permanent disability issue in WCB No. 80-05999, the parties shall advise the Board that a final order has been entered, at which time the Board will resume its reconsideration of the third party distribution order previously entered herein.

ORDER

The Board's September 1, 1982 Order of Abatement remains in effect until further order of the Board.

VIRGINIA S. SHILLING, Claimant
Doblie, Bischoff et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 77-07450
October 21, 1982
Order on Remand

This case is before us again on remand from the Court of Appeals for reconsideration of the compensability of claimant's mental stress claim in light of James v. SAIF, 290 Or 343 (1981).

This claim was previously found compensable by the Board on a two to one vote. Virginia Shilling, 26 Van Natta 392 (1979). That finding was affirmed by the Court of Appeals on an eight to two vote before the Supreme Court's James decision, Shilling v. SAIF, 46 Or App 117 (1980), and subsequently remanded by the Supreme Court to the Court of Appeals and then remanded by the Court of Appeals to the Board for reconsideration in light of James.

The split nature of the prior decisions suggests the closeness of this case. Under these circumstances and in light of the several prior written decisions, we see no point in yet another extensive analysis of the facts of this case and the relevant law.

Briefly, while working at the counter at the Motor Vehicles Division office in Coquille, claimant perceived a significant increase in her workload. Other evidence documents that there was some increased workload between about mid-1976 and late 1977; claimant's perception of the gravity of the situation, however, exceeded the objective reality of the situation. About this same time, claimant experienced other sources of stress in her life: concern about menopause; concern about health problems; concern about a change of ministers at her church; and distress about her father's cancer.

On the question of whether there was any job-related stress, i.e., increased workload, this case is similar to Knoetzel v. SAIF, 37 Or App 627, 631 (1978), in which the court rejected such a claim, noting "the numerous incidents related by claimant . . . were either fanciful or clear misinterpretations of real ones." Likewise, here claimant's perception of her increased workload was out of touch with the reality of her increased workload. However, Knoetzel has to be deemed overruled by the court's subsequent decision in McGarrah v. SAIF, 59 Or App 448 (1982). Under McGarrah it matters not whether a claimant's perception of events at work are "fanciful" or "misinterpretations"; if a claimant subjectively perceives stress-producing circumstances in his or her employment, then we are bound to find that there was work-connected stress. See also James v. SAIF, supra.

The remaining question is whether the claimant's subjective perceptions of her employment were the major cause of her psychiatric disability. McGarrah, supra; SAIF v. Gygi, 55 Or App 570 (1982). That issue was previously discussed at some length by the Court of Appeals. 46 Or App at 121-22. We have nothing to add to that discussion. We conclude that claimant's perceptions of her employment were the major cause of her psychiatric disability.

ORDER

On reconsideration, the Board adheres to its Order on Review dated February 12, 1979.

DONALD W. AUBEL, Claimant
Bischoff & Strooband, Claimant's Attorneys
Lindsay, Hart et al., Defense Attorneys

WCB 81-10280
October 22, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

The employer/insurer requests review of Referee Mongrain's order that, in effect, found the Determination Order dated October 9, 1981 was entered prematurely.

We affirm and adopt the Referee's order with one qualification. The Referee ordered the claim reopened as of September 10, 1981 -- the day after the date that the Determination Order terminated compensation for temporary total disability. This form of the order suggests the issue was aggravation. Instead, the issue was premature claim closure and the Referee found, as do we, that claimant was not medically stationary when the October 9, 1981 Determination Order was issued. Thus, the Referee's order should have set aside the Determination Order dated October 9, 1981 as premature and remanded the claim for continuing payment of time loss until properly closed pursuant to ORS 656.268. We affirm with that understanding of the effect of the Referee's order.

ORDER

The Referee's order dated January 19, 1982 is affirmed. Claimant's attorney is awarded $400 for services rendered on Board review, payable by the employer/insurer.

N. MICHAEL CALKINS, Claimant
Hansen & Wobbrock, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 77-07594
October 22, 1982
Interim Order

This case is currently pending before us on remand from the Court of Appeals. Claimant has moved that all three Board members disqualify themselves from participating in the reconsideration of this case on remand. Some of claimant's relevant correspondence refers to this case; some of it refers to a separate case involving this same claimant, WCB Case Nos. 81-02805 and 80-02575, currently before us on the SAIF Corporation's request for review of Referee Menashe's order. We deem claimant's objections to the participation of the Board members to refer to both cases and resolve those objections by separate interim orders entered this date.

Claimant's objection, in essence, is that the present Board members cannot render a fair and impartial decision because claimant once was a Board employee.

Before the adoption of Oregon Laws 1977, chapter 804, claimant was an employe of the Workers Compensation Board. The 1977 statute separated what was then the Board into what is now the Workers Compensation Department, an agency with about 600 employes, and what is now the Workers Compensation Board, an agency with about 100 employes. After the 1977 division, claimant was an employe of the Department, not a Board employe.

None of the present Board members were members of the Board when Oregon Laws 1977, chapter 804, was enacted. Since claimant was no longer a Board employe after that date, none of the present Board members have ever had any employer-employe relationship with claimant.

Claimant, nevertheless, contends that there is some form of potential conflict of interest, and argues we should follow the procedures specified in ORS 244.120(1)(d). The four subsections of ORS 244.120(1) provide as follows:

> "(1) When involved in a potential conflict of interest, a public official shall:
>
> "(a) If he is an elected public official, other than a member of the Legislative Assembly, or an appointed public official serving on a board or commission, announce publicly the nature of the potential conflict prior to taking any official action thereon.
>
> "(b) If he is a member of the Legislative Assembly, announce publicly, pursuant to rules of the house of which he is a member, the nature of the potential conflict prior to voting, either on the floor or in committee, on the issue giving rise to the potential conflict.
>
> "(c) If he is a judge, remove himself from the case giving rise to the conflict or advise the parties of the nature of the conflict.
>
> "(d) If he is any other appointed official subject to this chapter, notify in writing the person who appointed him to office of the nature of the potential conflict, and request that the appointing authority dispose of the matter giving rise to the potential conflict. Upon receipt of the request, the appointing authority shall designate within a reasonable time an alternate to dispose of the matter, or shall direct the official to dispose of the matter in a manner specifed by the appointing authority."

"Potential conflict of interest" for purposes of ORS 244.120(1) is defined in ORS 244.020(4) as including decisions made by a person acting as a public official "the effect of which would be the private pecuniary benefit or detriment of the person or a member of the person's household." (Emphasis added.)

None of the present Board members have ever had any personal, professional or, as stated above, employment relationship with claimant. None of the present Board members perceive how a ruling

on the merits of claimant's case could conceivably produce any possible private pecuniary benefit or detriment. We conclude ORS chapter 244 is inapplicable.

Although the present motion cites only ORS 244.120(1)(d), we will also consider it in broader context. Board members have consistently followed the judicial model and withdrawn from participation in the decision of individual cases in which participation could create an appearance of impropriety, whether for pecuniary or any other reasons. In the past, in situations in which any one Board member has taken that action, there have always been two remaining Board members who felt qualified to render an impartial decision. If the present motion -- seeking the recusal of all three Board members -- were granted, there could be no Board decision.

To avoid such procedural paralysis, courts have recognized a "rule of necessity" which requires even potentially prejudiced members of a tribunal to participate in a decision where no other tribunal exists to decide a case and no provision is made for pro tem substitution. See Atkins v. United States, 566 F2d 1028 (Ct Claims 1977); Olson v. Cory, 27 Cal3d 532 (1980); Smith v. Department of Registration, 412 Ill 332 (1952); see generally 1 Cooper, State Administrative Law, pp 348-50; cf. Eastgate Theaters v. Board of County Commrs, 37 Or App 745 (1978). No other tribunal exists to decide this case. No provision is made for pro tem substitution for a Board member; indeed, the 1981 regular legislative session rejected the concept of pro tem Board members.

In summary, we conclude: (1) we have no pecuniary interest in the outcome of this case; (2) we do not feel unable to render a fair and impartial decision on this case; there is no actual prejudice nor appearance of impropriety; and (3) in any event, the rule of necessity compels at least two of the present Board members participate in the decision of this case.

Claimant's motion for the disqualification and recusal of all three Board members is denied.

IT IS SO ORDERED.

N. MICHAEL CALKINS, Claimant
Hansen & Wobbrock, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-02805 & 80-02575
October 22, 1982
Interim Order

This case is currently pending before us on the SAIF Corporation's request for review of Referee Menashe's order. Claimant has moved that all three Board members disqualify themselves from participating in the review of this case. Some of claimant's relevant correspondence refers to this case; some of it refers to a separate case involving this same claimant, WCB Case No. 77-07594, currently before us on remand from the Court of Appeals. We deem claimant's objections to the participation of the Board members to refer to both cases and resolve those objections by separate interim orders entered this date.

[Ed. Note: The remainder of this order is identical to the N. MICHAEL CALKINS order beginning on page 1506.]

ROSE M. HESTKIND, Claimant
Lindstedt & Bruono, Claimant's Attorneys
Wolf, Griffith et al., Defense Attorneys
Schwabe, Williamson et al., Defense Attorneys

WCB 82-02003
October 22, 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.

DOROTHY J. SWIFT, Claimant
Malagon & Velure, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-08742 & 81-08743
October 22, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

The SAIF Corporation requests review of Referee Wolff's order which set aside the Determination Order of July 27, 1981 as premature and reversed the subsequent denials issued by SAIF.

A hearing concerning these two claims was originally held before Referee Seifert on April 14, 1981. Referee Seifert's findings as a result of that hearing include the following. Claimant was employed at the Oregon State Employment office in Coos Bay. On May 21, 1980 the employer moved to a new building and claimant immediately began suffering symptoms which included dizziness and breathing difficulties. She informed her supervisor and was told that formaldehyde fumes were present in the building. Claimant continued working, but her symptoms worsened. On June 13, 1980 she transferred to the Oregon Adult and Family Services Division in Gold Beach, where she worked until terminated on October 3, 1980. Claimant has not worked since. While employed in Gold Beach, claimant again suffered dizziness and breathing difficulties following exposure to fumes from roofing tar. She sought medical treatment and Dr. Morgan diagnosed susceptibility to chemical exposure, which had progressed to a form of vasculitis of the lower extremities, with an asthmatic component.

Claimant filed claims against both employers. SAIF, insurer for both employers, denied both claims.

In the earlier proceeding, Referee Seifert found that the evidence indicated that formaldehyde was at least one source of the claimant's difficulties and that there was evidence that she was exposed to that chemical at work, and that a psychophysiologic event occurred which resulted in her symptomatology. He was persuaded that claimant's work exposure caused a worsening of her underlying condition resulting in disability. SAIF did not appeal the Referee's order.

On June 25, 1981, at the request of SAIF, claimant was seen by Dr. Minor, an allergy and immunology specialist. Following this examination, the claims were submitted for closure. Two Determination Orders issued on July 27, 1981, allowing benefits for temporary total disability only. Claimant continued to suffer symptomatology and continued her medical treatments. On October 15, 1981 SAIF issued two letters denying responsibility for claimant's continued treatment and alleging her current symptoms were not related to her employment.

In September of 1981 claimant began treating with Dr. Saddoris, also a specialist in allergy and immunology. Dr. Saddoris diagnosed reactive airway disease, vasculitis, fibrositis, with a remote possibility of multiple sclerosis. He noted that, although claimant suffered exacerbations of her symptoms following exposure to a variety of irritants, her reactive airway disease became symptomatic following her initial work exposure in 1980. He could not connect her vasculitis to the formaldehyde exposure, nor could he conclude within a reasonable medical probability that claimant's respiratory difficulties were the result of the work exposure. He found work exposure to be one of several possible causes. Dr. Saddoris found that the claimant was not medically stationary, as had Dr. Morgan in several prior reports.

A hearing on SAIF's denials was convened on October 23, 1981. Referee Wolff concluded that claimant had not achieved a medically stationary status at the time of the issuance of the July 27, 1981 Determination Orders and that there was no indication that she had achieved such a status at the time of the hearing. Referee Wolff rejected the opinion of Dr. Minor and relied on the opinions of Drs. Saddoris and Morgan, which is somewhat puzzling in view of the fact that Dr. Saddoris seemed to be in basic agreement with the opinions of Dr. Minor. The Referee found that the claimant had established the compensability of her occupational disease.

SAIF contends that the basic issue involved in this case is: "The compensability of symptoms which claimant alleges are the result of work-induced reaction to formaldehyde and/or tar fumes." We assume this to mean that SAIF is arguing the Determination Orders of July 27, 1981 were not issued prematurely, and that SAIF's denials of October 15, 1981, denying the compensability of claimant's "current conditions" (emphasis added) were correct. Claimant contends the issue is res judicata, that is, if SAIF wished to contest the compensability of these claims, the proper procedure would have been to appeal Referee Seifert's order of May 11, 1981. Since SAIF failed to do so, claimant argues that it is precluded from now "relitigating" compensability.

In Lewis Twist, 34 Van Natta 292, 293 (1982), we stated: "The side that asserts the affirmative defenses of res judicata or collateral estoppel has the burden of proving what was previously litigated." Moreover, an employer or insurer may contest the causal connection between what has been previously determined to be compensable and a claimant's present symptoms. See Jacobson v. SAIF, 36 Or App 789 (1978); Frasure v. Agripac, 290 Or 99 (1980); Saxton v. Lamb-Weston, 49 Or App 887 (1980).

In his May 11, 1981 order, Referee Seifert found that claimant's then "present symptomatology" was the result of formaldehyde exposure at work, which led to a worsening of her underlying disease and produced disability. It would serve no purpose to recite the voluminous medical evidence involved in this claim. We believe that the weight of that evidence establishes that claimant is suffering from the very same symptoms which were previously held to be the result of exposure at work and that claimant has yet to achieve a medically stationary status as a result of that exposure. We agree with Referee Wolff that the Determination Orders of July 27, 1981 were issued prematurely and we additionally find that the denials of October 15, 1981 relate to the same symptoms which were found compensable at the hearing before Referee Seifert, with no intervening event which would relieve SAIF from responsibility.

Our finding that claimant's current symptoms are still related to her 1980 work exposure is not necessarily the equivalent of a determination that her underlying condition itself is the result of that work exposure. A claimant need not show that work caused the underlying disease itself; it is enough that the work precipitated or worsened the condition. Beaudry v. Winchester Plywood, 255 Or 503 (1970). We are not convinced, if that is what claimant is arguing, that the compensability of her underlying condition itself was established by Referee Seifert's prior order. Referee Seifert stated:

> "There was evidence that the smell at work . . . set off some psychophysiologic event which led to her present symptomatology and there is evidence that she suffers a worsening of her underlying disease producing disability."

Based on that language from the prior order, we would agree with SAIF that the compensability of claimant's underlying disease itself was not litigated at that hearing, and that the Referee found only that claimant's then current symptoms were the result of her work exposure. With that qualification, we affirm the order of Referee Wolff.

ORDER

The Referee's order dated December 29, 1981 is affirmed. Claimant's attorney is awarded an attorney's fee of $400 for services rendered on Board review, payable by SAIF.

IVON J. WISEMAN, Claimant
Welch, Bruun et al., Claimant's Attorneys
Keith D. Skelton, Defense Attorney

WCB 82-00489
October 22, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

The employer requests review of Referee Quillinan's order which set aside its denial of claimant's occupational disease claim for carpal tunnel syndrome; assessed a penalty equal to 25% of the temporary total disability granted to claimant, based on a finding that the denial was unreasonable; and awarded a related attorney's fee of $250. The employer contends the claim was not timely, is not compensable and objects to the assessment of penalties and associated attorney's fee.

We find the claim was timely, at least in the sense that any delay in asserting the claim did not prejudice the employer. We affirm and adopt those portions of the Referee's order finding the claim compensable.

We disagree only with the Referee's assessment of a penalty and associated attorney's fee. The Referee concluded the employer's denial was unreasonable because all of the medical evidence in its possession at the time it issued its denial showed a "positive relationship of claimant's carpal tunnel syndrome to his employment." We do not so interpret the documents in question. Dr. Throop's September 2, 1981 report indicates severe median nerve compression on the right and that the absent sensory latency to part of the right hand was indicative of "old ulnar nerve trauma." Dr. Throop did not relate either diagnosis to claimant's work. Dr. Cronk's December 15, 1981 report states claimant has bilateral carpal tunnel syndrome, worse on the right, and "arthritic involvement of both wrists." Dr. Cronk opines that the carpal tunnel syndrome is related to claimant's work activities "by history" and that claimant's arthritis has not "been an etiological factor in the development of" claimant's carpal tunnel syndrome. No explanation is offered for either opinion.

Furthermore, after the December 11, 1981 claim, the employer had 60 days to accept or deny. But before 30 days had passed, claimant had submitted to surgery for his carpal tunnel condition. This cut off the employer's right to obtain an independent medical examination that could be at all meaningful. Given these circumstances, in addition to Dr. Throop's suggestion of old ulnar nerve injury and Dr. Cronk's mention of arthritic involvement, we conclude the denial was not unreasonable.

ORDER

The Referee's order dated April 22, 1982 is affirmed in part and reversed in part. Those portions assessing penalties and an associated attorney's fee of $250 are reversed. The remainder of the Referee's order is affirmed.

Claimant's attorney is awarded a fee of $250 for services rendered on Board review for prevailing on the compensability issue.

FRANK E. AYRES, Claimant
Malagon & Velure, Claimant's Attorneys
Wolf, Griffith et al., Defense Attorneys

WCB 81-07960
October 28, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

The employer/insurer requests review of Referee Seymour's order which awarded claimant 121.73° for 63.4% binaural hearing loss, an increase over the 56.7° for 29.53% binaural hearing loss awarded by the Determination Order dated February 2, 1982. The Referee also assessed penalties and attorney fees on the ground that, although the industrial insurer intended to partially accept claimant's hearing loss claim, it never informed the claimant of its partial acceptance.

We affirm and adopt those portions of the Referee's order relating to penalties and associated attorney fees.

The rating of permanent disability for compensable hearing loss is a relatively precise process under ORS 656.214(2)(f), ORS 656.214(2)(g) and OAR 436-65-565. The referee's assessment of the evidence and computations are substantially correct with one significant omission. The statute allows compensation for loss of normal hearing which results from industrial exposure. In determining what is "normal" hearing for any given worker in any specific case, OAR 436-65-565(2) requires: "Compensation for work-related hearing loss . . . will be offset by . . . presbycusis," that is, the reduced acuteness of hearing associated with the aging process.

The Referee's calculations overlooked this required presbycusis correction regarding what "normal" hearing for a person claimant's age would have likely been. Failing to subtract the hearing loss that normally results from aging from the audiogram findings resulted in the Referee's award being excessive. When that subtraction is made, we conclude the award in the February 2, 1982 Determination Order was proper.

ORDER

The Referee's order dated April 15, 1982 is reversed in part and affirmed in part. That portion that granted claimant an increased award for permanent partial disability for his hearing loss is reversed and the Determination Order dated February 2, 1982 is reinstated and affirmed. The remainder of the Referee's order is affirmed.

KENDALL BARNES
Evohl F. Malagon, Lyle Velure, Attorneys
Todd Westmoreland, Richard Roll, Jr., Attorneys
Daniel O'Leary, Attorney

October 28, 1982
Order on Motion for Recusal

Petitioners, various attorneys and/or law firms, have moved for the recusal of Board Member Barnes in all cases and other matters before the Board in which they are counsel of record.

The motion is predicated upon a pending action in United States District Court, Dona Klinger Peterson v. Barnes, McCallister and Holmstrom, Civil No. 82-6253-E (D. Or.). In that action a former Board employe alleges that the Board's act of terminating her employment during her trial service period violated various Federal and State civil rights statutes. The plaintiff is represented in that action by the law firms of Malagon & Velure of Eugene, Pozzi, Wilson, Atchison, O'Leary & Conboy of Portland and Roll & Westmoreland of Tillamook.

It is not clear whether the present motion for recusal is made on behalf of all firms involved in the Peterson litigation. The motion is signed only by Evohl F. Malagon and Lyle C. Velure. The theory of the motion, however, is equally applicable to all attorneys and law firms representing the plaintiff in the Peterson case. We proceed on the understanding that the motion seeks the recusal of Board Member Barnes in all cases before the Board in which counsel of record is any attorney from any of the firms involved in the Peterson case.

According to the Board's records, the three law firms in question represent the claimants in a total of about 1,900 cases currently pending on request for hearing or request for Board review, which is slightly over twenty percent of the pending cases.

We understand the motion to allege only potential prejudice, not actual prejudice, by Mr. Barnes against workers compensation clients represented by petitioners. In any event, the Board is satisfied that Mr. Barnes is not, in fact, prejudiced and will not be prejudiced against any of petitioners' workers compensation clients by reason of petitioners' service as attorneys for plaintiff in an unrelated case in another forum in which Mr. Barnes is named as a defendant.

Potential prejudice or an appearance of impropriety can be, and has been in the Board's prior practice, sufficient reason for disqualification. But the present claim of possible impropriety has to be evaluated in context.

ORS 656.712 provides for a three-member Workers Compensation Board, of whom not more than two may belong to the same political party, appointed to represent the interests of employers, employes and the whole people of the state. While two members of the Board constitute a quorum and may act, decisions by less than the full Board are now on a relatively random basis. Disqualification of one member in a substantial number of cases would mean that the parties in those cases would not have the opportunity for a decision of the multi-interest Board contemplated by the legislature. And if two Board members could not agree on a decision and the third member were disqualified, the Board would be permanently disabled from deciding the case.

There is no provision for appointment of Board members pro tem or for substitution in any way. There is no provision for transfer of a case before the Board to another tribunal, or for reference to the Court of Appeals except by petition for judicial review after a decision by the Board.

If the theory of the pending motion were correct, a majority of the Board would be disqualified but for the fact that former Board Member Robert L. McCallister, also named as a defendant in the Peterson case, resigned from the Board in April of this year. If the theory of the pending motion were correct, the disqualification of Mr. Barnes could well continue beyond the conclusion of the Peterson litigation. If the theory of the pending motion were correct, the filing of a suit against all members of the Board would require recusal of all and thus deprive all parties of the opportunity for Board review and action. We are unable to make any theoretical distinction between the present motion and a motion for recusal of a majority of the Board or the entire Board.

We recently commented on the "rule of necessity" in a case in which there was just such a motion for the disqualification of all three Board members:

> "To avoid such procedural paralysis, courts have recognized a 'rule of necessity' which requires even potentially prejudiced members of a tribunal to participate in a decision where no other tribunal exists to decide a case and no provision is made for pro tem substitution. See Atkins v. United States, 566 F2d 1028 (Ct Claims 1977); Olson v. Cory, 27 Cal3d 532 (1980); Smith v. Department of Registration, 412 Ill 332 (1952); see generally 1 Cooper, State Administrative Law, pp 348-50; cf. Eastgate Theaters v. Board of County Commrs, 37 Or App 745 (1978). No other tribunal exists to decide this case. No provision is made for pro tem substitution for a Board member; indeed, the 1981 regular legislative session rejected the concept of pro tem Board members." N. Michael Calkins, WCB Case No. 77-07594, 34 Van Natta 1506 (Interim Order, October 22, 1982).

Any party dissatisfied with an order of the Board in a case that the Board reviews may have our order reviewed by the Court of Appeals. The standards for Court of Appeals review under ORS 656.298(6) are virtually the same as the standards for Board review under ORS 656.295(5), that is, de novo on the record. Because of this available scope of judicial review, we find that the continued participation of Board Member Barnes in the decision of petitioners' cases before the Board would not deprive any person of due process of law.

ORDER

For the foregoing reasons, petitioners' motion is denied.

PETE DOMINICI, Claimant
Marcy Leskela, Claimant's Attorney
Schwabe, Williamson et al., Defense Attorneys

WCB 82-00665
October 28, 1982
Order of Dismissal

The claimant has requested review of the Referee's order dated September 7, 1982. The request for review was filed with the Board on October 14, 1982, more than 30 days after the date of the Referee's order. It is not timely filed.

ORDER

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

GEORGE W. EGBERT, Claimant
Galton, Popick et al., Claimant's Attorneys
Wolf, Griffith et al., Defense Attorneys

WCB 81-01873
October 28, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

Claimant requests review of Referee Leahy's order which affirmed the Determination Order dated February 13, 1981 and denied all other relief claimant sought. Claimant argues this case should be remanded to the Referee or, alternatively, that he should receive an increased award for permanent partial disability, together with penalties and related attorney's fees.

This claim began with a 1975 left leg injury. Over the next couple of years the right leg also became involved. A 1977 stipulation resulted in claimant receiving awards compensating him for 40% loss of the left leg and 25% loss of the right leg. Subsequently, the claim was reopened when an aggravation claim was accepted and reclosed by the Determination Order dated February 13, 1981 which awarded time loss only. Claimant requested a hearing on that Determination Order.

Claimant's request for remand is based on the fact that the Referee issued his order before claimant's attorney submitted his written closing argument. We do not agree this is an appropriate reason for remand. We do not expect Referees to wait indefinitely for counsel to submit closing argument or otherwise put a contested matter at issue. More to the point, our review is de novo and claimant has submitted written argument to us. Therefore, any error committed by the Referee is now harmless.

We affirm and adopt those portions of the Referee's order finding claimant not entitled to greater awards for scheduled permanent partial leg disability than previously awarded and finding claimant not entitled to penalties and attorney fees.

ORDER

The Referee's order dated March 22, 1982 is affirmed.

BARBARA KAESEMEYER, Claimant
Kilpatrick & Pope, Claimant's Attorneys
Mitchell, Lang et al., Defense Attorneys

WCB 81-06721
October 28, 1982
Order on Review

Reviewed by Board Members Lewis and Ferris.

Claimant requests review of Referee Knapp's order which found claimant's claim for an injury of January 26, 1981 was untimely filed. On the merits of the claim, the Referee felt claimant failed to carry her burden of proof to establish legal causation.

After de novo review, the Board affirms the conclusion reached by the Referee with respect to the compensability of claimant's claim. We disagree with him, however, on the issue of timeliness. Claimant need overcome only one of the conditions outlined in ORS 656.265. The Referee's finding that the employer was prejudiced by claimant's late filing appears to have been gratuitous. The employer neither contended, nor proved, that it was prejudiced. Comments in its brief to the Board are not sufficient. We find that claimant's claim is not barred due to untimely filing because there is no evidence that the employer was prejudiced by delay in receiving notice.

However, claimant has failed to prove her claim is compensable. The inconsistencies in the histories taken by the doctors, claimant's diminished credibility, the testimony of the employer's witnesses and the doctors conclusions based on her history, all work against claimant's case. The Referee's order, in this regard, should be affirmed.

ORDER

The Referee's order dated April 30, 1982 is affirmed.

GWEN KESSEL, Claimant
Olson, Hittle et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

Own Motion 82-0252M
October 28, 1982
Own Motion Order

Claimant, by and through her attorney, has requested that the Board exercise its own motion jurisdiction and reopen her claim for an injury sustained on September 27, 1973. Claimant's aggravation rights have expired.

A thorough review of the medical evidence submitted both by claimant and by SAIF Corporation reveals that claimant's condition, although related to her 1973 injury, has not materially worsened. There is no objective evidence of worsening, although claimant complains of pain. The doctors recommend no additional treatment, except for possibly a referral to the Pain Center. There is also a question of claimant's work status. The information before us currently, is that claimant has not worked since March of 1978. Based on this information, even if claimant's condition had materially worsened, we would not reopen for the payment of time loss benefits. Vernon Michael, 34 Van Natta 1212 (1982). Claimant's request for own motion relief is denied.

IT IS SO ORDERED.

RONALD KLEIST, Claimant
Welch, Bruun et al., Claimant's Attorneys
Schwabe, Williamson et al., Defense Attorneys

WCB 81-10874
October 28, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

The employer requests review of that portion of Referee Shebley's order which awarded claimant 10% unscheduled permanent partial disability as a result of his June 17, 1980 compensable low back injury.

The challenged portion of the Referee's order in this case is inconsistent with a prior order of the Board involving the same claimant and same claim, the Board's order having recently been affirmed by the Court of Appeals. Ron Kleist, 34 Van Natta 190 (1982), aff'd without opinion, 58 Or App 534 (1982). Although the present record contains evidence that was not before us in the prior proceeding, we are not persuaded the new evidence justifies any different result.

ORDER

The Referee's order dated March 10, 1982 is reversed in part. Those portions which awarded claimant permanent partial disability and allowed an attorney's fee from the increased compensation are reversed. The balance of the Referee's order is affirmed.

WILLIAM T. LATTION, Claimant
Carney, Probst et al., Claimant's Attorneys
Bullivant, Wright et al., Defense Attorneys

WCB 80-05992
October 28, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

The insurer requests review of Referee Braverman's order which awarded claimant an additional 45% unscheduled permanent partial disability and reversed in part the insurer's partial denial. The insurer contends that the Referee's award was excessive under the guidelines in OAR 436-65-600 et seq., and that the Referee should have upheld its June 13, 1980 partial denial of responsibility for claimant's degenerative disc disease and gouty arthritis. All parties agree that the gouty arthritis condition is not compensable.

We find, as did the Referee, that the medical evidence indicates that claimant does not suffer from preexisting degenerative disc disease. Claimant's impairment is from chronic lumbar strain which resulted from his industrial injury. The insurer's partial denial of responsibility for degenerative disc disease that does not exist has no effect on the compensability of claimant's current low back condition or on the extent of claimant's disability. Since the partial denial is neither right nor wrong, but merely irrelevant, we conclude that the Referee erred in setting it aside.

The other issue is extent of disability. Both parties have done an excellent job in the briefs regarding application of OAR 436-65-600 et seq.

Based on the medical evidence, we find claimant has suffered a 10% impairment. Claimant was 61 years old at the time of the hearing, a +10 value. He has a ninth grade education, a +7 value. The SVP for claimant's job as a heavy duty mechanic is 7, a +10 value. The restrictions placed on claimant's future work activities limit him to light to sedentary jobs, a +15 value. A combination of the above factors indicate that approximately 12% of the labor market is left open to claimant, a +2 value.

We find the other relevant factors have no positive or negative impact on claimant's loss of wage earning capacity. The insurer argues that claimant's decision to retire indicates poor motivation and that a negative value should be assigned for the psychological/emotional factor. We disagree for the reasons stated in Danny H. Sackett, 34 Van Natta 1107 (1982).

After combining the figures for claimant's impairment and the relevant social/vocational factors, and considering other similar cases, we conclude claimant is entitled to an award of 45% unscheduled permanent partial disability. This is an increase over and above the 20% disability awarded by the Determination Order and a decrease of the total of 65% disability awarded by the Referee.

ORDER

The Referee's order dated December 4, 1981 is modified. Claimant is awarded 144° for 45% unscheduled permanent partial disability. This award is in lieu of all prior awards. Claimant's attorney's fee should be adjusted accordingly.

The Referee's partial reversal of the insurer's June 13, 1980 partial denial is set aside and that partial denial is reinstated and affirmed. Claimant's attorney is, therefore, not entitled to an insurer-paid attorney fee.

JAY LONG, Claimant
Acker, Underwood et al., Claimant's Attorneys
Keith D. Skelton, Defense Attorney

WCB 81-11734
October 28, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

The claimant requests review of that portion of Referee Braverman's order which found that claimant had suffered no permanent disability due to his compensable low back injuries of March 28, 1979 and May 12, 1981 and thus affirmed the Determination Order dated November 12, 1981.

Claimant contends that the reports of his treating physician, Dr. Daack, support a finding of permanent impairment when properly interpreted. Claimant also argues that the Referee erred in finding he lacked motivation to return to work. The employer responds that the reports of the Intensive Diagnostic Advisory Board present a more complete and cogent assessment in finding that claimant has no permanent impairment and that claimant lacks motivation.

We find the Referee's analysis of the motivation issue to be inconsistent with our subsequent decision in Danny Sackett, 34 Van Natta 1107 (1982). However, it is not necessary or appropriate to reach the question of motivation or any of the other social/vocational factors relevant to rating disability unless there is first a finding of some permanent physical impairment; and we affirm and adopt those portions of the Referee's order finding that claimant suffers no permanent impairment as a result of his industrial injury. See also Patricia Nelson, 34 Van Natta 1078 (1982).

ORDER

The Referee's order dated May 3, 1982 is affirmed.

MICHAEL N. McGARRY, Claimant
Fallgren & McKee, Claimant's Attorneys
Rankin, McMurry et al., Defense Attorneys
Moscato & Meyers, Defense Attorneys

WCB 81-07324 & 81-07325
October 28, 1982
Order on Review

Reviewed by Board Members Lewis and Ferris.

United Pacific Insurance Company has requested review of Referee Menashe's order which found it to be the insurer on the risk at the time of claimant's compensable low back injury.

The primary question in this case is whether claimant suffered a new injury as the result of an on-the-job incident on June 3, 1981, or an aggravation of a 1979 occupational injury. United Pacific contends that the Referee erred in finding claimant's condition to be a new injury and also asserts that Midland Insurance Company, the insurer on the risk at the time of the 1979 injury, should be required to pay for the deposition of Dr. Berretta.

We affirm and adopt the Referee's order with one modification.

It is apparent from the record that the deposition of Dr. Berretta was taken pursuant to United Pacific's right to cross-examine the doctor regarding a report offered into evidence by and supporting the position of Midland Insurance Company. Under the rule set forth in Hanna v. McGrew Bros. Sawmill, 44 Or. App. 189, 195 (1980), aff. as mod., 45 Or. App. 757 (1980), Midland Insurance Company must bear the the cost of this deposition.

ORDER

The Referee's order dated May 26, 1982 is modified.

Midland Insurance Comapany is ordered to pay for all costs incident to the April 14, 1982 deposition of Dr. Berretta.

The remainder of the Referee's order is affirmed.

Claimant's attorney is awarded $150 as a reasonable attorney's fee for services rendered on Board review, to be paid by United Pacific Insurance Company. This is in addition to the fee awarded by the Referee.

J. DAVID MOBLEY, Claimant
Galton, Popick & Scott, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 80-08362
October 28, 1982
Order on Remand

On review of the Board's order dated January 19, 1982 the Court of Appeals reversed that part of the Board's order which failed to award claimant's attorney a reasonable attorney's fee for services rendered on Board review and remanded the case for an award of an attorney's fee pursuant to ORS 656.382(2). Claimant's counsel have provided the Board with an affidavit of time spent in representing claimant on Board review.

Now, therefore, the Board awards claimant's attorneys $600 as and for a reasonable attorney's fee on Board review.

IT IS SO ORDERED.

ELEANOR L. ROTHROCK, Claimant
Black & Hanson, Claimant's Attorneys
Lindsay, Hart et al., Defense Attorneys

WCB 82-00105
October 28, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

Claimant requests review of Referee Brown's order which granted her 30% unscheduled permanent partial disability for injury to her low back, that being an increase of 5% over and above the Determination Order of January 28, 1981. The only issue is the extent of claimant's disability.

We adopt the Referee's findings of fact as our own.

Examining the record in light of the guidelines set forth in OAR 436-65-600 et seq., and considering the additional factors in the record as set forth by the Referee, we view this case as follows.

Claimant's impairment as a result of her injury (back strain) was rated in the range of minimal by the January 6, 1981 report of the Southern Oregon Medical Consultants. It is true, as claimant points out, that her total impairment has been rated in the range of moderate to moderately severe; however, this rating includes all of claimant's problems, such as her preexisting degenerative disc disease, and unrelated cervical problems. Her impairment due to her injury was specifically found to be minimal. We agree with the Referee's assignment of a +10 to this factor.

Claimant's age at the time of the injury was 60, and 62 at the time of the hearing. A +10 is, therefore, assigned to this factor. OAR 436-65-602. We additionally agree with the Referee's assignment of a +5 in recognition of claimant's 10th grade education. CAR 436-65-603. Claimant was employed as a nurse's aide at the time of her injury. Utilizing the Dictionary of Occupational Titles, the specific vocational preparation time for that occupation is 30 days to six months, correlating to an impact value of +3. OAR 436-65-604. We agree with the Referee that mental and emotional considerations have no impact in rating this claimant's disability.

With regard to claimant's residual function capacity (RFC), OAR 436-65-605, we depart from the Referee's finding. The Referee found the claimant to be restricted to light work. Claimant argues that she is restricted to sedentary work. There is some discrepancy among the various medical examiners in that regard. Based in part on claimant's testimony, it does not appear that she is limited to strictly sedentary work; however, it also appears that she experiences difficulties if required to function in a light work capacity for a length of time. We, therefore, assign this factor a value of +10. Making the appropriate adjustment for our finding concerning claimant's RFC, we find that she has approximately 10% of Oregon occupations available to her, which results in an impact of +4.

The Referee noted two other factors affecting his decision. He stated that the claimant's earning capacity had been enhanced by her four week motel management course provided through vocational rehabilitation. The Referee also noted that claimant is married to a person with similar skills and, therefore, her employability is enhanced since couples are normally hired for such positions. We have doubts that a four week motel management course would serve to enhance the employability of a 62 year old former nurse's aide to any meaningful extent and give no consideration to the fact that her husband may possess marketable skills in that area because it is claimant's disability that is being rated.

Combining all of the factors noted above, we conclude that claimant is entitled to an award of 35% unscheduled permanent partial disability.

ORDER

The Referee's order dated May 21, 1982 is modified. Claimant is awarded 35% unscheduled permanent partial disability, that being an increase of 10% over and above the Determination Order of January 28, 1981. This award is in lieu of, and not in addition to all previous awards.

Claimant's attorney is allowed 25% of the increased compensation awarded by this order, not to exceed $3,000, in lieu of the fee allowed by the Referee's order.

PATRICIA ADAMS, Claimant
Des Connall, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-09006
October 29, 1982
Order on Review

Reviewed by Board Members Ferris and Lewis.

SAIF Corporation requests review of Referee Menashe's order which awarded claimant 35% scheduled permanent disability arising from a left foot injury. Although SAIF contests the amount of the award, most of its brief is devoted to a discussion of whether a claim for left knee and left hip conditions was raised and decided adversely to claimant at hearing. Claimant contends that she never raised an issue of the compensability of knee and hip conditions at hearing, and that the 35% award was appropriate.

We believe that the Referee's award of permanent disability accurately reflects the loss of function claimant has sustained as a result of the compensable injury to her left foot. Therefore, we affirm and adopt the Referee's order subject to the following comments.

We agree with SAIF on the knee and hip conditions issue. The transcript of the hearing graphically reveals that claimant considered the knee and hip conditions to be at issue. The Referee's order reveals to our satisfaction that the evidence relating to alleged knee and hip conditions was considered and that the claim for compensation based on those conditions was disposed of adversely to claimant. It is with that understanding that we affirm and adopt the Referee's order.

ORDER

The Referee's order dated April 15, 1982 is affirmed. Claimant's attorney is awarded $250 as and for a reasonable attorney's fee, payable by SAIF.

ROBERT J. FREEMAN, Claimant
Cottle, Howser et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-08124
October 29, 1982
Order on Review

Reviewed by Board Members Lewis and Ferris.

SAIF Corporation requests review of Referee Mongrain's order which found claimant's "fibrositis" condition and bilateral elbow conditions compensable and remanded them for acceptance and payment of compensation under ORS 656.245. On review, SAIF does not contest the compensability of the elbow condition but contends that "fibrositis" is not a recognized disease which can be compensated and that claimant's current symptoms, diagnosed as "fibrositis", are not related to the original 1974 accepted industrial injury.

Except as inconsistent with our findings herein, we adopt the Referee's findings of fact.

We find this to be a somewhat confusing case. As a result of litigation following the 1974 injury, in June, 1980, claimant ultimately received an award of 80% unscheduled permanent disability primarily for low back pain. Claimant's then treating physician, for the first time in March, 1981 attributes what appears to us to be the same symptoms claimant has had since the 1974 injury to a disease process the physician calls "fibrositis". Based on our review of the record, we agree with SAIF that claimant has failed to prove that he suffers from a distinct disease process labeled "fibrositis". The symptoms claimant is experiencing are the same symptoms he has been experiencing for years and are the logical consequence of a back condition reflected by an 80% unscheduled permanent disability award. The only thing claimant receives and that SAIF is obligated to provide arising from the Referee's finding that claimant has "fibrositis", is medical treatment for low back pain. Claimant is already entitled to such treatment, as it arises from his original, accepted claim for a low back injury.

(With respect to the existence of a fibrositis condition, claimant's treating physician, Dr. Emori, a rheumatologist, reported that fibrositis was a disease process and that claimant suffered from it. SAIF's expert witness, Dr. Brooke, opined that the medical community generally no longer recognizes fibrositis as a distinct disease process and that at most it is a label for a "constellation of symptoms". Given this conflict in expert opinion, we are not persuaded based upon the limited medical evidence presented in this record that there is a separate and distinct disease process called "fibrositis".

If claimant does have "fibrositis", we are unable to discern how its symptoms differ from those claimant has experienced since the 1974 injury. To the extent that claimant has "fibrositis", he has had it since before the June 30, 1980 order and has already been compensated for it by virtue of that order ending the litigation arising from the original injury claim.

Therefore, we reverse that portion of Referee Mongrain's order remanding the fibrositis claim for acceptance, with the understanding that claimant remains entitled to medical services under ORS 656.245 for low back pain arising from the previously accepted condition or conditions.

Although SAIF did not raise it as a contingent issue, the Referee's award of attorney's fees must be reduced because we are reinstating that portion of SAIF's denial concerning a claim the compensability of which was the primary issue at the hearing. Similarly, since claimant failed to successfully defend the reversal of that denied claim on Board review, counsel is not entitled to an award of fees for services before the Board.

ORDER

The Referee's order dated May 14, 1982 is reversed in part, modified in part, and affirmed in part. That portion of the order remanding the fibrositis condition for acceptance is reversed. That portion of the order remanding the bilateral elbow condition is affirmed. That portion of the order awarding an attorney's fee is modified to reduce the award to $400 for counsel's services at the hearing.

HARLEY J. GORDINEER, Claimant
Malagon & Velure, Claimant's Attorneys
Schwabe, Williamson et al., Defense Attorneys

WCB 80-06759 & 81-06402
October 29, 1982
Order on Review

Reviewed by the Board en banc.

Claimant requests and the employer cross-requests review of Referee Danner's order which ordered the employer to pay claimant a penalty equal to 25% a specified amounts of temporary total disability compensation for unreasonable delay in paying compensation benefits, found the claimant to have been a part-time as opposed to a full-time employe at the time of his injury and allowed the employer an offset for an overpayment of temporary total disability benefits in the amount of $11,675.56, and awarded claimant's attorney a $500 attorney's fee, payable by the employer for the employer's illegal use of sight drafts rather than checks to pay claimant's compensation benefits.

Claimant contends that the Referee erred in finding him to have been a part-time employe and allowing the employer an offset for overpayment of benefits. The employer, in an excellent brief, argues that the Referee improperly allowed admission of hearsay statements from persons unknown, which were contained on three exhibits submitted at the hearing, that the Referee was in error in finding the instruments of payment used by the employer/insurer to be sight drafts, and defends the Referee's finding concerning the issue of claimant's status as a part-time employe. Neither party takes issue with the Referee's finding concerning delay in the payment of compensation, nor is there any issue concerning the compensability of claimant's injury.

We adopt the Referee's findings of fact as our own.

I

The first issue is a preliminary matter raised by way of motion by claimant's counsel. Claimant/appellant filed an opening brief with the Board on August 5, 1982. Respondent/cross-appellant filed its brief on August 26, 1982. A reply brief from the claimant as appellant/cross-respondent was received on September 2, 1982. On September 9, 1982 a cross-reply brief was received from the employer. Claimant thereafter moved to strike the cross-reply brief on the ground that no further briefing of the matter would be appropriate under OAR 436-83-702(3). In view of the importance that is attached to written argument before the Board, we have never construed OAR 436-83-720(3) in such a rigid manner. Since the employer did request permission to file a cross-reply brief on September 7, 1982, and since, due to an oversight, no response was forthcoming from this agency, we have determined that the cross-reply brief will not be stricken.

II

OAR 436-54-315 provides:

> "A sight draft will not be used to make payment of any benefits due a worker or beneficiary under ORS Chapter 656. Such

benefits include temporary disability, permanent disability and reimbursement of costs paid directly by the worker."

In Reed v. Del Chemical Corp., 16 Or App 366 (1974), the court held that an insurer's use of sight drafts to pay compensation benefits constituted unreasonable delay in payment and approved a penalty equal to 5% of the benefits payable for a specified time period. Neither the rule nor the Reed case defines "sight draft."

The apparent center of dispute concerns the language appearing on the bottom-left side of the instruments utilized to pay the claimant which states, "GIRARD BANK, PHILADELPHIA, PA OR PAYABLE AT UNITED CALIFORNIA BANK, SAN FRANCISCO MAIN OFFICE, S.F. CA." The claimant testified that he encountered difficulty in attempting to negotiate the instruments at various banks, and was forced to resort to local supermarkets which did cash them so long as he made a purchase.

In view of the fact that there is no controlling authority under the law of workers compensation as to what constitutes a sight draft, we turn to the Commercial Paper article of the Uniform Commercial Code, contained in ORS 73.1010 to 73.8050. See, however, Cornell v. Stimson Lumber Co., 257 Or 215 (1970).

ORS 71.1040 states:

> "(1) Any writing to be a negotiable instrument within ORS 73.1010 to 73.8050 must:
>
> > "(a) Be signed by the maker or drawer; and
> >
> > "(b) Contain an unconditional promise or order to pay a sum certain in money and no other promise, order, obligation or power given by the maker or drawer except as authorized by ORS 73.1010 to 73.8050; and
> >
> > "(c) Be payable on demand or at a definite time; and
> >
> > "(d) Be payable to order or to bearer.
>
> "(2) A writing which complies with the requirements of this section is:
>
> > "(a) A 'draft' . . . if it is an order.
> >
> > "(b) A 'check' if it is a draft drawn on a bank and payable on demand."
> >
> > * * *

The employer produced expert testimony from Professor Henry J. Bailey, III, an acknowledged expert in the area of commercial law. Professor Bailey testified that in his opinion, the disputed instruments were without question checks, and not sight drafts due to the fact that the drawee was a designated bank, the instrument was signed by the maker or drawer with an unconditional promise to pay a sum certain in money, and payable on demand. Therefore, under Professor Bailey's interpretation, and ours also, the instruments match the statutory definition of "check" perfectly.

The apparent confusion in this matter, however, seems to have resulted from the use of the words "OR PAYABLE AT. . ." on the face of the instruments. The Referee held that the fact that an alternative drawee was provided for on the instrument, made it either a check or a draft depending upon the place of presentment by the claimant, the final test being whether or not the instruments are accepted as checks by a bank. We disagree with the Referee's analysis. The instruments are either sight drafts or checks, not both. Under the Referee's conceptualization it is not difficult to perceive of a scenario where litigation is generated each time any particular financial institution refuses to accept an instrument which may unquestionably be considered a check under any definition, and which it may have a legal right to refuse in any event. We agree with Professor Bailey's interpretation of the effect of the disputed language. Apparently the Referee's conclusion was that the words "OR PAYABLE AT. . ." resulted in a condition, assuming the instrument was presented to the alternative drawee bank, although there would be no condition if it were presented to the Pennsylvanis bank. Professor Bailey, however, adamantly maintained that this did not convert the instrument into a sight draft. He stated that the California bank merely served as a checking agent to forward the check to the Pennsylvania bank, and that payment is not conditional even though a depository bank in Oregon may choose to utilize the California bank, since it may do so at its discretion. Since it is not mandatory to utilize the California bank, but only voluntary, the instrument contains no conditions and is, therefore, a check, not a sight draft.

It could be argued that although the instrument is legally a check, that the spirit of OAR 436-54-315 is still violated since the policy behind the rule contemplates providing claimants with forms of compensation that are easily negotiable and provide the least inconvenience in negotiating. However, as the claimant himself testified, one of the main reasons for the difficulty he encountered in negotiating the instruments was due to the fact that he failed to maintain an account at any of the banks at which he presented the instrument.

One additional matter of some concern regards the Referee's statement, "Considering the numerous banking agencies within the State of Oregon, one cannot help but wonder why a carrier which writes a great deal of business within the state, finds it necessary to issue checks and/or drafts payable at a bank in Philadelphia, Pennsylvania." Be that as it may, we are aware of no statute or rule in the law of workers compensation requiring employers and/or insurers to transact their business affairs through local financial institutions only, even though a local bank may exhibit some trepidation when presented with checks for acceptance drawn on distant banks.

Our disposition of this issue makes it unnecessary for us to reach the employer's assignment of error regarding the Referee's admission of allegedly hearsay statements contained on copies of three checks issued to the claimant.

III

The final issue for review is whether claimant's temporary total disability benefits are properly calculated on full, or part-time employment status. The Referee relied on ORS 656.210, which states:

* * *

> "As used in this subsection, 'regularly employed' means actual employment or availability for such employment."

The Referee found that claimant worked 18 out of a possible 54 working days, or exactly one-third time, and that he did not believe this to qualify for regular employment at five days per week for purposes of calculation of benefits. With regard to availability for employment, although the claimant testified that he worked everyday that work was available, the Referee found his testimony in that regard to be not credible. He noted that claimant testified that he was available for work in January, 1979 but that severe weather conditions prevented him from working, and that he testified that he telephoned his employer every night to see if work was available the next day. However, the employer's business records show that the alleged adverse weather conditions did not prevent their trucks from operating despite claimant's contention, and the newspaper articles he produced at hearing concerned a severe storm which occurred in 1969, ten years earlier. Additionally, business records and testimony from the employer's representative reveal that work was available on many occasions and claimant did not check in. It would seem self-evident that we find no basis for departing from the Referee's finding concerning credibility, and agree with him that, at best, claimant was only a part-time employe, and at worst, an "on-call" employe.

IV

Since we have agreed with the Referee's finding that claimant was a part-time employee at the time of his injury, it follows that we also agree with his allowance of the claimed offset, pursuant to OAR 436-54-320.

ORDER

The Referee's order dated February 26, 1982 is affirmed in part and reversed in part. Those portions of the order which found the employer to have paid claimant compensation by the illegal use of sight drafts, and allowing claimant's attorney a fee of $500 in relation thereto, are reversed. The remainder of the Referee's order is affirmed.

EDWIN L. HARDT, Claimant
Leeroy Ehlers, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 79-04466
October 29, 1982
Order on Review

Reviewed by Board Members Lewis and Ferris.

The SAIF Corporation requests and claimant cross-requests review of Referee Williams' order which affirmed those portions of the April 3, 1979 denial by which SAIF refused to reopen the claim on the basis of aggravation, and reversed those portions of the denial by which SAIF denied the compensability of claimant's degenerative spinal arthritis, and allowed claimant's attorney a fee of $600, payable by SAIF.

SAIF contends that there was no issue before the Referee concerning the compensability of claimant's spinal arthritis, and that any finding regarding that issue was gratuitous. In the alternative, SAIF argues that the medical evidence fails to support the Referee's finding. Claimant argues that the Referee erred in upholding those portions of SAIF's denial refusing to reopen the claim in 1979 on the basis of aggravation.

Claimant, who was 48 years of age at the time of the hearing and had been employed as a bread truck delivery driver for 17 years, suffered low back problems beginning in September, 1976. The diagnosis was low back strain. X-rays revealed spondylolisthesis L4-L5 with degenerative disc disease L4-L5 and L5-S1 with associated osteoarthritic changes. The claim was originally deferred and later accepted by SAIF. Vocational rehabilitation assistance was provided and claimant began coursework at Blue Mountain Community College, concentrating in geology technology, which related to claimant's hobby of gold mining. No surgery was performed and a Determination Order issued on December 13, 1978 after claimant was found medically stationary by the Orthopaedic Consultants. Claimant was awarded benefits for temporary total disability and 10% unscheduled low back disability.

On January 5, 1979 claimant visited his treating physician, Dr. Donald D. Smith, with complaints concerning the amount of his permanent partial disability award. Dr. Smith concurred with the findings of the Orthopaedic Consultants but felt that claimant's disability exceeded 10%. On January 24, 1979 a Determination Order on reconsideration issued, but failed to allow any additional compensation.

Claimant sought no treatment from July 24, 1978 to January 25, 1979 when he was examined by Dr. Ruggeri. Dr. Ruggeri noted low back pain and degenerative arthritis and suggested a trial with a flexion body cast, a procedure, which the Referee noted, could have been accomplished without a reopening of the claim. On March 13, 1979 Dr. Ruggeri reported that he felt claimant's condition was not any different than when he was examined by the Orthopaedic Consultants, except that he felt claimant was not medically stationary. On April 3, 1979 SAIF issued a denial, refusing to reopen the claim and stating that claimant's then current condition was a result of the natural progression of his non-injury related condition and, therefore, a noncompensable condition. SAIF, however, voluntarily reopened the claim in January, 1980. On January 16, 1981, a laminectomy L4-5 right, with a fusion of the L4-5 to the sacrum was performed. SAIF apparently has paid for the operation and provided additional benefits.

A hearing was convened on March 10, 1982. Since SAIF had reopened the claim voluntarily, the issues for determination at the hearing were narrowed. Counsel for the claimant delineated the issue for decision as follows:

> "[B]ut as I would view the issue, it would be whether -- or it would be the request for hearing on the denial letter of April 3, 1979. That is whether the claim should have been reopened at that time -- that is, in early 1979 -- on account of aggravation of the original condition. That would be my view of the only issue."

The Referee found that the claimant failed to establish a worsening of his condition since his last award or arrangement of compensation, and prior to the time SAIF voluntarily reopened the claim in January, 1980. The Referee, however, went on to find, "The medical records in places give lip service to the idea that claimant suffered a back strain, but the evidence as a whole suggests that his 17 years on this job . . . actually caused the degenerative changes in his low back." The Referee disapproved those portions of SAIF's denial which denied the fact that claimant's degenerative condition was caused by his industrial injury.

In Michael R. Petkovich, 34 Van Natta 98 (1982), we stated, "Referees (and this Board too) should concentrate on making the best possible decision on the issues raised by the parties without the distraction of volunteering decisions on issues not raised." We reiterated this policy in Marlene L. Knight, 34 Van Natta 278 (1982), and again in Dorotha Lorraine Oyler, 34 Van Natta 1128 (1982), wherein we stated that unless it is necessary for determination of the issues raised by the parties, a Referee should not attempt to raise or consider issues not before him. Since there was no issue concerning the compensability of claimant's degenerative arthritic condition before him, we believe SAIF's objection to the Referee's finding is well taken, and we, therefore, reverse that portion of the Referee's order.

Even had we found that the Referee properly considered the issue of compensability of claimant's degenerative arthritis, we would have disagreed with his finding. We do not believe that the medical evidence indicates that claimant's work activities were the cause of his degenerative condition, as opposed to an aggravating factor. Dr. Smith stated in his report of January 18, 1980 that claimant's work activities aggravated his degenerative condition, and that the condition was accelerated to a greater degree than it would have been as a result of natural progression. Dr. Ruggeri, in his report of January 4, 1982 also indicated that although claimant's degenerative arthritis probably predated his injury, that the injury served to aggravate his condition. The preponderance of the medical evidence indicates that claimant's industrial injury aggravated rather than caused his degenerative condition, and, therefore, SAIF's position as stated in its letters of denial was correct. Claimant's current difficulties, however, are no less compensable whether the injury actually caused or only aggravated his condition. Beaudry v. Winchester Plywood Co., 255 Or 503 (1970).

The second issue for our consideration involves the Referee's determination that claimant failed to prove a worsening of his condition such that reopening of the claim in 1979 would have been justified. The only medical reports in evidence between the date of the issuance of the Determination Order and the date SAIF voluntarily reopened the claim are from Drs. Smith and Ruggeri. Dr. Smith's report of January 5, 1979 does nothing more than disagree with the amount of claimant's permanent partial disability award. The only report of Dr. Ruggeri which addresses the issue is dated March 13, 1979. That report is somewhat vague and contradictory in terms, stating, "I do not believe that his condition is any different now from what it was when he was examined by Orthopaedic Consultants. However, I do not feel that his condition is medically stationary." We take this to mean that Dr. Ruggeri is stating that claimant's condition has not worsened since the closing examination done by Orthopaedic Consultants on October 24, 1978, but feels that they were incorrect in determining him to be medically stationary at that time. That appears to be an argument that would be better addressed to an issue of premature claim closure. Since premature closure, however, was not an issue in the present case, and since Dr. Ruggeri felt that claimant's condition was no worse upon his examinations in early 1979, than when claimant was examined by Orthopaedic Consultants in October, 1978, we would agree with the Referee, that a claim for aggravation has not been established.

ORDER

The Referee's order dated April 19, 1982 is affirmed in part and reversed in part. Those portions of the order which overturned SAIF's April 3, 1979 denial, insofar as it denied the compensability of claimant's degenerative arthritis, and which awarded claimant's attorney a fee of $600 for partially prevailing on a denial, are reversed. SAIF's denial of claimant's degenerative arthritis condition is reinstated and affirmed.

The remainder of the Referee's order is affirmed.

WILLIAM R. JAMESON, Claimant
Coons & McKeown, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-01724
October 29, 1982
Order on Review

Reviewed by the Board en banc.

The SAIF Corporation requests review of Referee Johnson's order which set aside its denial of claimant's back condition claim. The only issue is the compensability of that condition.

Claimant was employed as a logger when, on October 10, 1979, he stepped in a hole causing him to fall down an incline and strike a tree with his right shoulder. Dr. Falk's initial diagnosis was sprained muscles of the right shoulder. Claimant, however, began experiencing low back pain and advised Dr. Falk of his symtoms. Claimant thereafter was examined by numerous physicians, who offered various diagnoses, including a herniated disc and degenerative disc disease. Surgery was performed on June 5, 1980. The preoperative diagnosis was "L5-S1 disc herniation, left." The postoperative diagnosis was "Lipoma of the epidural space at L5-S1 and an anomalous origin of L5-S1-S2 roots on the left." No attempts were made to remove the disc. A myelogram was performed on December 11, 1980 by Dr. Smith who found a large lipoma of the lumbar spine. On December 19, 1980 a second surgery was performed -- an exploratory lumbar laminectomy with resection of the lipoma of the spinal canal with intramedullary and/or filum terminale with lysis of roots and untethering of the spinal cord.

There seems to be no question that claimant's lumbar spinal canal lipoma was a condition which long preexisted his industrial injury and, as Dr. Raaf indicated, was probably a congenital or developmental growth. The Referee, apparently relying on Weller v. Union Carbide Corporation, 288 Or 27 (1979), found that claimant had established that his work activity caused a worsening of his preexisting underlying condition which increased his pain to an extent that it produced disability and required medical services.

SAIF argues that the appropriate question is not whether claimant's industrial injury caused the preexisting lipoma to become symptomatic, but whether claimant's surgeries were necessitated by the injury. The cases that appear to be dispositive are Cooper v. SAIF, 54 Or App 659 (1981), and Cochell v. SAIF, 59 Or App 391 (1982). In Cochell, the court stated, ". . .where work-connected activities caused an onset of pain only, without medical evidence of a worsening of the underlying condition, the claim is not compensable, even if the pain is of sufficient intensity to be disabling and require surgery." 59 Or App at 395. Therefore, the only question is whether the evidence establishes that claimant's work activities caused claimant's underlying lipoma to worsen.

The medical reports are as follows. Dr. Golden stated in his letter of January 7, 1981:

> "Mr. Jameson had a lipoma and his injury of October 10, 1979, appears to be an aggravation of an underlying condition. The recurrence of a lipoma, if this is truly occurring, is not caused by the injury per se." (Emphasis Added.)

Dr. Golden later reported that tumors produce symptoms generally due to increasing pressure caused by an increase in size. He stated:

> "Physiologically, the tumor may have been aggravated to produce pressure on the nerve roots by swelling. . ."

On September 1, 1981, Dr. Smith reported:

> ". . .the traumatic effects of that injury with muscle/bone, stress/strain, etc., undoubtedly produced a pain response in an abnormal spinal canal and quada equina. * * * I would, therefore, feel that the causative relationship of the injury and its subsequent treatment to the intractible pain problem for which the patient was again studied and operated in December of 1980, was directly related as a pain problem and caused by, as a pain problem, the working injury of 10/10/79."

As we understand them, claimant's treating physicians are stating that claimant's work activity only resulted in increased pain, and they are unable to state that claimant's underlying condition itself was actually worsened.

Dr. Smith submitted another report dated September 10, 1981, in which he stated that claimant had suffered a "severe aggravation," but again only appears to associate increased pain to claimant's work incident and not a change in his underlying preexisting condition. SAIF consulted Dr. Raaf, who reported that claimant's work incident only served to draw attention to and produce symptoms leading to the discovery of the lipoma. This is basically what we understand Dr. Smith to have concluded. Dr. Raaf went on to report that some stretching of the nerve roots could have taken place, resulting in pain, but that claimant would have developed symptoms in any event despite his work incident, and that trauma did not cause the tumor to grow more rapidly. Dr. Raaf also found that although there may have been nerve root stretching, that the incident did not affect the lipoma itself, or cause it to worsen. Therefore, under Cooper and Cochell, claimant has not established the compensability of his lipoma condition.

ORDER

The Referee's order dated November 27, 1981 is reversed. The SAIF Corporation's denial of February 11, 1981 is reinstated and affirmed.

Board Member George Lewis Dissenting:

I respectfully dissent. I believe that claimant has established the compensability of his claim.

It is my understanding of the facts of this case that claimant had a pre-existing lipoma (a fatty tumor) of the spinal

cord in the lumbosacral area of his spine. Prior to the industrial injury in October, 1979, the condition was totally asymptomatic; indeed, claimant was not even aware he had the tumor. Following the injury and as a direct result of the injury, claimant experienced pain, loss of reflex action, and loss of bowel and other body functions. The purpose of the surgeries at issue here was to remove a sufficient portion of the tumor to accomplish decompression, thereby alleviating the pain, loss of body functions, etc. At the time of the hearing in October, 1981, claimant was still recovering from the surgery but was still experiencing substantial amounts of pain and had not yet regained total control over his body functions.

As noted by the majority, the Referee apparently felt that this case was governed by Weller v. Union Carbide Corporation, 288 Or 27 (1979). In its brief, SAIF argues that disposition of this case is governed by Cooper v. SAIF, 54 Or App 659 (1981). In Cooper the Court of Appeals applied Weller to a case involving an industrial injury which allegedly aggravated an underlying and apparently asymptomatic condition, and found that the claimant failed to prove compensability by merely proving an onset of symptoms without also proving a change in the underlying condition. See also Cochell v. SAIF, 59 Or App 391 (1982). Claimant contends that Cooper and, by implication, Weller, are irrelevant because this is an industrial injury case, that the injury caused the onset of symptoms and precipitated the need for surgery, and that therefore the condition is compensable. Alternatively, claimant argues that he has proven a worsening of the underlying condition. I believe Weller (and Cooper to the extent that it relies on Weller) is not applicable here, and that the condition is compensable.

Weller involved a claimant who had a preexisting symptomatic condition which allegedly was aggravated by work activities. The claimant therein proceeded on an occupational disease theory and the Court based its holding in part on ORS 656.802, the occupational disease statute. By contrast, this case involves a claimant whose preexisting condition was totally asymptomatic prior to an industrial injury. To my knowledge the Oregon Supreme Court has never considered or decided whether the requirements of Weller are applicable to (1) industrial injury cases (2) involving previously asymptomatic conditions.

The Court of Appeals has addressed itself to both issues. In Florence v. SAIF, 55 Or App 467 (1982), over the dissent of Judge Roberts, the Court of Appeals held that Weller was not applicable to industrial injury cases. Florence was cited with apparent approval in Hall v. The Home Insurance Co., 59 Or App 526 (1982). On the other hand, the Court of Appeals has applied Weller to industrial injury cases. Partridge v. SAIF, 57 Or App 163 (1982), Cooper v. SAIF, supra, and Cochell v. SAIF, supra.

Similarly, with respect to whether a condition is compensable where an injury causes a previously asymptomatic condition to become symptomatic without a pathological change in the underlying condition, the Court of Appeals has held both that such a condition is compensable, Weidman v. Union Carbide Corp., 59 Or App 381 (1982), and that it is not compensable, Cochell v. SAIF, supra.

In light of conflicting Court of Appeals decisions, I believe that the Board should adopt positions on both issues consistent with reason and relevant Supreme Court decisions. The Board has previously considered both issues and has decided that Weller is applicable to industrial injury cases, Richard A. Davis, 30 Van Natta 513 (1981), but that it is not applicable to cases involving previously asymptomatic conditions, Lorena Iles, 30 Van Natta 666 (1981) and Patricia L. Lewis, 34 Van Natta 202 (1982). In Lewis we explained why we believe Weller is not applicable to cases involving previously asymptomatic conditions:

> "The significance of a condition being previously asymptomatic 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."

There are other policy reasons for not applying Weller to cases involving previously asymptomatic conditions. It does not appear from the Supreme Court's opinion in Weller exactly what statutory provisions, prior decisions of the Court, or policy considerations led the Court to adopt the "pathological worsening" requirement to establish the compensability of a preexisting condition allegedly affected by work activities. Certainly that language does not appear in the occupational disease statute nor does it appear in the industrial injury legislation. The Supreme Court's opinion in Weller is devoted primarily to explaining why other authorities did not require the Court to reach a different result.

Some guidance to the policy considerations underlying Weller may be found in the Court of Appeals opinion which was affirmed by the Supreme Court without disagreement on this point:

> "To have a compensable occupational disease, claimant must establish that his work as a crane operator originally caused or materially worsened his spine condition. It is not sufficient merely to establish that claimant's work as a crane operator required him to make certain motions which caused his underlying condition to be symptomatic, i.e., caused pain. Otherwise, any person with common idiopathic conditions such as rheumatism, arthritis or bursitis whose job required painful movements would have a compensable occupational disease."

Weller v. Union Carbide Corp., 35 Or App 355 at 359 (1978).

Where a worker already is experiencing symptoms from an underlying condition and is involved in work activities over an extended period of time which produce the same symptoms, there is merit to requiring proof of a "pathological change" in the condition in order to establish a nexus between work exposure and disability, and to rule out the possibility of the symptoms being due to natural progession of the condition or off-the-job activities. These seem to have been the Court of Appeals' primary concerns in the Weller case:

> "In denying compensation, the referee and Board expressed the '* * * belief that the [claimant's] underlying problem would have progressed to the present state in any event and that it would be impossible to do more than speculate as to whether claimant's activities at work had anything more to do with his disease [than] his ordinary daily activities. * * *' "

Weller, supra, 350 Or App at 358. (This language from the Court of Appeals opinion in Weller suggests that the more appropriate test for determining the compensability of an alleged aggravation of a preexisting condition is the "major contributing cause" language arising from Beaudry v. Winchester Plywood Co., 255 Or 503 (1970), James v. SAIF, 290 Or 343 (1981) and SAIF v. Gygi, 55 Or App 570 (1981), in order to preclude claims for conditions related more to off-the-job factors than to work activities or exposure.)

Where there is a clearly identifiable, traumatic, on-the-job event or incident which interacts with a preexisting, underlying condition, resulting in disability, death, or the need for medical services, a logical nexus exists between work exposure and disability. In such circumstances, it defies the purpose of the Workers Compensation Act and well-established case law to say that the system has no obligation to accept responsibility for the worker's resulting disability or death. To the extent that the Court of Appeals has held in recent cases (Cooper and Cochell) that proof of a pathological change in the underlying condition is required when an industrial injury causes a previously asymptomatic condition to become symptomatic, I believe that the holdings are inconsistent with earlier Supreme Court decisions. Elford v. SIAC, 141 Or 284 (1932), Armstrong v. SIAC, 146 Or 569 (1934), and Kinney v. SIAC, 245 Or 543 (1967). These cases hold that where an injurious exposure accelerates the progression of a disease or causes it to become symtomatic where it otherwise might never have become symptomatic, resulting in an earlier onset of disability or death, the resulting condition is compensable. (The Supreme Court in Weller, and in one of the Weller companion cases, referred to both "worsening" and "acceleration" of conditions and indicated that both are compensable. See Weller v. Union Carbide, supra, 288 Or at 34, and Stupfel v. Edward Hines Lumber Co., 288 Or 39, at 42 (1979).

Of the Elford, Armstrong, and Kinney trilogy, Kinney is the most relevant. Kinney is the clearest Oregon Supreme Court case involving a preexisting asymptomatic condition found to be

compensable when, as a result of an industrial injury, the condition became symptomatic without a pathological change in the underlying disease. Kinney also is significant because it was cited with approval by the Supreme Court in Beaudry v. Winchester Plywood Co., supra, and James v. SAIF, supra. Kinney was cited in Beaudry for the proposition that:

> "It is clear that under the accidental injury portion of the law a compensable injury occurs when an accidental injury accelerates or aggravates a pre-existing disease causing disability or death...." (Emphasis added)

Beaudry, supra, 255 Or at 512. In James, Kinney was cited in the following context:

> "SAIF does not contend that mental illness can never be compensable. It contends this claimant's mental illness is not compensable. In Kinney v. SIAC [citation omitted], we discussed mental injury cases from other jurisdictions. Kinney had aortic stenosis. He suffered stress on the job which caused him to be disabled. The testimony was that aortic stenosis itself is not disabling, but when stress is imposed on this condition it causes symptoms which are disabling. In deciding whether Kinney's disablement was a compensable injury we discussed the cases in which 'mental stimulus caus(ed) nervous injury.' We then stated:
>
> > 'So far as these nervous injury cases bear upon the question of the meaning of the word "injury" we see no significant difference between them and a case of aggravation of an aortic stenosis involving no pathological change.' [Citation omitted] [Emphasis added]
>
> "We went on to hold Kinney suffered an accidental injury which was compensable."

James, supra, at 346-347.

In the present case, SAIF argues that the issue is not whether claimant's industrial injury caused the preexisting lipoma to become symptomatic, but rather, whether claimant's surgeries were necessitated by the injury. Regardless how the issue is phrased, I believe claimant's condition and the surgery intended to correct it are compensable. Claimant established that his preexisting condition became symptomatic for the first time as a direct result of the October 10, 1979 fall. SAIF's consulting physician characterizes the industrial incident as merely having "brought to light" the existence of the underlying condition that

would have become symptomatic at some point anyway. If this were a case where the claimant experienced no symptoms of the condition whatsoever and the existence of the condition had been revealed in the course of reviewing x-rays for an injury to another portion of the spine (as occasionally happens with respect to such conditions as spondylolysis and spondylolisthesis), then I would agree that the condition would not be compensable. In this case, however, the injury interacted with the condition and caused it to become symptomatic and disabling.

As noted above, SAIF seeks to characterize cases such as these in terms of "the underlying condition needing medical care, not the injury." It is unclear what is meant by the use of the word "injury". If SAIF means the industrial incident itself, I would agree that time loss or medical services are not payable solely because an incident occurs. It is possible, for example, for a person to fall and sustain no trauma at all, in which case no compensable event has occurred. However, if SAIF, in referring to "the injury", means the trauma resulting from an incident, then the reference would seem to be incorrect. The law is well-established that where an industrial incident results in trauma, or acts upon an underlying condition causing disability or death or requiring medical services, the combined result is compensable so long as the residual effect of the injury is a material contributing factor to the disability, death, or need for medical services. Elford v. SIAC , supra, Armstrong v. SIAC, supra, Olson v. SIAC, 222 Or 407 (1960), Lorentzen v. Compensation Department, 251 Or 92 (1968), and Kinney v. SIAC, supra. See also, Grable v. Weyerhaueser Company, 291 Or 387 (1981) and Hoffman v. Bumble Bee Seafoods, 15 Or App 253 (1973).

Excluding Dr. Raaf, SAIF's consulting physician, the consensus of claimant's treating physicians and surgeons is that claimant's October 10, 1979 fall "aggravated" or caused the early onset of disability arising from the preexisting spinal tumor and the need for surgery:

> "In my opinion the injury of October 10, 1979 aggravated an underlying condition of an intraspinal lipoma as described by my operative note. Although the lipoma was the primary pathology, it was made symptomatic by the injury the patient described. The treatment and diagnostic procedures done by me were, in fact, necessitated by the incidence of his injury which produced the symptomatic effects of the lipoma." (Ex. 40, Dr. Golden)
>
> "It is possible that the underlying pathology could have caused the patient's symptoms without an incident of trauma; however, in fact, the symptoms were caused after his injury....As to whether this condition of lipoma would have eventually caused the patient's symptoms, the answer is difficult to make because he may have been stable if the lipoma did not evolve to any greater size. * * * Physiologically,

> the tumor may have been aggravated to produce pressure on the nerve roots by swelling or if indeed some disc disease were present without herniation, the two factors combined could produce the pressure on the nerve roots." (Ex. 41, Dr. Golden, emphasis added)
>
> "This has proven to be a most interesting and obviously a most serious lesion. I believe that without question the history would suggest that this lesion was asymptomatic until the time that the patient sustained his working injury of 10/10/79, and the traumatic effects of that injury with muscle/bone, stress/strain, etc. undoubtedly produced a pain response in an abnormal spinal canal and quada equina....I would therefore feel that the causative relationship of the injury and its subsequent treatment to the intractable pain problem for which the patient was again studied and operated in December of 1980, was directly related as a pain problem and caused by, as a pain problem, the working injury of 10/10/79." (Ex. 43, Dr. Smith)

SAIF's consulting physician opined that the injury did not cause the tumor itself to grow and that claimant would have become symptomatic "eventually" regardless of the October 10, 1979 fall. However, he also conceded that the industrial injury could have caused stretching of the nerve roots incorporated by the lipoma, thereby eliciting the symptoms apparent after October, 1979. If it was this doctor's intent to say that the lipoma would have become symptomatic in October, 1979 regardless of the accident, I find such a conclusion very unpersuasive. If it was his intent to say merely that at some point in time the condition would become symptomatic, that opinion is contradicted by Dr. Golden's opinion that the tumor may have remained stable if there was no further growth of the tumor.

By and large, it is irrelevant whether the tumor itself grew in size. Growth is not the only way pathological change can be manifested. Dr. Raaf opined that the nerve roots may have become stretched as a result of the injury; Dr. Golden opined that the tumor may have swelled as a result of the injury. In any event, the facts are that the tumor was inextricably intertwined with the nerve roots and that claimant's industrial injury affected the entire tissue mass, causing pain, loss of reflex action, loss of body functions, etc. In my view, whether these facts are characterized as constituting a "worsening of the underlying condition" or as an injury precipitating the onset of disabling symptoms of a pre-existing, asymptomatic condition, I believe the condition and the medical services reasonably necessary to treat it are compensable and remain compensable until the condition returns to its pre-injury, symptom-free status. Rebecca Hackett, 34 Van Natta 460 (1982).

Given the amount of pain and disability claimant had at the time of the hearing, it is possible that the surgery may have failed to wholley achieve its intended result. That the surgery failed to achieve its intended result does not gainsay that its purpose was to correct a condition which became symptomatic as a direct result of an industrial injury. That the condition may have become symptomatic at some point in time does not alter the fact that the industrial injury caused the onset of the disabling effects of the condition when it did -- in October, 1979.

I, therefore, respectfully dissent. I would affirm the Referee and award claimant's counsel an attorney's fee of $450 for services before the Board.

JIMMY D. MATHIS, CLAIMANT
Olson, Hittle, et al., Claimant's Attorneys
Bullard, Korshoj et al., Defense Attorneys
John Klor, Defense Attorney

WCB 81-00162
October 29, 1982
Order on Review

Reviewed by Board Members Lewis and Ferris.

Self-insured employer Modoc Lumber Company requests review of that portion of Referee Foster's order which found that claimant sustained a new injury rather than an aggravation of a prior compensable injury. EBI Companies, the insurer on the risk for the prior injury, in its brief on review contends that the Referee wrongfully joined it as a party to this proceeding.

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

As is frequently the case where responsibility is at issue, there is evidence to support assigning responsibility to either employer or insurer. The record reveals that claimant continued to experience low back pain following the 1973 and 1976 injuries and the 1976 surgery, and that he sought medical care on a fairly regular basis from 1976 through 1979. However, the record also reveals that from November, 1978 to October, 1979, claimant worked without missing any time, that the four occasions he visited his doctor during that time frame were to monitor the results of what appears to have been palliative care, that from February 19, 1979 through October 18, 1979 (the date of the new incident) claimant received no medical care of any kind whatsoever, that the October, 1979 incident was of a type which is likely to cause new damage to claimant's back, and that after the incident claimant experienced substantially increased pain and had to be hospitalized.

Under the last injurious exposure rule, a prior industrial injury can be a material or even the major contributing cause of the claimant's condition. Nevertheless, the condition becomes the responsibility of the subsequent employer or insurer if the new incident also contributes to the condition. We appreciate the parties' thorough briefing of the numerous appellate court decisions involving the last injurious exposure rule and discussing the factors relied upon by the court to determine the aggravation versus new injury issue. We have considered the cases cited, but, in the end, the resolution of each case depends on its facts. Based on our de novo review of the record and considering the period of time claimant worked without time loss or medical care as well as the nature of the second incident, we believe the Referee correctly concluded that claimant experienced a new injury.

Because of our disposition of the aggravation versus new injury issue, it is unnecessary to decide whether EBI Companies, the "aggravation insurer", was improperly joined as a party.

ORDER

The Referee's order dated February 4, 1982 is affirmed.

LEONARD W. SMITH, Claimant
Merten & Saltveit, Claimant's Attorneys
Rankin, McMurry et al., Defense Attorneys

WCB 81-00825
October 29, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

The self-insured employer requests review of Referee Mongrain's order which ordered acceptance of claimant's psychological condition claim effective February 26, 1981. The employer contends that the psychological condition is not compensable at all. Claimant contends that not only is the claim compensable but it is compensable effective at an earlier date, namely, February 13, 1981.

I

Compensability is the primary issue; however, there is a preliminary issue concerning the Referee's denial of the employer's motion for an order requiring an independent medical examination by psychiatrist Dr. Arlen Quan.

Claimant originally sustained a back strain in December of 1979, which was accepted as a compensable injury by the employer and ultimately submitted for closure in December of 1980. A Determination Order issued in January of 1981 awarding time loss only. Claimant appealed the Determination Order. In the course of processing the claim prior to submission for closure, the employer required and the claimant submitted to three independent orthopedic medical exams. The first exam resulted in claimant selecting that physician as his treating physician.

A report submitted by Dr. Moss, claimant's treating psychiatrist, in February, 1981, constituted claimant's claim for compensability of a psychological condition allegedly arising from the 1979 back injury. In March, 1981 the employer sought and obtained an independent medical exam by psychiatrist Dr. Parvaresh, who submitted a report that month. The employer issued a partial denial on the psychological condition and claimant requested a hearing on that issue.

After the parties were notified of a hearing date, the employer scheduled claimant for two independent medical examinations: an orthopedic exam and a psychiatric evaluation. Claimant resisted the psychiatric exam, not wishing to be examined by a third psychiatrist. Claimant's counsel indicated that claimant was willing to be reexamined by Dr. Parvaresh, but the employer rejected this option. The employer moved the Referee for an order requiring claimant to submit to a psychiatric evaluation by another psychiatrist of their choosing. The Referee denied the motion on the ground that the employer had had "an adequate and fair opportunity to develop relevant and necessary information through required medical, including psychiatric, evaluation."

A motion to compel an independent medical exam under the circumstances of this case is addressed to the discretion of the Referee, and considering the evidence on this issue as a whole, we cannot say that the Referee abused his discretion. The employer argues that the Referee impermissibly made a judgment as to whether the employer had sufficient evidence to litigate the claim at issue. We do not so read the Referee's order. He denied the motion on the ground that the employer had an adequate opportunity to develop its case. With that understanding of the Referee's order, we affirm his ruling on the independent medical examination issue.

II

We agree with the Referee that claimant has established that the residuals of his 1979 injury were a material contributing factor in the depression claimant experienced in February, 1981. However, inexplicably, the Referee chose February 26, 1981 as the appropriate date for claim reopening. We believe that to the extent that claimant's psychological problem is compensable at all, it is only because it manifested itself and resulted in claimant seeking treatment for the condition on February 13, 1981. In selecting this date, we are impressed by the fact that psychiatric hospitalization was suggested on that date, and strongly recommended by Dr. Moss either on February 19 or on some other date between February 19 and 26.

The more difficult question for us is whether the condition remained compensable after claimant was terminated from his employment with Fred Meyer, Inc. on February 25, 1981 for allegedly stealing a packet of gum. The claimant does not allege that job stress or a reaction to the termination itself contributed to the compensability of his psychological condition. His sole claim is that the residual pain and decreased level of activity, along with the financial and domestic distress arising from the injury, taken together, materially contributed to his depression.

Dr. Moss felt that even after claimant's discharge the residuals and sequelae of the original back injury were a material factor in claimant's depression. Dr. Parvaresh, who did not examine claimant until March 17, 1981, felt that the termination, alleged harassment from the employer and other factors unrelated to the back injury were the cause of claimant's depression, and that the injury was not a material contributing factor at that time. Except for two additional factors, we would tend to agree with the employer that the termination of February 25, 1981 broke the chain of causation with the original injury. First, although claimant as a management level person might be expected to react very strongly to being terminated for alleged theft, in fact, he viewed the incident merely as the culmination of the employer's long-standing harassment of him. While we agree that claimant's perception of harassment is markedly at variance with reality, the fact remains that he perceived the termination as another form of "harassment" that existed prior to the onset of the depression.

Secondly, claimant consulted a new orthopedic physician, Dr. Thompson, in April of 1981 and the parties stipulated that, based on findings of back spasms and other evidence of disability, Dr. Thompson would authorize time loss through June 30, 1981. This indicates to us that claimant's back condition continued to be a significant factor, and supports Dr. Moss' opinion that the back injury remained a material contributing cause of claimant's psychological problem despite the intervening termination from employment.

For these reasons, as well as the reasons set forth in the Referee's order, we agree the claimant has established by a preponderance of the evidence that his depression was a compensable consequence of his 1979 injury.

The employer's primary defense that the psychiatric claim is not compensable, assuming an onset date of February 25, 1981, has considerable support in the record but does not address why the claim was not compensable as of February 13, 1981. A claim generally becomes compensable when the claimant becomes disabled or requires medical services. ORS 656.005(8)(a). Claimant was in need of and sought medical care for his depression on February 13, 1981; therefore, his claim was "perfected" as of that day.

ORDER

The Referee's order dated January 12, 1982 is affirmed as modified herein. The claim is remanded for acceptance effective February 13, 1981; otherwise, the Referee's order is affirmed. Claimant's attorney is awarded $600, payable by the employer in addition to and not out of any compensation due claimant, as and for a reasonable attorney's fee for successfully defending on Board review the reversal of a denied claim.

WILLIAM M. STILL, Claimant
Emmons, Kyle et al., Claimant's Attorneys
Lindsay, Hart et al., Defense Attorneys

WCB 80-03041 & 80-01909
October 29, 1982
Order on Reconsideration

The Board issued its Order on Review herein on August 18, 1982. Self-insured employer Peter Kiewit & Sons timely requested reconsideration. In order to give the Board more time to consider the employer's contentions, on September 15, 1982, we abated our Order on Review. Having considered the employer's contentions we modify our former order sufficiently to justify withdrawing our Order on Review and substituting the following therefor.

All three parties to this proceeding, the claimant, the insurer on the risk at the time of the first injury and the self-insured employer on the risk at the time of two subsequent lifting incidents all seek review of Referee Daron's order which: (1) found that the 1979 lifting incidents constituted a new injury and assigned responsibility for the claim to the self-insured employer; (2) ordered the employer to partially reimburse the insurer for temporary total disability paid pursuant to an order designating a paying agent under ORS 656.307; and (3) set aside a Determination Order which had awarded temporary total disability and an additional 5% permanent disability.

The brief of employer Peter Kiewit & Sons contains a good summary of the parties' contentions, which we paraphrase here. The claimant is dissatisfied because he was awarded no additional benefits and the Referee held he should not have received as much as he was awarded by the Determination Order. The self-insured employer is dissatisfied because it was held responsible for the subsequent injurious exposure and ordered to reimburse SAIF Corporation for time loss payments. SAIF is dissatisfied because the Referee did not order the employer to totally reimburse SAIF. Thus, the issues are aggravation versus new injury, entitlement to temporary total disability, entitlement to permanent partial disability, and the propriety of an adjustment between the insurer and the self-insured employer.

Except as inconsistent with our findings herein, we adopt the Referee's findings of fact as our own.

I.

The evidence on the issue of aggravation versus new injury is very close. In our initial review, we were strongly influenced by the depositional testimony of Dr. Cookson, claimant's treating physician, to the effect that as a result of the two 1979 lifting incidents, claimant probably sustained actual tissue damage. Upon reconsideration and after reviewing Dr. Cookson's testimony again, it appears that Dr. Cookson's actual testimony was equivocal: he qualified his answer by saying that claimant probably sustained actual tissue damage if he experienced significant pain.

The evidence strongly suggets that claimant did not experience significant pain as a result of the lifting incidents. Claimant continued working for five days after the last lifting incident before quitting. It appears to us that claimant quit working primarily for reasons other than pain arising from the two lifting incidents, i.e., he quit because of conflicts with another employe. Also significant in this regard are the representations made by the attorney handling claimant's case at that time to the effect that claimant was not disabled from performing the duties of a flagman. Claimant's present counsel contends we should disregard the representation of claimant's former attorney because he is not a physician. That contention misses the point. Regardless of whether claimant's treating physician or any other physician thought he was able to continue working, in fact claimant continued to work for several days after the last incident and representations were made on claimant's behalf that he was capable of returning to work.

Lastly, Dr. Cookson consistently maintained that claimant experienced an aggravation, not a new injury. A physician's statement that a worker sustained a new injury or an aggravation is not necessarily determinative because we have no way of knowing whether the physician understood the subtleties of the last injurious exposure rule when rendering an opinion on the issue. Nevertheless, we consider a physician's opinion and afford it the weight that the record as a whole suggests it should have. Here, claimant's treating physician following the 1979 incidents was the same physician who treated claimant following the original injury, and he consistently maintained that claimant sustained an aggravation of his former injury, not a new injury.

For all these reasons, upon reconsideration, we decide that the evidence slightly favors a finding of aggravation.

II.

With respect to claimant's entitlement to temporary total disability, upon reconsideration, as noted above, it appears that the primary reason claimant quit working within a few days after the last of the lifting incidents was conflict with another employee, not back pain or inability to do the job. Of all the contentions and arguments made by the employer's counsel concerning this issue only one has any merit: claimant's former attorney clearly represented that claimant was not disabled from performing the duties of flagman and had quit for reasons other than disability. Accordingly, claimant's claim for temporary total disability as of the date he quit working is disallowed.

III.

For the first time in its request for reconsideration the employer challenges the medically stationary date established in the Determination Order. Because of the posture of the case on review, there was no occasion to raise the issue earlier. Since we have decided that claimant is not entitled to temporary total disability, the selection of an accurate medically stationary date becomes less important. Nevertheless, the employer's point is well taken in one respect: there is little or no support in the record for the medically stationary date selected by the Evaluation Division. There also is very little support for any medically stationary date. Although Dr. Cookson signed a report in July, 1980 unequivocally stating the claimant was not medically stationary, in his deposition, Dr. Cookson testified that in retrospect claimant was probably medically stationary on June 10, 1980. Accordingly, for lack of better evidence, we find claimant to have become medically stationary on June 10, 1980.

III.

The employer contends that claimant is not entitled to any additional permanent disability other than that which claimant received pursuant to a stipulation signed shortly before the two lifting incidents at issue here. The employer correctly notes that claimant is subject to the same lifting limitations following this second set of injuries as he was following the original injury. A lifting limitation is but one guide to the evaluation of loss of earning capacity. The determination of extent of disability depends on the assessment of degree of physical impairment combined with other social-vocational factors. With respect to determining the degree of impairment, range of motion tests are a more objective measure than lifting limitations. Here, the medical reports indicate that upon becoming medically stationary following the 1979 lifting incidents, claimant had decreased range of motion as compared to his range of motion at the time of the last arrangement of compensation (the December, 1979 stipulation).

The employer argues that the stipulated 15% disability award was probably too low, and that by re-rating claimant's disability anew and merely subtracting the former award from the current disability rating, we are attributing a greater share of claimant's disability to the new incidents than is justified by the facts. The employer further argues that ORS 565.222 requires us to award only such permanent partial disability as is equivalent to the increased disability attributable to the 1979 incidents. We agree with that proposition but believe that based on this record there is no other rational way to measure that difference than to subtract the prior award from claimant's current level of disability. We recognize that Cascade Steel Rolling Mills v. Madril, 57 Or App 398 (1982) indicates that a strict mathematical computation is not required by ORS 656.222. However, we see no factors in this case which justify doing otherwise.

The employer further argues that the Board's holding in Patricia Nelson, 34 Van Natta 1078 (1982), requires us to reduce claimant's permanent disability award. Nelson sets forth the circumstances under which a permanent disability award may be reduced upon a showing that an overweight claimant has failed without good cause to comply with medical advice to lose weight. We believe the record is insufficiently developed here to apply Nelson. There is doubt whether loss of weight would significantly reduce claimant's extent of impairment. Dr. Cockson reported that a significant change in lifestyle, weight, and exercise pattern might result in improvement but not necessarily. There are two references in the record to weight programs, but no clear indication of a medically prescribed plan of weight loss or to what extent claimant did or did not comply with a weight loss program and lose weight. Lastly, Orthopaedic Consultants in its evaluation of claimant noted claimant's obesity and proceeded to rate the degree of impairment attributable specifically to the injuries. The degree of impairment attributable to the injuries is less than claimant's overall impairment, and we have used the lower impairment rating in determining extent of disability.

We believe that we correctly rated the extent of claimant's disability attributable to the combined effect of all compensable incidents at 50%, subtracted the 15% prior stipulated award, and arrived at an award attributable to the new incidents of 35% unscheduled disability. The employer correctly notes an ambiguity in our order which arguably could be read to result in an additional 5% arising from the Determination Order. It was our intent to award an amount of disability in lieu of the award by the Evaluation Division and our order will be amended accordingly.

Based upon claimant's attorney's representations in his memorandum on reconsideration, it does not appear that the employer paid out any part of the permanent disability award granted by our Order on Review. To the extent that Peter Kiewit may have paid out any part of the permanent disability award, Kiewit is entitled to reimbursement from SAIF.

ORDER

On reconsideration, the Board's order dated August 18, 1982 is vacated.

The Referee's order dated September 25, 1981 is affirmed in part and reversed in part.

That portion of the order remanding the claim to Peter Kiewit & Sons for acceptance and payment of compensation is reversed. That portion of the order requiring Peter Kiewit and Sons to reimburse SAIF is reversed.

Part (4) of the order in effect affirming SAIF's denial is reversed and the claim is remanded to SAIF for acceptance and payment of compensation in accordance with law and this order.

That portion of the order setting aside the Determination Order is affirmed. Claimant is awarded no temporary total disability, but is awarded 35% unscheduled permanent partial disability for his back condition in addition to the 15% awarded pursuant to stipulation, for a total award of 50% unscheduled permanent disability.

Claimant's attorney is awarded as a reasonable attorney's fee 25% of the increased permanent partial disability awarded by this order, not to exceed $1500.

BETTY J. STRONG, Claimant
Enver Bozgoz, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-02187
October 29, 1982
Order on Review

Reviewed by Board Members Ferris and Lewis.

The insurer requests review of Referee Leahy's order which granted claimant awards of permanent partial disability for her right shoulder as well as the cervical and lumbar areas of her back and increased the awards of temporary total and temporary partial disability over the award granted by the determination order. The Referee also ordered the insurer to pay a bill for physical therapy and another for medication. The insurer asserts that all of the above is in error and that the $500 attorney's fee awarded to claimant's counsel was excessive. Claimant has cross-requested review contending that she was entitled to an award of permanent partial disability for her ankle and that the insurer should have been required to pay for medical reports obtained by claimant for litigation purposes.

We find that the Referee's order was correct with one exception. There is a discrepancy between the Referee's discussion of the temporary total disability issue in the text of the opinion and the award granted in the actual order portion of the Referee's opinion. On page 4 of the the Referee's order, after a somewhat confusing discussion of temporary partial disability, the order states:

> "Claimant was hospitalized on August 3, 1981 until August 9, 1981 by Dr. Campagna (Ex.32). She has not worked since. She should have been paid time loss during the hospitalization. She was to return to Dr. Campagna a month after discharge. On September 8, 1981 he noted claimant was not working and was about the same(Ex. 33). On October 6, 1981 he found her stationary (EX.35). Time loss should cease as of October 5, 1981."

In the order portion of the opinion, the Referee states:

> "In lieu of the Determination Order award of February 24, 1981 claimant is granted temporary total disability compensation inclusively from January 23, 1980 through October 12, 1980 and from August 3, 1981 through September 7, 1981..." (emphasis added)

Although claimant did not question this error on board review, the issue of time loss was raised by the insurer. In order to avoid any question in the future we feel obligated to correct this oversight. The correct date for terminating temporary total disability was October 5, 1981, as stated in the body of the Referee's order.

We find that the balance of the Referee's order is correct and that the attorney's fee awarded was reasonable. Claimant's contention that she is entitled to permanent partial disability for her ankle is not supported by the preponderance of medical evidence in the record. Claimant's second assertion on cross appeal is that the insurer should pay for the medical reports obtained by claimant for litigation purposes. We disagree. This question was most recently addressed by the Board in Daniel Ball, 34 Van Natta 100 (1982).

ORDER

The Referee's order dated April 2, 1982 is modified to award claimant temporary total disability from August 3, 1981 through October 5, 1981 rather than through September 7, 1981.

The remainder of the Referee's order is affirmed.

Claimant's attorney is awarded $250 as a reasonable attorney's fee for services rendered on Board review, to be paid by SAIF Corporation. This is in addition to the fees awarded by the Referee.

THERIEN M. THORNTON, Claimant
Emmons, Kyle et al., Claimant's Attorneys
Cowling, Heysell et al., Defense Attorneys

WCB 81-06392
October 29, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

The insurer requests review of Referee Quillinan's order which set aside its denial of claimant's back injury claim.

Some procedural confusion in this case may mask the relative simplicity of the issues. Claimant contends he injured his back at work on May 23, 1981. It is agreed that claimant injured or reinjured his back at home on May 28, 1981. The insurer argues that there really was no at-work injury on May 23, and, alternatively, that the May 28 incident constitutes an intervening and superceding injury that cuts off its responsibility for claimant's subsequent disability.

Whether there was an at-work injury on May 23 depends entirely on claimant's credibility. The Referee stated that her finding of an at-work injury was "supported by the medical evidence." However, there is no medical evidence that does other than repeat claimant's contentions about an at-work injury on May 23 and, as we have frequently noted: "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." Evelyn M. LaBella, 30 Van Natta 738, 743 (1981).

The Referee found claimant's testimony about an at-work injury on May 23 to be credible. There are certainly circumstances that would support a contrary finding: claimant did not seek medical attention after the alleged May 23 injury; claimant instead apparently continued working and was engaged in significant physical activity at home when he injured or reinjured his back five days later; and a co-worker testified that she did not note claimant in any physical distress between May 23 and May 28. On the other hand, however, the Referee noted that claimant seemed to be of "stoic temperament." On balance, despite some doubts about whether there was an at-work injury on May 23, we find no comfortable basis in the record for a contrary finding on the question of claimant's credibility.

Given that the compensable May 23 injury is thus established, we agree with and adopt those portions of the Referee's order which concludes that the May 28 at-home injury was not an intervening and superceding injury.

ORDER

The Referee's order dated April 15, 1981 is affirmed. Claimant's attorney is awarded $450 for services rendered on Board review, payable by the employer/insurer.

CAROLYN TURAN, Claimant
Emmons, Kyle et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

Own Motion 82-0186M
October 29, 1982
Own Motion Order

Claimant has asked the Board to exercise its own motion jurisdiction and reopen her claim for an injury sustained on October 24, 1969. Claimant's aggravation rights have expired.

The sole issue before us is whether claimant is entitled to compensation for temporary total disability. SAIF Corporation has advised us that they are paying her medical expenses at this time. Surgery has been recommended; however, the authorization of that surgery is up to SAIF to decide initially. ORS 656.245.

The evidence before us is silent concerning claimant's current work status. We have not been advised whether claimant was working prior to this most recent "aggravation", whether she was off work due to her industrial injury, or whether she has voluntarily retired. It is Board policy not to grant time loss benefits in cases where the worker has voluntarily removed herself from the labor market. Vernon Michael, 34 Van Natta 1212 (1982). We have asked claimant's attorney for information on claimant's current work status, but no information has been forthcoming. At this time, we conclude claimant's request for own motion relief must be denied.

IT IS SO ORDERED.

RALPH CASTRO, Claimant
Hansen & Wobbrock, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-11645
November 5, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

The SAIF Corporation requests review of Referee Gemmell's order in this enforcement proceeding that directed SAIF to comply with an earlier litigation order and assessed penalties and attorney's fees because of SAIF's noncompliance.

The issue is whether an appellate court decision finding a claim to be compensable imposes a duty on the industrial insurer to pay compensation under circumstances in which the appellate court's decision as expressed in an opinion is not followed by the issuance of a mandate.

The Court of Appeals has recently resolved this issue in favor of the position SAIF asserts in this case. SAIF v. Castro, 60 Or App 112 (1982).

ORDER

The Referee's order dated February 18, 1982 is reversed.

JORJINA J. HIX, Claimant
Allen & Vick, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-09515
November 5, 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.

JEFFREY A. ROBB, Claimant
Stoel, Rives et al., Claimant's Attorneys
Wolf, Griffith et al., Defense Attorneys

WCB 81-07594
November 5, 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.

ROBERT W. TEEL, Claimant
Malagon & Velure, Claimant's Attorneys
Schwabe, Williamson et al., Defense Attorneys

WCB 80-02438
November 5, 1982
Order of Remand

On review of the Board's order dated December 31, 1981, the Court of Appeals remanded to the Board for an award of a reasonable attorney's fee to claimant's attorney for services on Board review.

Now, therefore, claimant's attorney is awarded $350 as a reasonable attorney's fee pursuant to ORS 656.382(2).

IT IS SO ORDERED.

DARELL YARDLEY, Claimant
Doblie & Francesconi, Claimant's Attorneys
Rankin, McMurry et al., Defense Attorneys
Horne & Tenenbaum, Defense Attorneys

WCB 82-01323 & 82-03085
November 5, 1982
Order of Dismissal

A request for review, having been duly filed with the Workers Compensation Board in the above-entitled matter by the insurer, 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.

FRED GASCON, Claimant
Flaxel, Todd & Nylander, Claimant's Attorneys

Own Motion 82-0269M
November 9, 1982
Own Motion Order

Claimant, by and through his attorney, has requested that the Board exercise its own motion authority and reopen his claim for an injury sustained on August 30, 1971. Claimant's aggravation rights have expired. Attached to his request are numerous medical reports in support thereof. The insurer has been paying for claimant's medical expenses to date.

We are persuaded that the medical reports of Dr. Wilson support the fact that claimant's condition is worsened and claimant is entitled to time loss benefits. Although the record is not clear with respect to claimant's work status prior to this "aggravation", we are satisfied that claimant's inability to work is due to his back condition, rather than a voluntary retirement from the labor force. See Vernon Michael, 34 Van Natta 1212 (1982).

When a claim is reopened on the Board's own motion, in those instances in which an attorney has been instrumental in accomplishing the reopening, claimant's attorney is entitled to an attorney's fee for effecting reopening; however, the Board has previously held that the attorney's fee is not payable until the time that the Board closes the claim by an Own Motion Determination. Hazel Stanton Lovell, 31 Van Natta 69 (1981). In our interpretation of OAR 438-47-070(2), the Board's administrative rule governing attorney's fees under these circumstances, the Board considered whether attorney's fees in own motion claims should be awarded both at the time of opening and the time of closure or whether it was more appropriate to award a fee at one stage of the proceedings. We concluded that, because the rule refers to "an increase in compensation", and a claimant's entitlement to receive compensation is determined at the time of an own motion determination order, the attorney's fee should also be determined at the time of own motion closure. Consequently, in Lovell, the Board held that counsel's request for an attorney's fee at the time of own motion reopening was premature.

The Board modified its holding in Lovell in Virginia M. Schmidt, WCB Case No. 80-07561, ___ Van Natta ___ (December 17, 1981), by holding that in those instances in which a request for own motion reopening is referred to the Hearings Division pursuant to OAR 436-83-820, and the claimant's attorney is, as a result of a hearing, instrumental in obtaining reopening in behalf of the claimant, counsel is entitled to an attorney's fee at the time of own motion reopening.

> "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." Virginia M. Schmidt, supra.

After almost a year since deciding Schmidt and 1 1/2 years since deciding Lovell, experience has shown that deferring an allowance of an attorney's fee on reopening until the time of own motion closure is a less than satisfactory procedure.

By many of the Board's own motion determination orders, a claimant is awarded no permanent disability. When an attorney has been instrumental in accomplishing reopening in the first instance, under Lovell the attorney has not received any remuneration for obtaining temporary total disability benefits in behalf of the claimant. When the claim is ready for closure, and the Board awards no permanent disability by its own motion determination, the claimant has received all compensation to which he or she is entitled for purposes of that claim reopening; and when the Board awards an attorney's fee on closing, the fee is allowed as a percentage of the temporary disability compensation the claimant already has received. It is a fiction to assume that a worker who has been receiving temporary total disability benefits for a period of time in lieu of his or her regular income is in a position to pay an attorney a fee pursuant to the terms of the Board's own motion determination order. See ORS 656.388(3), OAR 438-47-010(5). Any attorney's fee allowed by the Board's order would, therefore, be the direct responsibility of the claimant. This runs contrary to the statutory scheme for allowing claimants' attorneys a fee payable out of the compensation awarded to a claimant, which the attorney has been instrumental in obtaining. ORS 656.386(2).

The practical effect of Lovell is that only those attorneys representing own motion claimants who receive an award of permanent disability are compensated for their services. Attorneys representing claimants who have received temporary disability compensation, but no permanent disability, often may not receive any remuneration, in spite of the fact that they have been instrumental in obtaining additional compensation in behalf of the claimant.

In light of our experience with the procedure instituted by Lovell, finding that it has in some instances produced unfair results, we have reconsidered our interpretation of OAR 438-47-070(2). We now find that when a claim is reopened by the Board on its own motion, for payment of temporary total disability benefits, this constitutes "an increase in compensation" within the meaning of that rule; therefore, claimants' attorneys are entitled to be compensated for those services rendered in connection with own motion reopening at the time of own motion reopening. It is in the best interest of own motion claimants to interpret the Board's rules in such a way as to lessen the probability of an unfair result in all instances.

The Board's rules governing attorney's fees include a rule which allows an attorney to receive a fee if the attorney has been instrumental in obtaining compensation in behalf of a claimant and there has been no hearing. OAR 438-47-015. That rule provides for a fee to be determined by a Referee in a summary proceeding. The Board, in the exercise of its own motion authority, is equally capable of determining an appropriate fee to be awarded claimants' attorneys when they are instrumental in effecting claim reopening.

When warranted, we will award a reasonable attorney's fee payable out of a worker's temporary total disability compensation as part of an own motion order reopening a claim. The attorney's fee allowed by the Board will be based upon the efforts expended by counsel in behalf of the claimant, as well as the results obtained. OAR 438-47-010(2).

Our holding in Lovell, that attorneys entitled to a fee for accomplishing own motion reopening do not receive a fee until the Board issues an order closing the claim, is hereby overruled.

Claimant's attorney in this case has been instrumental in establishing that claimant is entitled to have his claim reopened pursuant to ORS 656.278. We have considered the efforts expended by counsel in marshalling some of the medical evidence forming the basis for our decision to reopen the claim, as well as counsel's services in properly bringing claimant's request for own motion relief before the Board. Counsel is entitled to a reasonable fee pursuant to OAR 438-47-070(2).

ORDER

Claimant's claim arising out of his August 30, 1971 compensable injury is reopened as of July 28, 1981. Claimant shall be paid compensation for temporary total disability as of that date and until claim closure pursuant to ORS 656.278. Claimant's attorney is allowed a reasonable attorney's fee in an amount equal to 25% of the increased compensation awarded by this order, not to exceed $250.

FRED GASCON, Claimant
Flaxel, Todd & Nylander, Claimant's Attorneys
Cowling & Heysell, Defense Attorneys

Own Motion 82-0269M
December 3, 1982
Own Motion Order on Reconsideration

The Board issued an Own Motion Order dated November 9, 1982 which reopened claimant's claim as of July 28, 1981. The employer has requested the Board to reconsider its order, especially focusing on reports submitted by Dr. Yamodis. The employer felt that the Board placed undue importance on reports from Dr. Wilson. We refer the employer to a letter written by Dr. Wilson in November, 1981, which states that he and Dr. Yamodis were in agreement that claimant's condition at that time was connected to his industrial injury. The employer itself wrote a letter to Dr. Wilson which stated they had misinterpreted the report of Dr. Yamodis (based on a discussion with Dr. Yamodis) and that he actually agreed with Dr. Wilson. As a result of this misunderstanding, the employer was then willing to assume responsibility for claimant's current medical expenses. We are not persuaded by the employer's request for reconsideration that our decision should be changed.

Claimant has responded to the employer's request asking that we, at the same time, consider granting him time loss benefits back to April 26, 1978. We, again, are not persuaded that this is warranted by the evidence before us and would deny claimant's request.

The employer has also requested that we close claimant's claim as of September 4, 1981 based on a report by Dr. Yamodis. We decline to do so.

ORDER

After reconsideration, the November 9, 1982 Own Motion Order is reaffirmed and republished.

IT IS SO ORDERED.

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

WCB 80-01476
November 10, 1982
Republished Order on Review & Order Denying Remand

Reviewed by the Board en banc.

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

We affirm and adopt the Referee's order. On claimant's request for the Board to remand for consideration of newly discovered evidence, we deny on the ground that claimant has failed to provide the information required by Robert A. Barnett, 31 Van Natta 172 (1981).

There is a pending request for own motion relief involving some of the same issues involved in this case on which we, at the request of claimant's attorney, suspended action pending this decision in this case. Claimant's attorney is now asked to advise us how he wishes us to proceed.

ORDER

The Referee's order dated November 7, 1980 is affirmed.

GERRY E. ELLER, Claimant
Doblie & Francesconi, Claimant's Attorneys
Wolf, Griffith et al., Defense Attorneys

WCB 81-08344
November 10, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

Claimant has requested review of that portion of Referee St. Martin's order which allowed the insurer an offset against claimant's award of permanent disability for time loss paid to claimant between the date claimant became medically stationary and the date time loss payments terminated pursuant to the August 28, 1981 Determination Order. Claimant contends that the insurer should be estopped from asserting the offset because it failed to comply with claimant's request to be notified in a timely manner of the date the insurer would recommend for a medically stationary date. Claimant also contends that penalties and an attorney's fee should be awarded because of the insurer's conduct in the processing of this claim.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated March 12, 1982 is affirmed.

MABEL A. GRIFFITH, Claimant
Gatti & Gatti, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-04743
November 10, 1982
Order Denying Reconsideration

The SAIF Corporation, by letter of November 5, 1982, has requested the Board to reconsider its Order On Review in the above-entitled case or, alternatively, to abate the order pending reconsideration.

SAIF contends that the Board incorrectly concluded that the claimant had established a work-related worsening of the symptoms of her underlying psychological condition rather than a worsening of the underlying condition itself. SAIF also seems to argue that a temporary worsening of an underlying condition is not compensable. With regard to the latter, if that is what SAIF is arguing, it is clearly incorrect. Stupfel v. Hines Lumber Co., 288 Or 39 (1979). With regard to the problem of differentiating between a worsening of a psycholgocial condition versus increased symptomatology, we believe that we adequately discussed the problem in our order by citation to Webster v. SAIF, 52 Or App 957 (1981), and concluded that claimant had established a worsening of her underlying condition rather than merely an increase in symptoms.

Concerning the issue regarding SAIF's Motion To Remand for another hearing due to the Referee's perceived bias to Dr. Stolzberg, it is correct in assuming that the motion is denied. Any concern regarding the Referee's possible bias toward Dr. Stolzberg seems to be a matter cured by the Board's de novo review power and is, therefore, not sufficient grounds for a new hearing.

SAIF's request for reconsideration is therefore denied.

IT IS SO ORDERED.

ROBERT A. LUCAS, Claimant
SAIF Corp Legal, Defense Attorney

Own Motion 82-0244M
November 10, 1982
Own Motion Order Referral for Hearing

Claimant, by and through his treating physician, requested the insurer to authorize medical treatment that in the physician's opinion is causally related to claimant's December 5, 1956 injury. SAIF submitted all of the medical information to the Board by memorandum dated September 16, 1982, opposing own motion reopening and payment of any other benefits to claimant, its contention being that claimant's current complaints are due to the normal aging process and subsequent trauma.

The information presently before the Board indicates that claimant has voluntarily left the labor market. He is not, therefore, entitled to claim reopening pursuant to ORS 656.278. Vernon Michael, 34 Van Natta 1212 (1982).

Claimant's claim for further medical treatment is not, however, a proper subject for consideration by the Board pursuant to ORS 656.278. Disputes over entitlement to claimed medical benefits fall under ORS 656.245. Subsection 1 of that statute provides in part: "The duty to provide such medical services continues for the life of the worker." Subsection 2 of that statute provides in part: "If the claim for medical services is denied, the worker may submit to the Board a request for hearing pursuant to ORS 656.283." Although it is quite clear that claims for medical services must be formally accepted or denied notwithstanding the expiration of a claimant's aggravation rights, it appears that this claim for medical services neither has been accepted nor denied.

We, therefore, construe the material that has been submitted to us ostensibly under our own motion authority pursuant to ORS 656.278 to be, in addition, a request for hearing under ORS 656.283. This request for hearing is hereby referred to the docket clerk, who is directed to set a preferential hearing, and the Referee is directed to take evidence on the issues of claimant's entitlement to medical services and penalties/attorney's fees for failure to accept or deny this claim for medical services. The Referee shall then issue an order pursuant to ORS 656.289.

ORDER

Claimant's request for own motion relief is denied at this time. Claimant's request for hearing is referred to the Hearings Division for processing and scheduling as set forth above.

EINAR SATHER, Claimant
Michael B. Dye, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-07282
November 10, 1982
Order on Review

Reviewed by Board Members Ferris and Lewis.

The SAIF Corporation requests review of Referee Braverman's order which found claimant to be permanently and totally disabled. The only issue for review is the extent of claimant's disability.

We adopt the Referee's findings of fact as our own.

The Referee apparently concluded that, although the claimant was not permanently and totally disabled from a medical standpoint, he could not competitively engage in the labor market in any regular, gainful employment. The Referee found that the record established that claimant was motivated to return to work, but was precluded from doing so by his physical limitations. He was found to be relieved of the burden imposed by ORS 656.206(3), under Butcher v. SAIF, 45 Or App 313 (1980). The Referee found claimant to be permanently and totally disabled as of July 3, 1980.

We disagree with the Referee's conclusion finding claimant to be permanently and totally disabled. From a medical standpoint, we agree with the Referee's apparent conclusion that claimant is not permanently and totally disabled. The Orthopaedic Consultants assessed claimant's total loss of function as moderately severe,

and felt that he would be able to perform light or sedentary work, so long as overhead work was not required. Dr. Nash, in his letter of June 23, 1980 stated that he agreed with that rating. Dr. Fry stated that he agreed with the diagnosis of the Orthopaedic Consultants, and agreed with most of their findings and recommendations, although he was pessimistic about claimant's chances of returning to work, unless he found a job he was motivated to perform and had flexibility of scheduling. The preponderance of the medical evidence does not indicate that claimant is permanently and totally disabled from a medical standpoint.

As noted by the Referee, a claimant may also establish permanent total disability by less than total physical incapacity plus non-medical conditions which together result in permanent total disability. Wilson v. Weyerhaeuser, 30 Or App 403 (1977). The record establishes that claimant is only 40 years of age and has his GED. The claimant attended an industrial welding school in arc and gas welding and attended Central Oregon Community College for two and a half terms training as a forestry technician. He completed five months training in small engine repair in 1979, receiving training in the repair of mowers, motorcycles, outboard motors and chain saws, with no apparent problems. Claimant has been employed in numerous occupations in the past ranging from farm work, survey crew experience and welder, to self-employment in the scrap metal business. Claimant's intelligence is rated in the bright-normal range.

Unlike the Referee, we do not find that claimant is relieved of the requirements of ORS 656.206(3) by Butcher. We do not believe that in this case, the doctors' statements taken together with claimant's age, education, work experience and mental capacity indicate that it would be futile for him to attempt to make a reasonable effort to seek work. Although claimant has participated in vocational rehabilitation, his efforts to seek reasonable and suitable employment have been very minimal, as evidenced in the reports generated by the Vocational Rehabilitation Division during the period July 7, 1980 through December 2, 1980.

We do not believe that claimant has demonstrated that his physical impairment is so severe, when combined with his favorable social/vocational factors, that he has established himself as permanently precluded from gainful employment in the labor force. Based on the record before us and utilizing the guidelines set forth in OAR 436-65-600 et seq., we conclude that claimant is entitled to an award of 70% unscheduled disability for his loss of wage earning capacity. This award is in lieu of and not in addition to prior awards.

ORDER

The Referee's order dated March 24, 1982 is modified.

Claimant is granted 70% unscheduled permanent partial disability in lieu of and not in addition to prior awards. Claimant's attorney is allowed a fee of 25% of the increased compensation granted by this order over and above the Determination Order dated July 29, 1980, not to exceed $2,000.

LEO R. BEHNKE, Claimant
Malagon & Velure, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 79-07837
November 12, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

The SAIF Corporation requests review of Referee Mannix's order which: (1) affirmed those portions of SAIF's March 10, 1981 denial which denied the compensability of claimant's bilateral hearing loss claim; (2) reversed the remainder of that denial and found claimant's blackout spells and tinnitis to be compensable; (3) reversed SAIF's May 11, 1981 denial in its entirety and found claimant's cervical condition and associated medical treatment to be compensable; and (4) set aside the Determination Order of January 24, 1980 as premature, and remanded the claim to SAIF for further processing.

SAIF contends that the Referee erred in admitting the March 3 and March 25, 1981 reports of Dr. Smith into evidence on the ground that these exhibits were not submitted at least ten days prior to the hearing as generally required by OAR 436-83-400(3). SAIF also argues that the Referee erred in finding the Determination Order of January 24, 1980 to have been issued prematurely, and in finding the claimant established that his conditions were the result of his industrial injury.

We adopt the Referee's findings of fact as our own.

We agree with SAIF's contention that it was error on the Referee's part to admit the two March, 1981 exhibits written by Dr. Smith. OAR 436-83-400(3) states:

> "As soon as practicable and not less than 10 days prior to the hearing each party shall file with the assigned referee and provide all medical reports and all other documentary evidence upon which the party will rely except that evidence offered solely for impeachment need not be so filed and provided."

In Minnie Thomas, 34 Van Natta 40 (1982), we confronted an essentially similar set of factual circumstances. In that case the employer presented an exhibit for admission at the time of the hearing. The employer, although having nearly six months to do so, did not solicit the exhibit until shortly before the hearing and received it 17 days prior to the hearing. No excuse was offered by the employer for its failure to secure the report earlier or to serve a copy of it on claimant's counsel prior to the hearing. We found that the offer by the employer to make the author of the exhibit available for post-hearing deposition did not cure the violation of the 10-day rule. We concluded that the Referee's refusal to admit the exhibit was eminently correct.

We find Thomas controlling here. Claimant's counsel was in receipt of the disputed exhibits for over five months prior to the time of the hearing. He failed to present them to SAIF prior to the hearing and offered no excuse for that failure. The Referee,

although noting he would normally not allow admission under these circumstances, stated that he needed the additional reports since none of the previously submitted reports were very definite in nature. The Referee allowed the hearing record to remain open for an additional 45 days to allow SAIF to depose Dr. Smith and to submit additional documentary evidence. As SAIF correctly points out, the Referee's solution was not adequate to cure the defect in that SAIF was denied an opportunity to present rebuttal evidence from physicians who could have examined claimant at or near the time of the generation of the disputed reports. We conclude the March 3 and March 25, 1981 reports of Dr. Smith are inadmissible and have not considered them in our review of this case.

We turn to SAIF's contention that the Referee erred in finding the Determination Order of January 24, 1980 to have been issued prematurely. The Referee found the claim to have been prematurely closed on the basis that the medical reports concerning claimant's medical status and ability or inability to work waxed or waned over the course of time, and that his condition was punctuated by intermittent ups and downs. Generally speaking, that may indeed be the case; however, it is clear that by the time of the issuance of the contested Determination Order, claimant had achieved a medically stationary status and thereafter remained stationary for several months. On September 10, 1979 Dr. Campagna reported: "He has been released to his usual and customary work. Mr. Behnke's condition related to his claim is medically stationary." Dr. Campagna indicated again on November 11, 1979 that claimant was medically stationary. Claimant was examined on November 13, 1979 by Dr. Raaf, who also found him to be medically stationary. There are no contrary medical opinions in the record concerning claimant's condition at that time and it was not until March 24, 1980 that claimant returned to Dr. Campagna complaining of increased symptomatology. We, therefore, find that the claim was properly closed by Determination Order of January 24, 1980, and that claimant's return to Dr. Campagna in March, 1980 constituted an aggravation of his condition.

The final issue for review concerns the basic compensability of claimant's condition. SAIF contends that there is no evidence supporting the compensability of claimant's cervical condition, blackout spells and tinnitus. We agree with the Referee with regard to claimant's cervical problems and blackout spells. Dr. Campagna's basic diagnosis has been post-traumatic aggravation of cervical spondylosis at C5-6 and C6-7. Dr. Saez appears to be in agreement with that diagnosis. In his report of October 10, 1979 Dr. Campagna stated: "His present problems are related to or the result of his injury of July 25, 1978." Dr. Raaf concluded that claimant sustained a muscle and ligament strain superimposed on spondylosis. The admissible exhibits authored by Dr. Smith also support Drs. Campagna and Saez's diagnosis. In his February 25, 1981 report Dr. Smith related all of claimant's problems to a severe exacerbation of his cervical spondylosis. We agree with the Referee that the evidence, as a whole, supports the compensability of claimant's cervical problems as well as his blackout spells.

With regard to claimant's tinnitus condition, however, we conclude that the evidence does not support compensability of that condition. The Referee found that the history of the claim

supported his conclusion and that there was no medical opinion evidence directly against the compensability of that condition. We find that to be a misstatement of the proper burden of proof. See Riutta v. Mayflower Farms, Inc., 19 Or App 278 (1974). Dr. Smith does appear to relate claimant's tinnitus to his industrial injury and resultant cervical difficulties. We note that following surgery, most of claimant's problems did resolve. This would seem to be consistent with Dr. Smith's theory. However, claimant's tinnitus problems failed to resolve. Thus Dr. Smith's opinion relating that condition to claimant's cervical problems, which were a result of the injury, seems questionable. Therefore, we rely primarily on the opinion of Dr. Lee, an otolaryngologist. Dr. Lee stated that he was unable to determine any relation between claimant's injury and the tinnitus. Dr. Lee related the problem to cochlear abnormality. We conclude that claimant has failed to establish that his tinnitus condition is related to his industrial injury.

ORDER

The Referee's order dated November 25, 1981 is affirmed in part and reversed in part. Those portions of the order which set aside the Determination Order of January 24, 1980 as premature are reversed. Those portions of the order which set aside SAIF's denial of compensability of claimant's tinnitus condition are also reversed.

The remainder of the Referee's order is affirmed and the claim is remanded to SAIF for the provision of benefits beginning on March 24, 1980. Claimant's attorney is entitled to a fee, payable by SAIF, of $300 for services on Board review for successfully defending the Referee's order with regard to the denial of May 11, 1981.

NORMAN JAGER, Claimant
SAIF Corp Legal, Defense Attorney

Own Motion 82-0209M
November 12, 1982
Own Motion Order

Claimant, by and through his treating physician, requested the insurer to authorize medical treatment that in the physician's opinion is causally related to claimant's April 19, 1976 industrial injury. The insurer submitted all of the medical information to the Board by a memorandum dated August 5, 1982. The insurer contends that claimant's current condition and the need for surgery is not related to the 1976 compensable injury.

The materials submitted by the insurer indicate a dispute over entitlement to medical benefits under ORS 656.245. Subsection (1) of that statute provides in part: "If the claim for medical services is denied, the worker may submit to the Board a request for hearing pursuant to ORS 656.283." Although it is thus quite clear that claims for medical services must be formally accepted or denied notwithstanding the expiration of a claimant's aggravation rights, it would appear that this claim for medical services has neither been accepted nor denied.

We, therefore, construe the material that has been submitted to us ostensibly under our own motion authority pursuant to ORS 656.278 to actually be a request for hearing under ORS 656.283. The docket clerk is directed to set a preferential hearing and the Referee is directed to take evidence on the issues of entitlement to medical services and penalties/attorney's fees for failure to issue an appealable order on those issues pursuant to ORS 656.295, whether to grant claimant compensation for temporary total disability under its own motion authority.

IT IS SO ORDERED.

ROBERT J. LYNN, Claimant
Des Connall, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-05743
November 12, 1982
Order on Review

Reviewed by Board Members Lewis and Ferris.

Claimant requests Board review of Referee Williams' order which affirmed the SAIF Corporation's denial of his claim for an occupational disease involving his right hip, right knee and low back. Claimant contends he has proven the compensability of his case under the rationale presented in Weller v. Union Carbide Co., 288 Or 27 (1979).

We accept the facts as recited by the Referee in his order. Douglas S. Chiapuzio, 34 Van Natta 1255 (1982), sets forth the criteria used to reach a decision in this case. We must first consider claimant's claim in light of the test in Weller, supra, especially placing emphasis on the second criterium, that being whether claimant's underlying disease has been worsened by the job activity. We find the preponderance of the evidence indicates it has not. Admittedly, however, a statement made by Dr. Sloop, when viewed alone could lead one to an opposite conclusion: ". . . his present job does materially aggravate his underlying condition."

Assuming, arguendo, that claimant has fulfilled all the criteria in Weller, his condition must then be considered in light of SAIF v. Gygi, 55 Or App 570 (1982). Chiapuzio, supra. The most claimant has been able to show is that his work activity was a material contributing cause of his disability. Claimant is severely obese, has diabetes and suffered a traumatic automobile accident to his right hip in 1968 which resulted in osteoarthritis. We are not persuaded that claimant has shown his work was the major contributing cause of his current disability.

ORDER

The Referee's order dated April 30, 1982 is affirmed.

WILLIAM M. STILL, Claimant
Emmons, Kyle et al., Claimant's Attorneys
Lindsay, Hart et al., Defense Attorneys
SAIF Corp Legal, Defense Attorney

WCB 80-03041 & 80-01909
November 12, 1982
Order on Further Consideration

The SAIF Corporation has requested reconsideration of the Board's Order on Reconsideration entered herein on October 29, 1982.

Previously, the Board issued its Order on Review on August 18, 1982. Peter Kiewit & Sons and its insurer requested reconsideration and the Board entered its Order of Abatement herein on September 15, 1982. The Board issued its Order on Reconsideration on October 28, 1982. By letter dated November 8, 1982, the SAIF Corporation requested reconsideration of the Order on Reconsideration.

In our initial review of this case and our review on reconsideration, we took into account the evidence and the arguments the SAIF Corporation relies upon. We are not persuaded to modify our Order on Reconsideration.

ORDER

On SAIF Corporation's request for reconsideration of the Board's October 29, 1982 Order on Reconsideration, the Board adheres to its former order.

CAROLYN TURAN, Claimant
Emmons, Kyle et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

Own Motion 82-0186M
November 12, 1982
Own Motion Order

The Board issued an Own Motion Order on October 29, 1982 which denied claimant's request for own motion relief based on the fact that the available evidence indicated that claimant had voluntarily retired from the labor market. Claimant's attorney has submitted new evidence that indicates claimant was actually attempting to participate in a vocational rehabilitation program in 1981, just prior to her most recent "aggravation," and that she was not retired. We have reviewed the evidence and agree that claimant is entitled to compensation for temporary total disability. Claimant came under medical treatment sometime in September, 1981. However, the first medically verified indication that claimant was temporarily totally disabled is in a May 28, 1982 letter of Dr. Gerstner. We conclude that her time loss benefits should commence on May 28, 1982 and continue until closure is authorized pursuant to ORS 656.278. Claimant's attorney is entitled to an attorney fee equal to 25% of the increased compensation claimant is granted by this order, not to exceed $400.

IT IS SO ORDERED.

REBON ARMSTRONG, Claimant
Richard Fowlkes, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-02568 & 81-02567
November 16, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

SAIF Corporation requests review of that portion of Referee Neal's order which set aside SAIF's denial of claimant's aggravation claim.

While we do not disagree with any of the Referee's findings of fact regarding claimant's several injuries and diseases, for purposes of this case the essential facts are as follows.

September 6, 1978: Claimant suffered a compensable cervical injury.

September 4, 1980: A Referee signed a stipulation resolving all issues that were raised or could have been raised in claimant's then pending request for hearing on the Determination Order that closed his cervical injury claim.

October 2, 1980: Claimant was hospitalized and, on October 13, 1980, Dr. Ordonez performed a cervical foraminotomy for claimant's cervical spondylosis. This is the basis of claimant's aggravation claim.

There are two issues: (1) whether the condition for which surgery was performed in October of 1980 was causally related to claimant's compensable injury in September of 1978; and (2) whether claimant established that his cervical condition worsened after the last award of compensation in September, 1980. Claimant's dilemma, as we view this case, is that his proof of causal relationship also proves a lack of any worsening in his condition.

We find the most complete and persuasive analysis of the causal relationship between the 1978 injury and the 1980 surgery to be stated in two reports read in conjunction, Dr. Snodgrass' report dated April 20, 1981 (Ex. 172) and Dr. Grewe's report dated April 5, 1982 (Ex. 178). Comparing 1976, i.e., two years pre-injury, and 1980, i.e., two years post-injury, myelograms, Dr. Grewe concluded: "Central bar defects and lateral defects at C4-5 and C6-7 were . . . pretty much the same." Expressing the same thought, Dr. Snodgrass first notes that claimant's 1980 surgery was "for a problem which existed prior to his 1978 injury." However, Dr. Snodgrass, who had reviewed all of the medical records, continued:

> ". . . there is still a problem. I do not find any reports indicating any symptoms in the area of the neck prior to [the 1978] injury. [Thus] you are faced with the problem of continuous complaints in the same general area since his injury. . . If he did, indeed, have complaints referrable to the neck-shoulders, etc., only subsequent to his September 1978 injury, then I think some relationship with that injury would have to be assumed."

From claimant's testimony and the rest of the voluminous medical record, we conclude that claimant's cervical spondylosis, although apparent on a 1976 myelogram, was asymptomatic prior to his 1978 cervical injury and was basically continuously symptomatic following his 1978 injury. The temporal relationship theory espoused by Dr. Snodgrass is not necessarily conclusive. Compare Joe McKenzie, 31 Van Natta 101 (1981) aff'd 57 Or App 426 (1982), with Edwards v. SAIF, 30 Or App 21 (1977). But in this case we are persuaded by Dr. Snodgrass' analysis.

That analysis, however, is premised on "continuous complaints" in the neck-shoulder area between claimant's injury in 1978 and surgery in 1980. We have found this premise to be otherwise supported by the record. How then can claimant show his condition worsened as required by the aggravation statute in the short interval between the stipulated order signed by a Referee in early September of 1980 and claimant's hospitalization and surgery in October of 1980?

We conclude that claimant's cervical condition simply did not worsen in this period of about one month. The myelogram findings remained the same. Claimant's symptoms remained the same. All that really changed was claimant's physician; and Dr. Ordonez decided to proceed with surgery after claimant's prior physicians had tried two years of conservative treatment without success.

This case could be viewed as a premature closure problem, in that claimant's 1978 injury aggravated or accelerated his cervical spondylosis, which was not stationary at the time of claim closure. See William Bunce, 33 Van Natta 546 (1981). But we do not think the Bunce approach offers claimant any aid in this case. Claimant not only failed to raise the issue of premature closure, he affirmatively participated in the September, 1980 stipulation granting an award for permanent disability that was only appropriate to award at that time if claimant was in fact stationary.

Notwithstanding our conclusion that claimant has not proven his cervical condition worsened after the last award of compensation within the meaning of ORS 656.273, it does not follow that claimant is not entitled to any form of compensation benefits. ORS 656.245 provides for ongoing medical services for the consequences of a compensable injury. We discussed the interrelationship of ORS 656.273 and 656.245 in Mary Ann Hall, 31 Van Natta 56 (1981):

> "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. . . [T]his 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."

See also Willard B. Evans, 34 Van Natta 490 (1982).

From our findings stated above, that claimant's 1980 surgery was causally related to his 1978 injury, it follows that claimant is entitled to have this medical treatment provided under ORS 656.245. However, from our findings stated above, that claimant has not proven his cervical condition worsened between September 4, 1980 and October 2, 1980, it follows that, contrary to the Referee's conclusion, claimant is not entitled to claim reopening pursuant to ORS 656.273.

We affirm the Referee's award of a fee to claimant's attorney, although the basis for this award is for prevailing on a denial of medical services rather than for prevailing on a denial of aggravation reopening.

ORDER

The Referee's order dated April 30, 1982 is affirmed in part and reversed in part. Those portions that ordered claimant's claim reopened on the basis of aggravation pursuant to ORS 656.273 are reversed and in lieu thereof, the SAIF Corporation is ordered to pay for claimant's hospitalization and surgery of October, 1980 pursuant to ORS 656.245. The remainder of the Referee's order is affirmed.

BRENT BENNETT, Claimant
James C. Sims, Claimant's Attorney
Keith Skelton, Defense Attorney
Earl M. Preston, Defense Attorney

WCB 81-09721 & 81-09722
November 16, 1982
Order on Review

Reviewed by Board Members Lewis and Ferris.

Liberty Mutual Insurance Company and its insurer Hewlett-Packard have requested review of those portions of Referee Mongrain's order which found that claimant had sustained an aggravation rather than a new injury, and awarded attorney's fees in the amount of $650 payable by Liberty Mutual.

We adopt the Referee's findings of fact as our own. This case involves primarily a responsbility issue between the "aggravation" employer/insurer (Hewlett-Packard and Liberty Mutual) and the "new injury" employer/insurer (City of Medford and its insurer the SAIF Corporation).

Liberty Mutual vigorously contends that under a line of cases culminating in the Supreme Court's decision in Bracke v. Baza'r, Inc., 293 Or 239 (1982) it is now the law that the subsequent employer becomes responsible for a condition if the work exposure there could have caused the injury.

> "We believe that is a misstatement of the Court's holding in Bracke. The 'could have' language relates to the rule of proof under Inkley v. Forest Products Co., 288 Or 337 (1980) where it is unclear whether the the subsequent employment contributed at all to the condition which is disabling the worker. The 'could have' test is not used as a defense by one employer/insurer against another employer/insurer in the assignment of liability."

We believe the Court in Bracke made it quite clear that the determination of responsibility in injury cases depends on determining whether a new injury occurred, not whether a new injury could have occurred. See particularly the Court's discussion at 293 Or 245. The test of whether a new injury occurred is the "last injurious exposure" standard enunciated and applied in numerous appellate and Board decisions.

We are not inclined to rehash the evidence in this case relating to the aggravation versus new injury issue. Suffice it to say that we agree with the Referee and therefore affirm and adopt that part of his order relating to the responsibility issue.

Liberty Mutual also questions whether the Referee correctly assessed an attorney's fee against it. Liberty Mutual points out that it denied responsibility only and neither denied compensability nor requested claimant's presence at the hearing. Although an order issued pursuant to ORS 656.307 in this case, SAIF subsequently denied compensability and the order was revoked. At the hearing, claimant's counsel stated:

> "Mr. Bennett is not particular about who pays his benefits. The main thing for us today is to establish his entitlement."

Under these circumstances, claimant's attorney is not entitled to an attorney's fee at the hearing level for services rendered in connection with the issue of responsibility. OAR 438-47-090. Cf. Robert Heilman, WCB Case Nos. 81-02750, 81-02751, 34 Van Natta 1487 (October 15, 1982).

SAIF, however, had denied compensability, and claimant, therefore, was required to appear and seek reversal of that denial. The Referee's order does not refer to SAIF's denial of compensability; it merely affirms the initial denial of responsibility. However, it is clear from the Referee's opinion that he rejected SAIF's contention that some off-the-job incident was the cause of claimant's exacerbation. The Referee should have specifically set aside SAIF's denial of compensability. We regard this as an oversight. Since the claimant prevailed in having a denial set aside, he is entitled to an insurer-paid attorney's fee. ORS 656.386(1). This fee is payable by SAIF, not by Liberty Mutual.

Claimant's attorney is not entitled to an attorney's fee on Board review. Robert Heilman, supra.

ORDER

The Referee's order dated April 7, 1982 is modified. SAIF's denial dated November 25, 1981 is set aside. The attorney's fee awarded in part (4) of the Referee's order shall be paid by SAIF, not Liberty Mutual. Except as modified, the Referee's order is affirmed.

ALBERT BLANCHARD, Claimant
Kirkpatrick et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 82-00011
November 16, 1982
Order on Review

Reviewed by Board Members Lewis and Ferris.

The claimant requests review of Referee's Leahy's order which found claimant not entitled to time loss from September 15, 1981 to February 8, 1982. This period of time is the interval after claimant was found medically stationary on September 15, 1981 and before he began a vocational rehabilitation program on February 8, 1982.

The claimant contends: (1) that ORS 656.268(1), regarding payment of temporary disability compensation should be read to prohibit termination of those payments while a claimant is awaiting entry into a vocational rehabilitation program even though the claimant is medically stationary, and (2) that OAR 436-61-020(6)(c) requires that workers are to be referred to the Field Services Division after 90 days of consecutive time loss for vocational assistance, but that claimant was not referred until December 2, 1981, even though he had been receiving consecutive time loss since April 17, 1980.

The insurer responds: (1) that "a worker whose condition is medically stationary, but inactive or employed at less than full potential while awaiting vocational rehabilitation, is not entitled to temporary disability benefits" citing Austin v. SAIF, 48 Or App 7, 10-11 (1980), and (2) that claimant had been referred to the Field Services Division three times prior to the December, 1981 referral. Prior referrals were made in April, 1976, March, 1978, and August, 1978, but the claimant failed to show any interest in rehabilitation. The claimant was informed in May, 1978 that he should contact the Division if he wanted to avail himself of their services.

We know of no case law that permits a reading of ORS 656.268(1) as the claimant suggests. In fact, Austin v. SAIF, supra, has specifically held to the contrary (see especially footnote 1 inter alia). Therefore, we affirm the Referee's order finding that claimant is not entitled to time loss from September 15, 1981 to February 8, 1982.

We have no jurisdiction to decide claimant's second contention regarding the insurer's failure to timely refer the claimant to the Field Services Division for vocational assistance. Violations of OAR 436-61-020(C) may be penalized by the Director of the Worker's Compensation Department, pursuant to OAR 436-61-981.

ORDER

The Referee's order dated February 24, 1982 is affirmed.

JAMES E. FOSSUM, Claimant
Richardson et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-07704
November 16, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

SAIF Corporation requests review of Referee Menashe's order in this enforcement proceeding that directed SAIF to comply with an earlier litigation order and assessed penalties and attorney fees because of SAIF's noncompliance.

The issue is whether an appellate court decision finding a claim to be compensable imposes a duty on the industrial insurer to pay compensation under circumstances in which the appellate court's decision as expressed in an opinion is not followed by the issuance of a mandate.

The Court of Appeals has recently resolved this issue in favor of the position SAIF asserts in this case. SAIF v. Castro, 60 Or App 112 (1982.)

ORDER

The Referee's order dated April 23, 1982 is reversed.

JAMES W. MEAD, Claimant
James P. O'Neal, Claimant's Attorney
Schwabe, Williamson et al., Defense Attorneys

WCB 81-09602
November 16, 1982
Order Denying Motion to Dismiss

The employer has moved to dismiss claimant's request for review of the Referee's September 13, 1982 order, on the grounds that claimant's request for review was not served upon attorneys for the employer. See ORS 656.295(2).

The employer's motion is denied. Matthew Sampson, 34 Van Natta 1145 (1982). See also ORS 656.005(19) and Nollen v. SAIF, 23 Or App 420 (1975).

IT IS SO ORDERED.

GORDON L. OGDEN, Claimant
Coons & McKeown, Claimant's Attorneys
Foss, Whitty & Roess, Defense Attorneys

WCB 80-11536 & 81-09657
November 16, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

The SAIF Corporation requests review of Referee Seymour's order which set aside its denial of claimant's occupational disease claim for his October 6, 1980 myocardial infarction and subsequent triple bypass surgery. The issue is compensability.

We adopt the Referee's findings of fact, but summarize the most significant facts here for purposes of our review.

Claimant became a police officer in October of 1966 at the age of 21. At that time he was employed by the City of Coos Bay as a patrol officer. Claimant was 5'11 1/2" tall and then weighed 170 pounds. He had been a cigarette smoker since the age of 15 or 16. In 1970, at the age of 25, claimant was promoted to the rank of sergeant and served as a Watch Commander. In 1974 he began working on the burglary squad and received special instruction in the use and training of police dogs. Claimant worked approximately 12 hours a day, spending his evening hours training dogs and answering calls which required the use of dogs. Claimant's weight went from 170 to 195 pounds and his cigarette smoking increased.

In 1977 claimant was hired by the City of Hillsboro to serve as an Operations Lieutenant. His duties expanded substantially. He worked nine to ten hours per day and continued to train dogs at night. Claimant supervised 25 to 30 other police officers and was responsible for many aspects of departmental operations. His employment with the City of Hillsboro was not a particularly pleasurable experience. Personnel problems and conflicts with other members of the force, including his militaristic captain, caused claimant considerable stress. Claimant was in competition with another member of the force for a promotion. His marital and social life deteriorated, and he suffered considerable anxiety when a close friend and fellow officer died in the line of duty, for which claimant felt that his Chief of Police held him responsible. Claimant gained approximately 20 pounds while working in Hillsboro and his smoking continued to increase.

In 1980 claimant left Hillsboro and went to work for Coos County as an Operations Lieutenant, working 60 to 70 hours per week. Claimant's main job was that of a "troubleshooter" whose job it was to clean up operations at Coos County. Claimant was confronted with a considerable amount of resistance and resentment from other members of the force because he was perceived as an "outsider." He experienced difficulties with other members of the force whom he felt were trying to undermine his work and authority.

In August of 1980 claimant first began noticing chest problems, involving shortness of breath. On September 11, 1980, following his participation on several accident review boards, claimant began suffering chest pain. He was examined at the Coquille Clinic, where an electrocardiogram was performed. Claimant returned to work. On September 13, 1980 he again began to

experience breathing difficulty. He visited the Bay Area Hospital where early pneumonia was diagnosed. In retrospect, it appears that claimant probably suffered a myocardial infarction at that time. On October 6, 1980, while speaking with the County Sheriff, claimant began hyperventilating and experienced diaphoresis. He was taken to the hospital and surgery was performed seven days later. There is little question that the October 6 incident represented another infarction.

It seems to be accepted that claimant's infarction and the surgery that followed were the result of atherosclerosis, i.e., plaque formation that resulted in narrowing of the coronary arteries. This is thus, as indicated above, an occupational disease case, claimant's theory being that his work activity caused or worsened the atherosclerosis disease process with the infarction and surgery being consequences of that disease process.

This occupational disease approach is somewhat unique in that virtually all other heart cases decided by the Board and appellate courts have been litigated on an injury theory. But the court in James v. SAIF, 290 Or 343, 349-50 (1981), acknowledged the possibility of a heart case being litigated on an occupational disease theory and indicated that the burden of proof would be the same as in any other type of occupational disease claim. Claimant must, therefore, establish that work factors were the major cause of the acceleration of his atherosclosis. SAIF v. Gygi, 55 Or App 570 (1982).

The Referee acknowledged that the medical opinions concerning causation were in conflict. Dr. Kloster indicated that work stress was not a factor in this case and Dr. Griswold concluded that it was. The Referee found that James and Gygi were not applicable since the claim involved stress with a resultant physical rather than mental disability, although he did find major contributing cause to have been established. The Referee discounted Dr. Kloster's opinion on the ground that Dr. Kloster did not accept stress as a risk factor in heart disease. He accepted Dr. Griswold's opinion, and did not mention the opinions of Drs. Rush and Rogers.

Claimant was initially treated at Good Samaritan Hospital by Drs. Rush and Page, Dr. Rush performed the angiogram. SAIF solicited Dr. Rush's opinion concerning the relationship between claimant's heart disease and his work activity. Dr. Rush, in a somewhat concise letter of November 21, 1980 stated: "I do not feel that his work activity was a material contributing factor to the development of his heart disease." There is no indication of what led him to that conclusion, but his report of October 10, 1980 does contain a reasonably good history regarding the claimant.

SAIF next solicited the opinion of Dr. Kloster of the Division of Cardiology at the University of Oregon Health Sciences Center. SAIF provided Dr. Kloster with available medical reports and investigative reports of an interview with the claimant concerning his work environment. Dr. Kloster stated that the claimant's work activity was not a material factor in coronary atherosclerosis, his myocardial infarction or the need for bypass surgery. With regard to the relationship of work-related stress to claimant's early development of coronary artery disease, Dr. Kloster stated that as a risk factor, work-related stress is controversial and not generally accepted and:

> "In the face of these multiple other and important risk factors for coronary heart disease in Mr. Ogden's case, it would be difficult for me to identify work-related stress as a significant additional risk factor adding a significant additional increment of risk to his development of coronary disease. It is my opinion that Mr. Ogden developed severe, extensive coronary disease as a result of the risk factors of heavy cigarette smoking, an adverse family history, obesity with probable related hypertriglyceridemia, possibly elevated blood pressure and/or cholesterol and that his work activity was not a material contributing factor."

In Bales v. SAIF, 57 Or App 621, 625-26 (1982), the court stated that Oregon has rejected the medical school of thought that stress can never be a causative factor in heart attacks and that the opinions of physicians who subscribe to that school of thought will be accorded less weight. We do not understand Dr. Kloster to be saying that he feels work-related stress can never be a factor in heart attacks, only that it is not generally accepted as such, and that he did not see it as a factor of importance in this particular case. In point of fact, the October 7, 1981 letter from claimant's counsel indicates that he considered Drs. Kloster and Griswold to be the leading experts in this state regarding the stress/cardiovascular disease relationship. Moreover, we are not aware that the appellate courts have accepted the theory that work-related stress can be a factor in the development of coronary atherosclerosis, as opposed to a triggering factos in myocardial infarctions. That may be a subtle distinction; however, we view that as a significant additional step from both a medical and legal standpoint.

Claimant was examined by Dr. Griswold of the Division of Cardiology of the University of Oregon. Dr. Griswold, in his report of August 6, 1981, summarized the various types of stress the claimant was exposed to over his years of police work. Dr. Griswold stated:

> "Based upon all the material available to me * * * it would be my medical opinion that the stresses that Mr. Ogden was confronted with * * * materially accelerated in a significant way his atherosclerosis and led to a myocardial infarction."

Thus, Drs. Kloster and Griswold have reached the exact opposite conclusion. We find no comfortable basis for giving greater weight to one opinion over the other. A third opinion is contained in the record, from Dr. Rogers, also a specialist in the field of cardiology. Dr. Rogers reviewed the medical and investigative reports and concluded:

> "My opinion is the same as that of Dr. Rush, that his severe triple vessel coronary

> atherosclerotic disease with angina was of natural development, based on obesity, heavy cigarette smoking, hypertension and a father who had developed a myocardial infarction at age 52. Although police lieutenants, like other professional men, work under some emotional stress and often work long hours, I think it unlikely this stress was, as he alleges, a material factor in the development of the coronary disease that led to his heart surgery. * * * [t]he, underlying course would appear to have been inexorable, based on events occurring away from work."

There is also an opinion in the record from Dr. Bullard, Ph.D. However, we accord his opinion less weight since his area of expertise is psychology.

We conclude that the preponderance of the medical evidence indicates that claimant's work-related stress was not a material or major factor in the development or acceleration of his coronary atherosclerosis, which was the cause of his myocardial infarction and subsequent bypass surgery.

Claimant, however, argues, and the Referee's order seems at least partially based on the concept, that work stress caused claimant to increase his cigarette consumption and caused him to gain weight due to bad dietary habits made necessary by his work schedule. Both are risk factors noted by nearly all physicians involved in this claim. The Referee stated that this compounding concept seemed to have been accepted in Schwehn v. SAIF, 17 Or App 50 (1974). In Schwehn the court stated that the testimony in that case was that stress could cause bad dietary habits, cause increased smoking and cause hypertension, all coronary risk factors if an individual reacted to the stress in such a manner. The court required that a claimant present evidence that he reacted to the work stress in such a fashion. Since the claimant in that case presented evidence that the only risk factor that was enhanced by the work stress was smoking, the court held that he had not met his burden of proof.

We find the same difficulty to be present in this case. We take notice of the fact that there can be a myriad of reasons why a person's dietary and smoking habits might change. Claimant had already been smoking for a number of years before he became a police officer. There is little or no evidence that his weight gain could be ascribed to his eating habits at work or a result of his work situation. It would be impossible for us to determine, based on this record, the relative contribution of the non-work versus the work-related smoking increase, if any, or the non-work versus the work-related weight gain, if any. A conclusion in this case that it was claimant's work that caused his smoking and diet habits to change would require too many inferences to be drawn. We are not persuaded it is appropriate to draw such a strained

inference. Additionally, obesity and smoking were only two out of five of the claimant's identified risk factors, and since claimant must establish that the work-related stress was the major accelerating factor leading to his infarction and surgery, we would in any case find that the burden had not been met.

ORDER

The Referee's order dated March 22, 1982 is reversed. The SAIF Corporation's denial letters of December 9, 1980 and October 6, 1981 are reinstated and affirmed.

CHRISTINE A. ROBINSON, Claimant
Malagon & Velure, Claimant's Attorneys
Schwabe, Williamson et al., Defense Attorneys

WCB 80-04701
November 16, 1982
Order on Review

Reviewed by Board Members Lewis and Ferris.

The claimant requests review of Referee's James' order which affirmed the denial of claimant's left arm flexor carpi ulnaris tendinitis under both the theory of accidental injury and occupational disease. The Referee found that claimant invented her story of almost falling and straining her left wrist. That incident was the basis of claimant's accidental injury theory. He concluded that since he could not rely on her testimony about the work accident, neither could he rely on her testimony regarding the relative contribution of work and non-work activities to her tendinitis. The claim, therefore, failed due to failure of proof.

The claimant contends she did strain her left wrist while turning a 16'x4'x7/16" plywood panel at work, and that testimony by her supervisor, August Zimmerman, corroborates that incident. Claimant further contends that her tendinitis is an occupational disease in that her job at the sawmill required her to manually flip three to five plywood panels an hour, each panel weighing from 89 to 150 pounds, and that she regularly performed that activity three weeks before the March 29, 1980 straining incident. Claimant contends that Dr. Warren, claimant's treating physician, stated that the repetitive board flipping motions can be a precipitating cause for tendinitis. Claimant finally contends that her non-work activities, particularly her care for her horse and horse riding activities, did not contribute to her tendinitis.

The employer responds that the claimant has been inconsistent in relating the etiology of her tendinitis and that her off-the-job activities of owning horses and competitive riding are significant as a cause of her tendinitis.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated March 5, 1982 is affirmed.

THEODORA L. STENNETT, Claimant
Galton, Popick et al., Claimant's Attorneys
Schwabe, Williamson et al., Defense Attorneys

WCB 81-04037
November 16, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

The employer requests review of Referee Mannix's order which set aside its denial of claimant's aggravation claim.

Claimant compensably injured her right wrist/forearm in December of 1976. Over the next 18 months claimant was examined or treated by Drs. Lee, Button, Cherry, Nathan and Gill. Dr. Gill ultimately performed surgery. After the claim was closed, a stipulated settlement of claimant's request for hearing resulted in a total award of 15% loss of the right forearm. This stipulation was approved in March of 1979 and is the last award of compensation for purposes of this aggravation claim.

There are two conflicting opinions on whether claimant's condition has since worsened and, if so, the causal relationship to the 1976 injury. Dr. Rinehart, who first saw claimant in February of 1981, opines that there has been a significant aggravation of claimant's condition. He reports that x-rays of both hands show significant demineralization of the bone on the right and finds that claimant's disability now extends into her right shoulder. Dr. Rinehart variously diagnoses claimant's condition as sympathetic dystrophy, shoulder-hand syndrome, post-traumatic osteoporosis and reflex dystrophy. Dr. Rinehart seems to relate all of claimant's right hand/arm/shoulder symptoms to the 1976 right wrist injury although, if this is the doctor's opinion, it is unexplained.

Claimant was examined twice by two different panels of three physicians at Orthopaedic Consultants. The first examination was in April of 1978, before the last award of compensation; the second was in May of 1981, after claimant asserted her aggravation claim. Despite some minor differences in the words two different medical authors used to describe their findings, the two reports indicate to us that claimant's condition was substantially the same at the time of the two examinations.

Dr. Holm, a member of the 1981 Orthopaedic Consultants panel, testified at the hearing. Contrary to Dr. Rinehart's interpretation that x-rays showed loss of bone density in the right hand and wrist, Dr. Holm testified that the panel members thought that both of claimant's hands looked identical in x-rays. Dr. Holm specifically took issue with Dr. Rinehart's various diagnoses:

> "At the time of our examination we found no evidence of a Sudeck's atrophy or shoulder-hand syndrome . . . We found no evidence of changes you find with dystrophy, and these would be swelling, wasting . . ."

Dr. Holm concluded, in essence, that comparison of the objective findings from the 1978 and 1981 Orthopaedic Consultants' examinations indicated no change in claimant's condition.

Dr. Rinehart reviewed the report of the second Orthopaedic Consultants' examination and wrote that he found it "impossible" to concur. Dr. Rinehart, however, offered no explanation for the

divergent interpretations of the same clinical data, such as x-rays, and did not further explain or defend the diagnoses he had previously offered.

Claimant has the burden of proving that her condition has worsened since the last award of compensation and that her condition is causally related to her original compensable injury. Given the Referee's findings regarding claimant's credibility, we think proof in this case depends largely on the medical evidence. And given the conflict between Dr. Rinehart and Orthopaedic Consultants, we think proof in this case requires an affirmative finding that we are more persuaded by Dr. Rinehart's analysis and conclusions.

We are simply not persuaded by Dr. Rinehart to that degree. All of Dr. Rinehart's clinical findings are disputed by Orthopaedic Consultants. Claimant attempts to minimize that conflict by arguing that there was a few months interval between Dr. Rinehart's first examination of claimant and Orthopaedic Consultants' second examination of claimant. However, all doctors were interpreting the same x-rays and thus passage of time does not explain disparate interpretations. Also, many of claimant's subjective complaints in early 1981 involved her upper arm and shoulder. It is far from apparent how a wrist injury in late 1976 can lead to shoulder impairment in early 1981, and Dr. Rinehart does not offer any explanation at all for this migration of symptoms. The lack of any persuasive and definitive diagnosis may not be as important on the question of whether claimant's condition worsened, but we think it is very important on the further question of whether all of claimant's current symptoms are causally related to her industrial injury.

ORDER

The Referee's order dated October 2, 1981 is reversed and the employer's denial dated April 23, 1981 is reinstated and affirmed.

JANICE HAGLUND, Claimant
Anderson, Fulton et al., Claimant's Attorneys
Moscato & Meyers, Defense Attorneys

WCB 81-00762
November 17, 1982
Order on Reconsideration

The employer requests reconsideration of the Board's Order on Review in the above-entitled case, which found that claimant sustained a compensable aggravation of her 1978 injury, and found the claim to be the responsibility of Del Monte/Alaska Packers based upon a stipulation entered at the time of the hearing.

The employer argues that the Board made a proper resolution of the facts of the case by accepting the opinions of Dr. Nathan, but that those opinions reflect that claimant's underlying condition did not worsen.

We agree with the employer, to a certain extent, that Dr. Nathan's opinions do attempt to state that claimant's condition did not worsen after 1978. Assuming, arguendo, that Weller v. Union Carbide, 288 Or 27 (1979), applies to ORS 656.273, we believe that it is somewhat of a strained argument to contend that a claimant

who was having some minor difficulties with her right wrist in 1978 and who, by 1980, had progressed to the point where surgery was necessary, did not suffer a worsening of her condition. On reconsideration we adhere to the findings and conclusions stated in our Order on Review.

IT IS SO ORDERED.

JAMES V. COMPTON, Claimant
Michael Dye, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 79-04395
November 18, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

Claimant requests and the SAIF Corporation cross-requests review of Referee Baker's order which awarded claimant 60% unscheduled permanent partial disability, that being an increase of 35% over prior stipulations and Determination Orders.

Claimant argues that he is entitled to an award of permanent total disability. SAIF argues that the disputed claim settlement of May 6, 1981 which disposed of a different claim against a different employer in some way prejudiced its defense of this case. Alternatively, SAIF argues that the Referee's award of permanent partial disability was excessive.

We adopt the Referee's findings of fact as our own.

We begin by addressing the issue concerning the effect of the disputed claim settlement. That settlement was the eventual result of claimant's contention that his left arm swelling, numbness and occluded axillary vein problems were the result of a compensable injury or occupational disease caused by his work as a sandblaster in 1979 at Interstate Coatings Inc., the compensability of which was denied by that employer on February 18, 1980. For a stated consideration, the request for hearing against Interstate Coatings was dismissed and the denial affirmed.

This proceeding involves a different claim against a different employer for a 1975 back injury. Claimant requested this hearing on the Determination Order dated May 8, 1979 which was issued following reopening of that 1975 claim.

Citing J. C. Compton v. DeGraff, 52 Or App 317 (1981), SAIF argues that the settlement between claimant and Interstate Coatings is "inextricably" tied to the extent of claimant's disability, that claimant should properly have requested an order pursuant to ORS 656.307 in order to resolve all questions concerning the relative responsibility between SAIF and Interstate Coatings for claimant's vascular problems, and that the settlement left SAIF at a disadvantage in litigating the case.

We find no merit in SAIF's argument. The issue involved in Compton was aggravation versus new injury. The claimant in that case entered into a disputed claim settlement with the new-injury insurer following the issuance of an order pursuant to ORS 656.307 designating one of the insurers as a paying agent. The claim was found to be the responsibility of the aggravation insurer, SAIF.

The effect of the settlement, if valid, would have resulted in double payment to claimant. The court determined that the settlement resulted in prejudice against SAIF since the claimant's evidentiary presentation at the hearing would be against SAIF only. The court concluded: "We hold that where there is a dispute as to which insurer is responsible for a claimant's injury or condition, any settlement entered into by one of the insurers and the claimant on the issue of responsibility after an order under ORS 656.307 has been issued is invalid". 52 Or App at 323.

The current case is distinguishable. There is no issue concerning aggravation versus new injury, and there was never a denial of responsibility issued which might have even raised the possibility of an order pursuant to ORS 656.307 being issued. The issue at the hearing was the extent of claimant's disability as a result of his 1975 back injury. There was never any issue concerning claimant's 1979 vascular condition claim, and it is neither relevant to nor part of the 1975 claim. Claimant's councel stated at the hearing:

> ". . . so there is no misunderstanding with my situation . . . that by dismissing out that case we have also dismissed out any claim we are making for vascular occlusion problems that resulted in that case against SAIF. * * * So, we are not making any claim at this point forward against SAIF for that case."

Since no claim was being asserted against SAIF for the claimant's vascular condition, it is difficult to perceive how the dangers which the court noted in Compton could materialize in this case. SAIF was not prejudiced because no evidence relative to the vascular condition was presented against it and because there was no danger of claimant receiving double recovery from the same claim.

With regard to the issue of the extent of claimant's disability, we affirm and adopt the order of the Referee.

ORDER

The Referee's order dated March 26, 1982 is affirmed.

DENNIS KELLEY, Claimant
Malagon & Velure, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 79-10932
November 18, 1982
Order on Reconsideration

The insurer has requested reconsideration of the Board's Order on Review dated October 28, 1982.

The request is granted. On reconsideration, the Board adheres to its former order.

IT IS SO ORDERED.

JEFFREY P. NEWTON, Claimant
Fadeley & Fadeley, Attorneys

Crime Victim's Compensation
Case No. CV 0144500
November 18, 1982
Notice of Hearing

This matter is before the Board on claimant's request for hearing concerning the Department of Justice's Order on Reconsideration which denied compensation to claimant under the Victims of Crime Compensation Act (ORS Chapter 147). Claimant has requested an evidentiary hearing.

The hearing has been set as follows:

DATE: December 13, 1982

TIME: 10:00 a.m.

PLACE: Workers Compensation Board
Hearing Room E
480 Church Street, S.E.
Salem, Oregon 97310

Pursuant to OAR 438-82-035, we appoint James W. Nass, staff attorney to the Board, as special hearings officer to conduct a hearing herein. Further, it appearing that the presence of the Department of Justice is desirable for a full determination of the issues herein, the Department of Justice is hereby requested to participate as a party herein.

We further direct that the request for hearing be processed and the hearing conducted in substantial compliance with OAR 438-82-035 and 438-82-040. The special hearings officer may consider only such documentary evidence as has been considered by the Department of Justice in rendering its Order and Order on Reconsideration herein. Only those persons whose statements were considered by the Department of Justice, including but not necessarily limited to claimant, the alleged assailant, the physicians who examined claimant and the assailant, witnesses to the incident, persons interviewed by the police, the police officers who investigated the incident, and the Department of Justice's investigator, if any, may be permitted to testify at the hearing.

Within 30 days after the hearing is closed, the special hearings officer shall prepare and forward to the Board recommended findings of fact and conclusions of law. A transcript of the oral proceedings shall be prepared and forwarded to the Board.

IT IS SO ORDERED.

JAMES C. SCHRA, Claimant
November 18, 1982

Own Motion 82-0281M
Own Motion Order Referring for Hearing

Claimant, by and through his treating physician, submitted a claim to the insurer for additional compensation which, in the physician's opinion, is causally related to claimant's October 9, 1975 industrial injury. Claimant's aggravation rights have expired. The insurer responded to the physician's report by a letter to claimant advising him of its determination that claimant's current condition and related medical treatment is not causally related to his industrial injury. Claimant was further advised that, due to the expiration of the five-year aggravation period, his only recourse for compensation was to apply to the Board and request reopening pursuant to the Board's own motion authority. The insurer has provided the Board with a copy of this letter to claimant, as well as documents relating to claimant's industrial injury, including medical reports.

The insurer contends that claimant's current condition and associated medical treatment is not related to his 1975 compensable injury, but instead is the result of subsequent employment or a natural progression of claimant's back condition.

The insurer's letter clearly indicates a dispute over entitlement to medical benefits. ORS 656.245(1) provides in pertinent part: "The duty to provide such medical services continues for the life of the worker." Subsection 2 of that statute provides in pertinent part: "If the claim for medical services is denied, the worker may submit to the Board a request for hearing pursuant to ORS 656.282." It is thus quite clear that claims for medical services must be formally accepted or denied notwithstanding the expiration of a claimant's aggravation rights. Although the insurer has informed claimant of its unwillingness to voluntarily accept responsibility for payment of claimant's recent medical treatment and present condition, the insurer has not formally denied the claim for medical services as required by law. OAR 436-54-305(4),(5).

Claimant has applied to the Board requesting reopening of his claim, indicating his belief that his present condition and associated medical treatment is directly related to his 1975 industrial injury. Inasmuch as claimant has a right to request a hearing concerning his entitlement to benefits pursuant to ORS 656.245, we regard claimant's letter to the Board as a request for hearing pursuant to ORS 656.283 as well as a request for the Board to exercise its own motion authority pursuant to ORS 656.278. By copy of this order, we refer this request for hearing to the Hearings Division. The docket clerk is directed to set a preferential hearing, and the Referee is directed to take evidence on the issue of claimant's entitlement to medical services, as well as any other issues that may be raised by claimant associated with claimant's claim for medical services. The Referee shall issue an order pursuant to ORS 656.289 concerning issues arising under ORS 656.245, with a copy to the Board, and the Board will then consider whether to grant claimant compensation for temporary total disability and/or permanent disability under its own motion authority.

IT IS SO ORDERED.

DOROTHY J. SWIFT, Claimant
Malagon & Velure, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-08742 & 81-08743
November 18, 1982
Order on Reconsideration

The claimant's attorney has requested reconsideration of that portion of the Board's Order on Review dated October 22, 1982 that awarded an attorney's fee of $400 for services rendered on Board review.

The request is granted. On reconsideration, the Board adheres to its former order.

IT IS SO ORDERED.

SHIRLEY E. ALLEN, Claimant
Cash Perrine, Claimant's Attorney
James Larson, Defense Attorney

WCB 81-10493 & 82-02965
November 19, 1982
Order on Review

Reviewed by Board Members Ferris and Lewis.

The SAIF Corporation requests review of Referee Nichols' order which affirmed SAIF's aggravation claim denial of April 30, 1982 and reversed its aggravation claim denial of January 28, 1982, remanding the claim to SAIF for acceptance.

The issue for review is whether the claimant has established a worsening of her condition since the last award or arrangement of compensation, which in this case was the December 4, 1980 order of Referee Braverman, awarding the claimant 30% unscheduled permanent partial disability.

We adopt the Referee's findings of fact as our own.

The claimant contends, based on Dr. Benson's report of November 3, 1981, that she has established a worsening of her condition since December 4, 1980. Dr. Benson's report does indeed appear to establish such a worsening in terms of restricted ranges of motion, diminished reflexes and severe pain when compared to the October 30, 1980 report of the Orthopaedic Consultants, that report being the most pertinent for purposes of ascertaining claimant's condition at the time of Referee Braverman's order.

SAIF argues that the January 13, 1982 report of the Orthopaedic Consultants, who examined claimant following receipt of Dr. Benson's report, established that claimant's condition had not worsened. The Orthopaedic Consultants' physical examination findings differ somewhat from those of Dr. Benson, and they basically find the claimant's condition to have improved since their last examination. However, the January, 1982 examination took place after claimant had received nearly three months of treatment from Dr. Benson. a point which is conceded in the Orthopaedic Consultants'

reports. We do note some severe discrepancies between Dr. Bensons' findings and those of the other examiners in this record. For example, Dr. Benson testified that he considered the claimant to be permanently and totally disabled. That is certainly an opinion not shared by any other physician who had examined claimant. Also, Dr. Benson found no functional overlay to be present. Virtually all other examiners, including Dr. Altrocchi, to whom Dr. Benson referred the claimant, found functional overlay present in varying degrees of severity. However, those discrepancies do not bear directly on the main issue in this case.

SAIF also argues that Dr. Benson based his conclusion that claimant's condition had worsened on comparisons of x-rays taken in 1979, with those taken in 1981, and that this is an improper comparison in view of the fact that claimant must establish a worsening of her condition since December 4, 1980. We agree with that basic proposition. However, Dr. Benson testified that as compared with her condition in December, 1980, relying on medical reports in evidence, that he considered claimant's condition to have worsened. We, therefore, affirm the conclusion of the Referee.

ORDER

The Referee's order dated June 1, 1982 is affirmed. Claimant's attorney is awarded an attorney's fee of $250, payable by SAIF, for services on Board review.

PAULINE M. COOPER, Claimant
Kenneth D. Peterson, Claimant's Attorney
Rankin, McMurry et al., Defense Attorneys

WCB 81-05509
November 19, 1982
Order on Review

Reviewed by the Board en banc.

Claimant requests review and the employer cross-requests review of Referee Neal's order which granted claimant an additional award of 19.2° for 10% loss of her right arm, for a total award of 30% loss of that arm. Claimant argues that the award is inadequate; the employer argues the award is excessive.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated April 22, 1982 is affirmed.

Board Member Barnes Dissenting:

The Referee's analysis, "adopted" by the Board majority without elaboration, was based on Boyce v. Sambo's Restaurant, 44 Or App 305 (1980); the Referee did not mention any of the relevant administrative rules, OAR 436, Division 65, and the majority "adopts" that silence.

We recently discussed the interrelationship between the Boyce doctrine and the Department's rules in Clyde V. Brummell, 34 Van Natta 1183 (1982):

"Since the facts giving rise to the Boyce decision, the Workers Compensation Department has adopted new administrative rules governing the rating of permanent disability. OAR 436, Division 65. * * * They are basically 'mechanical impairment' standards adapted largely from the American Medical Association's Guides to the Evaluation of Permanent Impairment (1977), pp. 30-32. Boyce, however, states that 'loss of use' within the meaning of ORS 656.214(1)(a) 'does not necessarily correlate to the extent of mechanical impairment, although the latter is usually a relevant consideration.' 44 Or App at 308. Other than this definition by negation, Boyce does not elaborate on the statutory language, 'loss of use.'

"We have never regarded the Department's rules on rating disability as the first, last and only word for each and every case, but we have always tried to specifically indentify other factors that we have taken into consideration in rating disability. See e.g., Charles Hanscom, 34 Van Natta 34 (1982). We will proceed on that understanding of the interplay between the Department's rules and the Boyce analysis. The Department's 'mechanical impairment' rules are relevant and should be considered in all cases; and, in any case in which a Referee or the Board finds a 'loss of use' not adequately covered by the Department's rules, that extra-rule factor should be specifically identified in the Referee's or Board's order. Hazel Ray, 34 Van Natta 1193 (decided this date), illustrates application of this methodology." 34 Van Natta at 1183-84.

In this case, claimant's loss of motion amounts to 14% impairment under the guidelines in OAR 436-65-525(1). Claimant also testified she suffers from pain, numbness, weakness and swelling. The first three problems are covered by the administrative rules. OAR 436-65-530(3) governs impairment in the form of disabling pain. OAR 436-65-530(1)(a)(i) and OAR 436-65-530(2)(a)(i) govern impairment in the form of sensory loss or sensory deficit, i.e., numbness. OAR 436-65-530(2)(b) and (c) and OAR 436-65-530(5) govern impairment in the form of loss of grip strength. If swelling is a form of permanent impairment appropriately to considered, it is not covered in the administrative rules.

I give full credence to claimant's testimony about her impairment subject to two qualifications. It is difficult to fully accept claimant's testimony about right arm weakness given that her treating physician found no atrophy or other evidence of weakness

or reduced usage. Second, claimant's subjective complaints of swelling are somewhat inconsistent with her doctor's finding that no edema was present. Claimant's impairment from loss of motion is 14% and, weighing all the evidence, I would find an additional 6% impairment in the form of pain/numbness/weakness/swelling. It follows in my mind that the award of 20% loss of the right arm granted by the challenged Determination Order was proper.

I would reverse the Referee's order and reinstate the Determination Order dated May 18, 1981. I respectfully dissent.

SNOWDEN GEVING, Claimant
Bischoff & Strooband, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-06352
November 19, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

The SAIF Corporation requests review of that portion of Referee Shebley's order which requires the insurer to pay temporary total disability, penalties and attorney's fees in connection with claimant's aggravation claim.

Claimant sustained a compensable low back injury in 1976 for which she was ultimately awarded 50% unscheduled permanent partial disability. The relevant events that followed, for purposes of this case, are as follows.

March 4, 1981: Claimant was seen by Dr. Dunn for continuing back pain.

March 17, 1981: Claimant signed a stipulation that granted her an additional 15% unscheduled permanent partial disability for an ulcer condition that was related to her compensable back injury. This stipulation stated:

> "2. Claimant agrees that the back and ulcer conditions are stationary.
>
> "3. Said award is in settlement of any or all issues which were or could have been raised by request for hearing."

July 13, 1981: Claimant's request for hearing was received by the Board.

July 28, 1981: Dr. Dunn reported that claimant "has been unable to participate in gainful employment since first being examined by me on March 4, 1981."

The Referee found that Dr. Dunn's July 28 report, in conjunction with his July 20 report and possibly his March 4 chart note, constituted an aggravation claim that triggered the duties to pay interim compensation and to accept or deny within 60 days. Because SAIF neither paid interim compensation nor formally responded to claimant's aggravation claim, the Referee ordered that interim compensation be paid from March 4, 1981 to the date of hearing and assessed penalties and associated attorney fees. In defense of the challenged portions of the Referee's order, claimant relies upon the theory that Dr. Dunn's July 28 report constitutes the aggravation claim in this case.

Under these circumstances, we find the Referee's order was erroneous for three reasons:

(1) The Referee ordered interim compensation paid from claimant's visit to Dr. Dunn on March 4. However, two weeks later claimant participated in a stipulation in which she agreed that her back condition was then stationary. We see no possible basis for ordering interim compensation paid for any period of time before the March 17 stipulation.

(2) If Dr. Dunn's July 28 report constitutes the aggravation claim, as the Referee found and as claimant argues, then interim compensation was only due and payable for the period after July 28 because interim compensation need only be paid for the period after notice or knowledge of a claim. Donald C. Wischnofske, 32 Van Natta 136 (1981), 34 Van Natta 664 (1982); Stone v. SAIF, 57 Or App 808 (1982).

(3) Our first conclusion would require modifying the Referee's order to provide that no interim compensation was due for the period before March 17; our second conclusion would require modifying the Referee's order to provide that no interim compensation is due for the period before July 28; our third conclusion requires reversal of the Referee's order. As previously noted, the present request for hearing was received on July 13, 1981. While claimant probably at that time had some other theory of what constituted her aggravation claim, as matters now stand, the Referee has found and claimant argues that Dr. Dunn's July 28, 1981 report constitutes her aggravation claim. It is thus apparent that claimant requested a hearing before any claim was made, much less denied. Syphers v. K-W Logging, Inc., 51 Or App 769 (1981), holds that there is no jurisdiction to request a hearing in this kind of situation.

ORDER

The Referee's order dated December 4, 1981 is reversed and claimant's request for hearing is dismissed for want of jurisdiction.

NORMAN J. GIBSON, Claimant
Roll & Westmoreland, Claimant's Attorneys
Guy Greco, Defense Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-08932 & 80-07855
November 19, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

Claimant requests review of Referee Fink's order which: in WCB Case No. 80-07885, found that Gene Ropp was not a subject employer and claimant was not a subject worker and, therefore, vacated Proposed and Final No. 5965-A that had found that Gene Ropp was a subject noncomplying employer; and, in WCB Case No. 80-08932, denied claimant all relief requested. More specifically, in WCB Case No. 80-08932 claimant argues on review: (1) he sustained a compensable injury on June 30, 1980 while working for Gene Ropp; (2) that was prematurely closed by Determination Order dated September 17, 1980 or, alternatively, that he is entitled to an award for permanent partial disability; (3) that the SAIF Corporation's denial of his subsequent aggravation claim should be set aside; and (4) that penalties and attorney's fees should be assessed for tardy denial of the aggravation claim.

I

The Referee relied upon a credibility finding in concluding that there was no employer-employe relationship between claimant and Gene Ropp; the Referee found claimant's credibility was "severely impaired" and that "Mr. Ropp's testimony should be given the greater weight." The Referee seems to assume, as we understand his analysis, that if one of the parties is not credible, the other is to be believed.

Our analysis is different. It is the burden of the alleged employer, here Gene Ropp, to show that the Proposed and Final Order is incorrect. ORS 656.740(1). We assume for sake of discussion that an alleged employer could sustain that burden solely with his or her own credible testimony. However, an additional item of evidence in this case not discussed by the Referee is an investigative report submitted by Marc Snook, Field Representative for the Workers Compensation Department. It was based on interviews with claimant and Mr. Ropp within a couple weeks after the alleged employment relationship and was written about a month after those events. Were this report to be completely believed, the Proposed and Final Order would be unquestionably affirmed. However, there is at least one known discrepancy in the report and the balance is at substantial variance with Mr. Ropp's testimony and somewhat different than claimant's testimony.

While we do not accept the investigative report completely, we conclude that it raises considerable doubts with respect to Mr. Ropp's testimony at the hearing. We, therefore, conclude that Mr. Ropp has failed to affirmatively show that the Proposed and Final Order is incorrect as required by ORS 656.740(1). It follows that at all material times Gene Ropp was a subject, but noncomplying employer and claimant was a subject employe.

II

Claimant has the burden of proof on the issues of compensable injury, premature closure, extent of disability and SAIF's denial of his aggravation claim. On these issues the Referee's adverse finding regarding claimant's credibility is generally conclusive and we affirm and adopt the relevant portions of the Referee's order with the following additional comments.

Claimant contends that his operation of a jackhammer on June 30, 1980 resulted in back injury without specific trauma. Claimant argues the medical evidence is unanimous in support of his claim. However, we find nothing in the medical evidence that causally relates claimant's low back symptoms after June 30, 1980 to work events of that date except recitation of claimant's history to his doctors, which gets back to the question of claimant's credibility. There being no proven compensable injury, claimant's various arguments for claim reopening and for an award for permanent disability must fail.

III

The final issue is penalties and attorney's fees. Claimant filed an aggravation claim on December 11, received by SAIF on December 12, 1980. Whether it was sufficient to prove aggravation is not the question; it certainly was a proper aggravation claim. SAIF apparently paid all interim compensation due, but did not issue a denial of the aggravation claim until March 19, 1980, over three months later.

In Bell v. Hartman, 289 Or 447 (1980), the court held that interim compensation need not be paid when a claimant is not a subject worker. Perhaps, by parity of reasoning, penalties for a late denial cannot be assessed when a claimant is found to not be a subject worker. We have concluded above, however, that Gene Ropp did not prove that he or claimant were exempt from the coverage of the Workers Compensation Act. It follows that Bell v. Hartman, supra, is not here relevant.

SAIF's denial was issued well beyond the 60 day limit. The delay is unexplained and unjustified in this record. Based on the criteria discussed in Zelda M. Bahler, 33 Van Natta 478 (1981), reversed on other grounds, 60 Or App 90 (1982), claimant is entitled to the maximum penalty of 25%. Although the "then due" language of ORS 656.272(9) admittedly creates some confusion in this kind of case, we conclude the penalty should be assessed on the interim compensation payable between the sixtieth day and the date of the denial. Also, for the reasons stated in Bahler, assessment of an attorney's fee is appropriate in this case.

ORDER

The Referee's order dated October 19, 1981 is modified. That portion which set aside Proposed and Final Order No. 5965-A is reversed and that Proposed and Final Order is reinstated and affirmed. Claimant is awarded a penalty for tardy denial of his aggravation claim equal to 25% of the compensation due from February 10, 1981 through March 19, 1981. Claimant's attorney is awarded a fee of $250 for services rendered in connection with the penalty issue, payable by the SAIF Corporation. The remainder of the Referee's order is affirmed.

MARILYN GREGORY, Claimant
Robert N. Ehmann, Claimant's Attorney
Wolf, Griffith et al., Defense Attorney

WCB 81-3691
November 19, 1982
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant seeks review of that portion of Referee Neal's order which granted claimant 20% unscheduled permanent disability, subject to an offset for an overpayment of temporary total disability. Claimant contends that the claim was prematurely closed or that the claim should have been reopened for payment of time loss, or, in the alternative, that claimant is entitled to a greater award of permanent disability. Lastly, claimant contends that penalties and attorney's fees should have been imposed for unreasonable failure to reopen the claim and for unreasonable failure to deny requests to reopen the claim.

There is a preliminary matter. Claimant enclosed a letter from a physician with his opening brief and asked the Board to consider it. The Board is unable to supplement the record on review in the absence of stipulation by the parties. ORS 656.295(5), OAR 436-83-720(1). Such a request to consider additional evidence is regarded as a request for remand to the Referee and must be supported by a showing that, in the exercise of due diligence, the evidence could not have been obtained prior to hearing. Robert A. Barnett, 31 Van Natta 172 (1981). [Compare Edward Morgan, WCB Case No. 80-00373, 34 Van Natta 1590 (decided this date), wherein we discuss the Board's authority to consider on review evidence which is not admitted but is made a part of the record by an offer of proof, where the Board disagrees with the Referee's evidentiary ruling.] No such showing has been made here; therefore, we decline to remand the case.

We adopt the Referee's order with the following comments.

We agree that claimant was medically stationary no later than the date established in the Determination Order, which date was affirmed by the Referee. We also agree that the insurer was not required to reopen the claim based on the post-closure medical reports. The medical reports indicate at most a need for additional medical services. It is not clear from the reports whether the need for medical services relates to conditions arising from the injury. It is very clear that no physician has attested to a worsening of claimant's condition since issuance of the Determination Order. Nor has any physician authorized or indicated the need for temporary total disability except as may be inferred from suggestions that claimant may benefit from participation in a pain clinic program. Claimant's reliance on Brooks v. D & R Timber, 55 Or App 688 (1982), is misplaced because the proposed tests were not necessarily for a compensable condition and, in any event, it does not appear that the tests required time loss. Claimant is eligible for medical services under ORS 656.245 for conditions arising from his injuries, and there is no need to reopen her claim simply to pay for medical services.

With respect to penalties, the insurer's refusal to reopen the claim was not unreasonable, therefore, no award of penalties on that ground is warranted. The insurer failed to deny either of claimant's two requests to reopen her claim made while a hearing request was pending on premature closure. Under the Board's holding in Harold Metler, 34 Van Natta 710 (1982) we would impose a penalty and attorney's fees. However, Harold Metler had not been decided at the time of the insurer's failure to deny herein, and the insurer legitimately relied upon the Court of Appeals' holding in Vandehey v. Pumilite Glass & Building Co., 35 Or App 187 (1978), for its belief that it was unnecessary to deny the requests to reopen the claim.

ORDER

The Referee's order dated March 23, 1982 is affirmed.

CAROLYN J. HAGGARD, Claimant
D.S. Denning, Jr., Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-03446
November 19, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

Claimant requests review of Referee Leahy's order which found: (1) that the February 27, 1980 Determination Order was not prematurely issued; (2) that the issue of permanent disability could not be considered because it was not raised until March 10, 1982 (the date of hearing) which was more than one year from the date of the Determination Order; and (3) alternatively, that claimant suffered no permanent disability as a result of her compensable March 22, 1979 neck injury.

Whether the issue of permanent disability was properly raised would depend upon application of Lucy (Froyer) Anderson, 34 Van Natta 1249 (1982), and Donald K. Shaw, 34 Van Natta 1260 (1982). We conclude it is unnecessary to reach this issue in view of our conclusion on the merits.

We affirm and adopt those portions of the Referee's order finding no premature claim closure and finding claimant did not prove entitlement to an award for permanent disability as a result of her minor neck strain injury.

ORDER

The Referee's order dated April 7, 1982 is affirmed.

JOE HOLMES, JR., Claimant
Peter Hansen, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

Own Motion 81-0034M
November 19, 1982
Own Motion Order on Reconsideration

The Board issued an Own Motion Order on October 8, 1982 which denied claimant's request for reopening based on the evidence that he had retired from the labor market. We based this decision on the rationale in Vernon Michael, 34 Van Natta 1212. Claimant has requested that we reconsider this conclusion based on a report of Dr. Kiest dated December 8, 1980.

We conclude that claimant has failed to show entitlement to compensation for temporary total disability. Our Own Motion Order of October 8, 1982 shall remain in effect.

IT IS SO ORDERED.

LOIS KLEINHANS, Claimant
Frohnmayer et al., Claimant's Attorneys
Alan Ludwick, Defense Attorney

WCB 81-08304
November 19, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

Claimant requests review of Referee Brown's order which upheld the SAIF Corporation's denial of compensability for claimant's neck problems subsequent to her September 30, 1980 auto accident.

Claimant first injured her neck on February 15, 1982 while moving a desk in the course of her employment. She was treated by Dr. Blandino, a chiropractor, who diagnosed her injury as acute cervical/dorsal strain syndrome and nerve root compression at the C 4-5 and T 4-5 levels. Dr. Blandino and his partner, Dr. Ladwig, treated claimant with manipulative and other physical therapy on a fairly regular basis over the next six months. Dr. Ladwig reported that claimant was approaching a medically stationary status on September 29, 1980.

On September 30, 1980 claimant was involved in an automobile accident and was seen on October 8, 1980 by Dr. Ladwig for "acute manifestations relating to that accident." Following this examination, Dr. Ladwig recommended closing claimant's workers compensation claim.

Claimant was examined by Dr. Narus, a neurologist, on October 13, 1980. He believed that claimant's symptoms were related to her on-the-job injury. Claimant, however, failed to tell Dr. Narus during this first examination about her auto accident two weeks earlier.

Dr. Narus referred claimant to Dr. Saez, a neurosurgeon, who performed a cervical myelogram in June of 1980. The myelogram revealed a hypertrophic ridge at C 5-6 with nerve root impingement on the left side at the C6 level. Dr. Saez performed corrective surgery on claimant's neck on July 7, 1981. It was Dr. Saez's

opinion that claimant's neck pain and nerve root irritiation and impingement were the result of her occupational injury and not caused by the auto accident. Dr. Saez states in his October 27, 1981 letter to claimant's attorney:

> "While it may be argued that the motor vehicle accident at least temporarily led to an exacerbation of her symptoms, I do not feel that the exacerbation was of such severity as to have mandated operation merely as a direct consequence of the trauma sustained in the MVA [motor vehicle accident]. Notice that there was a rather long interval still elapsing between the motor vehicle accident and the surgical intervention itself which suggests that the aggravation of symptoms by the MVA could not, beyond a point, be any longer distinguished as separate and beyond the underlying stream of symptoms that Lois had already experienced since the original occupational injury.
>
> "It is therefore my opinion that the eventual surgical treatment given Lois would have probably been necessary even if the motor vehicle accident had never occurred."

The only significant medical evidence indicating that claimant's neck problems following the auto accident may not have been related to her on-the-job injury was the short note by Dr. Ladwig, dated November 14, 1980, in which he recommended that claimant's workers compensation claim be closed. This statement was not elaborated upon by Dr. Ladwig and was made prior to the myelogram and examinations of Dr. Narus and Dr. Saez.

The Referee gave little weight to the opinion of Dr. Saez because he found it to be based on a "faulty, incorrect, and inconsistent history." The Referee placed considerable emphasis on the fact that Dr. Saez apparently believed that claimant's left arm symptoms had been present since the original injury but, according to the Referee, there was no mention of left arm problems until after the auto accident.

The significance of claimant's radiating left arm symptoms was that they were indicative of cervical nerve root compression. However, Dr. Blandino noted greater loss of cervical range of motion on the left side than the right and diagnosed cervical nerve root compression in his first examination following the original injury.

SAIF presented no medical evidence contradicting this original diagnosis of nerve root compression. We find that Dr. Saez had knowledge of sufficient facts relating to both incidents on which to base his opinion.

The Referee also found that different parts of the body were involved in the original injury than in the subsequent auto accident. He apparently based this conclusion on the fact that Dr. Blandino diagnosed claimant's original injury as nerve root compression at the C 4-5 level and Dr. Saez later found claimant's problem to be located one vertebra lower.

Dr. Saez had the benefit of a myelographic examination which Dr. Blandino did not. The X-rays taken by Dr. Blandino revealed no structural abnormalities whatsoever. Thus his diagnosis was based entirely on examination, claimant's reported symptoms, and range of motion and sensation testing. Dr. Saez reviewed Dr. Blandino's report and did not find that different body parts were involved in the two incidents.

We conclude that claimant's continuing symptoms following the auto accident and the need for surgery were compensable consequences of her occupational injury.

Our conclusion is not any form of endorsement of the oft-repeated argument in claimant's brief that the Referee "ignored" the evidence. Quite the contrary, we believe the Referee engaged in the proper process of weighing the evidence. See Edwin A. Bolliger, 33 Van Natta 559 (1981), aff'd, 58 Or App 222 (1982). The fact that we have engaged in the same process and come to a different conclusion proves only that reasonable persons can differ, not that anybody "ignored" anything.

ORDER

The Referee's order dated May 6, 1982 is reversed and claimant's claim is remanded to the insurer for payment of benefits.

Claimant's attorney is awarded $1500 as a reasonable attorney's fee for services rendered at the hearing and on Board review, to be paid by SAIF Corporation.

EDWARD MORGAN, Claimant
Welch, Bruun et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 80-00373
November 19, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

Claimant requests review of Referee Leahy's order which upheld the SAIF Corporation's denial of his aggravation claim and refused to allow interim compensation, penalties and attorney fees.

On July 30, 1982 the Board issued an Interim Order of Remand in this case, instructing the Referee to enter a supplemental order indicating which exhibits were admitted and which exhibits were not admitted, since SAIF initially raised a question in its brief regarding the record transmitted to the Board for review. The Referee was instructed to specify his basis for the exclusion of any exhibits.

On August 10, 1982 the Referee issued a Supplemental Order on Remand. The Referee stated in that order that Exhibits 1 through 80 were admitted, with the exception of Exhibits 69 and 70. There is no explanation of why Exhibits 69 and 70 were excluded other than a statement that "claimant objected to them" and a reference to the September 4, 1980 letter from claimant's counsel.

I

We believe that the Referee was in error in not admitting Exhibits 69 and 70, and we have considered them in our review of this case.

It has been held that the Board has no authority to consider evidence not part of the record, the only apparent alternative being to remand a case to a Referee for further development. Brown v. SAIF, 51 Or App 389 (1981); Gallea v. Willamette Industries, 56 Or App 763 (1982). We do not interpret either of those cases as standing for the proposition that the Board is required to remand a case to a Referee when the evidence in question has been presented to the Referee and transmitted as part of the record for purposes of review, although not actually admitted by the Referee based upon an evidentiary ruling. Such evidence, although not admitted, is nevertheless part of and included in the record. See Penifold v. SAIF, 49 Or App 1015 (1980); Neely v. SAIF, 43 Or App 319 (1979). Consideration of such evidence would, therefore, not entail going "outside" of the record made before the Referee.

ORS 656.295(5) specifically provides that if the Board determines that "a case has been improperly, imcompletely or otherwise insufficiently developed or heard by the Referee, it may remand the case to the Referee for further evidence taking, correction or other necessary action." (Emphasis added.) We do not believe that this case has been improperly, incompletely or insufficiently developed such that a remand for further evidence taking is necessary. We merely disagree with the Referee's refusal to allow admission of Exhibits 69 and 70, which are part of and contained in the record.

We recently addressed this issue to a limited extent in Fred Hanna, 34 Van Natta 1271 (1982). In that case SAIF tendered two exhibits which the Referee refused to admit based on OAR 436-83-400(3). We ruled that the Referee in that case erred in not admitting the exhibits, and we considered them upon review of the case without remanding the matter for the purpose of admission of the exhibits by the Referee. We do not believe Brown, Gallea or ORS 656.295(5) requires the Board to remand a case to the Referee merely for the purposes of admission of evidence already contained in the record whenever the Board disagrees with the Referee's evidentiary ruling regarding admissibility. Such a procedure would serve no purpose other than to delay the ultimate resolution of a case. In fact, it has long been Board policy to include all exhibits, whether admitted or not, as part of the record in deference to the possibility of some higher reviewing body disagreeing with any evidentiary ruling.

Moving from the general to the specific, as we noted in our Interim Order of Remand, we do not agree with claimant's counsel's objections to Exhibits 69 and 70. We feel that there was considerable confusion regarding the purpose for which the record was left open for, and what evidence would be accepted prior to closure. The Referee himself indicated in his letter of September 16, 1980 that he had not signed the stipulation which the parties had entered regarding the submission of additional evidence and that, since claimant had the right to submit additional medical reports, SAIF should have the same right. Yet, in his Supplemental Order on Remand, the Referee indicated that the additional reports offered by SAIF were not admitted.

One of the significant issues in this case concerns the accuracy of the diagnosis of arachnoiditis made by Dr. Hoos. Once the decision to leave the record open for receipt of additional evidence had been made, justice required that all information relevant to that diagnosis should have been accepted if generated prior to the time set for closure of the record. As we stated in our order remanding this case, "[W]e regard the search for truth to be more important than the tactics of the parties." We conclude claimant's objections to Exhibits 69 and 70 are tactical in nature only.

II

Turning now to the issue concerning the aggravation claim, an accurate summary of the involved history of this claim is contained in Referee Neal's order of March 31, 1978 and will not be repeated here. The sole issue at that hearing was the extent of claimant's disability. Referee Neal, in essence, concluded that, even though the claimant was apparently disabled to a certain extent, his problems could not be said to be the result of his industrial injury as opposed to functional and motivational problems. Referee Neal's order was affirmed on review by the Board. Edward Morgan, 26 Van Natta 111, 26 Van Natta 194, 26 Van Natta 699 (1978).

Claimant subsequently began treating with Dr. White, a psychiatrist, Dr. Brothers, an orthopedist, and Dr. Hoos, a neurologist, all in Tennessee. Dr. White, in his report of August 7, 1979, indicates that an incident took place on that day in which he believed claimant was attempting to "manipulate" him into agreeing

to authorize chiropractic treatment and a live-in housekeeper (claimant's daughter). Dr. White refused to do so and recommended that he return to Dr. Hamilton. Claimant did not return to Dr. White, nor did he see Dr. Hamilton.

Claimant was examined by Dr. Hoos on August 13, 1979. Dr. Hoos reported on September 24, 1979 that claimant was suffering from arachnoiditis, directly related to his 1975 myelogram. Dr. Hoos indicated that he had no access to any previous medical reports and that a confirmation of his diagnosis could only be made by repeat myelography, which was contraindicated since it could worsen claimant's condition. It is clear that Dr. Hoos' report was based in large part on a history taken from the claimant.

Dr. Brothers reported on November 14, 1979 that claimant's condition from an orthopedic standpoint was stationary and that he would require no further medical treatment. He indicated that he had no way of determining if claimant's condition had worsened since 1979 since he examined him only on one occasion in August of 1979, but that he did not find claimant's condition to be worsened based on that one examination. On November 20, 1979 Dr. Hoos reported that he saw claimant "on a single occasion for electromyographic studies", but could not document "any deterioration in his condition except by what he told me."

On January 8, 1980 Dr. Brothers reported that he had reviewed medical records provided by claimant's attorney. Dr. Brothers stated:

> "In these records, I find evidence of the exact same findings that I discovered on my examination of Mr. Morgan of August 13, 1979. Thereafter, I concluded there has been no substantial or even slight worsening of his condition. . . considering the physical findings in 1977 and the physical findings in 1979."

Dr. Brothers reiterated this opinion in his report of January 30, 1980, but did state that he considered Dr. Hoos more capable of evaluating electromyelographic changes from 1977 to 1979 since he had no expertise in that area. Dr. Brothers was apparently not aware that Dr. Hoos had never seen the earlier electromyelographic studies. Dr. Brothers continued to maintain that claimant's condition had not worsened from the standpoint of his physical findings.

Exhibit 69 is a report from Dr. Seres of the Northwest Pain Center. Dr. Seres was apparently asked by SAIF for his opinion concerning Dr. Hoos' findings and diagnosis. Dr. Seres states that nowhere in any of the medical reports are the specific electromyogram findings stated and that Dr. Hoos fails to provide information regarding any specific worsening from that standpoint. Dr. Seres also explains that accurate electromyographic studies require the patient's cooperation, i.e., that if the patient refuses to cooperate by contracting the muscles being tested, a decrease in the voltage activity would result. Dr. Seres also took issue with Dr. Hoos' diagnosis of arachnoiditis, based on the facts that the

necessary denervation documentation was not provided and claimant had not demonstrated an increased loss of motor function, as would be expected with arachnoiditis. Even if claimant did have arachnoiditis, Dr. Seres felt the cause and effect relationship to claimant's myelogram would be impossible to establish.

The Referee chose to rely on the reports of Dr. Brothers, since Dr. Hoos failed to provide any understandable reasons for his conclusions. The Referee also found that claimant was not persuasive in his testimony. We agree with the Referee. We also find the opinion of Dr. Seres to be more persuasive than that of Dr. Hoos.

III

We also agree with the Referee on the penalty issue. Although time loss was not paid within fourteen days of the claim, the medical reports in SAIF's possession do not verify inability to work. The only report that could be so construed is the November 14, 1979 report of Dr. Brothers. However, Dr. Brothers indicated in that report that he found claimant to be stationary, and was unable to verify a worsening of his condition. Claimant has, therefore, failed to establish a "medically verified inability to work resulting from the worsened condition." ORS 656.273(6).

In light of the available medical reports at the time of and subsequent to claimant's aggravation claim, we cannot say that SAIF's denial was unreasonable.

ORDER

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

MYRTLE DeFRIESE RITCHEY, Claimant
Olson, Hittle, et al., Claimant's Attorneys
Schwabe, Williamson et al., Defense Attorneys

WCB 80-01904
November 19, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

Claimant requests review of Referee Mannix's order which found her to be entitled to an award of 75% unscheduled permanent partial disability, that being an increase of 65% over and above the February 5, 1980 Determination Order. Claimant contends that she is permanently and totally disabled, while the employer contends that the Referee's award was correct.

We adopt the Referee's findings of fact as our own.

We affirm and adopt the Referee's order except those portions of it which seem to imply that a claimant who is capable of some type of part-time work is necessarily precluded from receiving an award for permanent total disability. The appellate courts have indicated a variety of views on the question of whether inability to work full-time, but ability to work part-time, is or is not incapacitation from regularly performing work at a gainful and suitable occupation within the meaning of ORS 656.206(1)(a). On the one hand, cases like Hill v. SAIF, 25 Or App 697 (1976), and Brown v. Balzer Machinery Co., 20 Or App 144 (1975), seem to suggest that ability to work part-time precludes an award for perma-

nent total disability. On the other hand, cases like Livesay v. SAIF, 55 Or App 390 (1981), and Cooper v. Publishers Paper Co., 3 Or App 415 (1970), seem to suggest the contrary.

In any event, we do not find it necessary to reach the issue of the legal effect of residual ability to work part-time only because we are not completely persuaded that claimant has established that she cannot work full-time. Some physicians and vocational rehabilitation counselors believe claimant is capable of working at a level considerably beyond that found by other medical and vocational experts. See, for example, the numerous reports of Drs. Seres, Buza and Pasquesi.

Given the debatable nature of claimant's residual work capacity, we believe that it is incumbent upon her to demonstrate adequate motivation pursuant to ORS 656.206(3). As the Referee noted, claimant has failed to do so. Claimant's motivation seems to be borderline at best. She has applied for some jobs, but refused to accept a job offered to her by her employer that probably would have been within her physical restriction because she felt that it would be "boring." The medical examiners are nearly unanimous in their opinions concerning claimant's lack of motivation and the secondary gain factors that are present. In view of these facts, we do not believe that claimant was relieved of the requirements of ORS 656.206(3). In fact, we believe it to have been all the more necessary for her to comply with that statute. She has failed to do so and we, therefore, affirm the order of the Referee.

ORDER

The Referee's order dated January 29, 1982 is affirmed.

CARLTON A. SPOONER, Claimant
Goldberg & Mechanic, Claimant's Attorneys
Wolf, Griffith et al., Defense Attorneys
Rankin, McMurry et al., Defense Attorneys

WCB 80-11400
November 19, 1982
Order on Reconsideration

The Board issued its Order On Review herein on September 3, 1982. On September 15, 1982 the Board abated its order to allow for reconsideration following receipt of additional correspondence from the parties.

The Board's Order On Review affirmed and adopted the Referee's order which found claimant suffered a new injury on September 23, 1980 and found Diamond International to be the responsible employer. Diamond International argues that the Board should make a finding that claimant suffered only a temporary aggravation as a result of his 1980 injury and that any additional benefits to which claimant may be entitled following his release from the hospital as a result of that injury, should be the responsibility of Wausau under the 1968 claim.

After reconsideration, the Board reaffirms and readopts its order. With regard to the issue of whether claimant suffered only a temporary aggravation of his preexisting condition, we would agree with claimant and Wausau, who argue that the issue at the hearing was confined to a determination of responsibility for the 1980 injury. Whether or not claimant suffered a temporary, as

opposed to a permanent, worsening of his condition as a result of the 1980 injury, and who is responsible for claimant's residuals following his release from the hospital, are questions that each party should have a full and fair opportunity to present evidence on. In this regard we note that an employer/insurer always has the option of denying continuing responsibility for a claimant's condition.

Considering the amount of confusion over just what was at issue at the hearing, and what was litigated, this method will allow each party to develop and litigate its case. Undoubtedly this will result in a second hearing following closure of the 1980 claim, but that appears to be the method that most comports with substantial justice.

ORDER

On reconsideraton of the Board's September 3, 1982 Order on review, the Board adheres to its former order.

EDWARD GREVE, Claimant
Emmons, Kyle et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

Own Motion 81-0026M
November 23, 1982
Own Motion Order and Determination

Claimant, by and through his attorney, has requested the Board to exercise its own motion authority and grant him additional compensation for time loss and for permanent partial disability for conditions resulting from his March 1, 1961 right knee injury. Claimant's aggravation rights have expired.

Attached to claimant's request were medical documents in support of his request. Dr. Woolpert indicated that claimant's current disability continues much as it was before. Claimant's right knee disability is marked but unchanged over the past two years. Claimant's back disability is moderate and, in Dr. Woolpert's opinion, related to his knee injury due to the stress placed on it with activity. Claimant is limited to sedentary work. SAIF Corporation has advised the Board that it opposes reopening of the claim as claimant's condition has not appreciably changed since 1978. Claimant has received awards totaling 90% loss of the right leg.

After thorough consideration of the evidence before it, the Board concludes that claimant has failed to show a worsening of sufficient degree to justify reopening his claim. We also conclude claimant has received adequate compensation for his right leg disability. However, claimant has never been compensated for his back disability. Under the authority granted us in ORS 656.278, we conclude claimant is entitled to an award of compensation for his back disability. Based on a comparison of this case with the numerous others the Board has rated in the past, we conclude claimant would be properly compensated with an award for 15% unscheduled low back disability.

ORDER

Claimant is hereby granted compensation for 15% unscheduled low back disability for residuals of his March 1, 1961 industrial injury.

Claimant's attorney is entitled to a reasonable attorney's fee equal to 25% of the increased compensation granted by this order, not to exceed $600.

ROBERT A. LUCAS, Claimant
SAIF Corp Legal, Defense Attorney

Own Motion 82-0244M
November 23, 1982
Own Motion Order

The Board issued an order on November 10, 1982 referring the above-entitled claim to hearing due to SAIF Corporation's failure to accept or deny claimant's request for medical treatment. It has been brought to our attention that this is a pre-1966 claim and that claimant does not have continuing rights to medical services. Claimant's sole remedy is to request own motion relief both with respect to the medical services and to his entitlement to time loss benefits. We are hereby rescinding our Own Motion Order Referral For Hearing and will consider claimant's entitlement to both medical services and time loss under the provisions of ORS 656.278.

Should the claimant or SAIF Corporation desire to provide us with any additional medical reports in support of their positions, we would ask that they do so in the near future.

IT IS SO ORDERED.

CHARLES MADDOX, Claimant
Olson, Hittle et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 80-01116
November 23, 1982
Order on Remand

On review of the Board's order dated December 7, 1981, the Court of Appeals reversed the Board's order.

Now, therefore, the above-noted Board order is vacated, and this claim is remanded to the carrier for acceptance and payment of benefits in accordance with law.

IT IS SO ORDERED.

ERIC S. YOUNGFELLOW, Claimant
Welch, Bruun & Green, Claimant's Attorneys
Tooze, Kerr et al., Defense Attorneys
Noreen K. Saltveit, Defense Attorney
Wolf, Griffith et al., Defense Attorneys

WCB 82-02890,82-02071 & 81-10085
November 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 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.

LEON E. COWART, Claimant
Galton, Popick et al., Claimant's Attorneys
Earle Lambert, Attorney
Alex K. Ginsberg, Attorney

WCB n/a
November 24, 1982
Order Approving Third Party Settlement

This matter has come before the Board on application of both SAIF Corporation and claimant concerning a dispute over the settlement of a third party action. The parties have characterized the dispute as one arising under ORS 656.593, requesting the Board to order a proper distribution pursuant to that statute. We conclude that the present matter is more properly viewed as arising under ORS 656.487, that is, that claimant is petitioning the Board to exercise its authority to approve a settlement of claimant's action against the third party tortfeasor which has been negotiated with the third party insurer. SAIF, as the industrial insurer, has refused to approve the settlement because of a disagreement with claimant's proposed apportionment of the settlement proceeds.

Claimant was injured in a motor vehicle accident while working in the course of his employment for K-Lines, Inc., insured by SAIF. Claimant elected to pursue an action against the third party. Claimant's wife filed a complaint in her own behalf, alleging loss of consortium as a result of the motor vehicle accident.

The third party insurer has offered a policy limits settlement of $65,000 in satisfaction of the actions brought by claimant and his wife. Claimant proposes allocating $50,000 of the settlement proceeds to satisfy his action and the remaining $15,000 in satisfaction of his wife's action for loss of consortium. SAIF is opposed to this allocation of the settlement proceeds on the ground that the $50,000 settlement between claimant and the third party insurer will result in SAIF's recovering less than the full amount of compensation benefits paid to claimant.

Nothing in the statutes governing third party actions guarantees or even contemplates that an industrial insurer will always have its statutory lien fully satisfied out of the proceeds of a third party recovery. Indeed, our experience is just the opposite. Many third party recoveries do not result in the industrial insurer recovering in full the compensation benefits paid. Cf. James H. Roberts, 34 Van Natta 1603 (decided this date). The question for purposes of ORS 656.587 is only whether the $50,000 settlement between claimant and the third party insurer is reasonable. We think that whether this settlement amount will result in full or only partial reimbursement to SAIF, as the industrial insurer, is a relatively minor facet of the determination of reasonableness.

Considering the present circumstances as presented by the parties' submissions to the Board, we find the proposed settlement of claimant's third party action for $50,000 to be reasonable.

ORDER

Pursuant to ORS 656.587, the Board approves settlement of claimant's cause of action against the third party herein for the sum of $50,000.

JOHN DENTON, Claimant
Clinton D. Simpson, Claimant's Attorney
George Goodman, Defense Attorney

WCB 81-08510
November 24, 1982
Third Party Distribution Order

This claim is before the Board for resolution of a dispute concerning the proper distribution of the proceeds of a third party recovery. ORS 656.593(1). The main issue is the extent of the insurer's lien for reasonably to be expected future expenditures for compensation and other costs of the claim. ORS 656.593(1)(c).

Claimant was compensably injured on January 24, 1978. He sustained a crushing injury to both legs, which resulted in an above-the-knee amputation of his left leg. His right leg was severely fractured with extensive soft tissue injury. After amputation claimant was fitted with a left above-the-knee prosthesis.

The claimant elected to pursue a third-party products liability claim against two manufacturers of the equipment involved in the industrial accident. Settlement was made with both defendants, the total settlement being $275,000. Prior to settlement, EBI Companies, the compensation carrier, claimed that it had paid workers compensation benefits to or in behalf of claimant in the amount of $55,630.84. EBI also was claiming $40,361 for future expenditures.

Following the settlement, EBI was paid $55,630.84 as reimbursement for expenditures made up to that time. A written agreement entitled "Stipulation and Agreement", signed by claimant's attorney, counsel for EBI and an authorized representative of EBI, recites that EBI was to be paid $55,630.84 "in satisfaction of [its] lien for expenses advanced on behalf of [claimant]." The stipulation also recites that $45,000 was to be placed in a special account pending resolution of the dispute concerning the proper distribution of the proceeds and further provides that EBI "claims a lien in said settlement in the sum of . . . $40,361 for expected future expenditures."

EBI is now claiming a lien of approximately $68,545 against the remaining proceeds of the third-party recovery. This figure represents $24,700.11 in temporary and permanent disability compensation, and $43,844 in anticipated medical expenses, and is the amount claimed after deduction of the aforementioned sum already paid to EBI ($55,630.84) pursuant to the terms of the stipulation.

Of the $24,700.11 claimed for disability compensation, $21,988.34 represents an amount of reimbursable temporary total disability benefits paid to claimant and other costs incurred by claimant while enrolled in an authorized program of vocational rehabilitation. See ORS 656.728(3). EBI failed to include these reimbursable expenditures as part of its lien against the settlement proceeds, as the lien was represented according to the terms of the Stipulation and Agreement.

Claimant contends that EBI is estopped from claiming these amounts as part of its lien, by virtue of the fact that prior to the settlement of claimant's third-party action EBI expressly represented its lien for expenditures to date and anticipated expenditures to be in particular amounts, as set forth above; and that in reasonable reliance upon this representation, claimant

entered into a settlement of his third-party action for the aforementioned sum. Claimant contends that if EBI had disclosed the full amount of its lien against the third-party recovery, he would not have settled his cause of action against the third-party defendants for $275,000. EBI's position on the estoppel argument posed by claimant is that claimant's attorney was aware of the fact that a detailed analysis of the anticipated future expenditures had not been accomplished when the $40,361 figure was quoted.

The explanation for EBI's failure to include the amounts of reimbursable benefits paid to or in behalf of claimant as part of its initial assessment is that:

> "It is not a policy of EBI Companies to reserve a file for temporary total disability benefits paid that [are] ultimately reimbursed by the Workers' Compensation Department while an injured worker is enrolled in an authorized vocational rehabilitation program."

We need not decide claimant's estoppel argument based upon oral representations made by EBI's representative(s) prior to settlement of claimant's action against the two third-party defendants, because we find that EBI is bound by the terms of the Stipulation and Agreement representing its actual expenditures to be $55,630.84 and its anticipated future expenditures to be $40,361. Since EBI has already recovered that portion of its lien for "expenses advanced on behalf of [claimant]" pursuant to the terms of the stipulation, the most that EBI can recover from this proceeding is $40,361 for future expenditures as set forth in the stipulation.

To the extent that EBI incurred claim costs for reimbursable benefits paid to or in behalf of claimant prior to execution of the stipulation, EBI has waived recovery of such claim costs. These costs represent liquidated amounts of which EBI was aware, or should have been aware, at the time it entered into the stipulation with claimant and his attorney.

EBI's expenditures relating to claimant's enrollment in a vocational rehabilitation program which were incurred after execution of the stipulation are amounts which EBI is entitled to recover from the proceeds of the third-party recovery, but only to the extent that all amounts recoverable by EBI as reasonably anticipated future expenditures do not exceed the stipulated sum of $40,361. Regardless of whether EBI recovers any part of the reimbursable benefits paid to or in behalf of claimant from the proceeds of the third-party recovery, EBI is obligated to reimburse the Workers Compensation Department for all such expenditures paid to EBI pursuant to ORS 656.728(3). EBI's waiver of the recovery of these expenditures by the terms of the Stipulation and Agreement is not binding upon the Department, and the Department is obligated to recover these expenditures from EBI. Cf. ORS 656.593(1)(c).

The major dispute about the distribution of the proceeds of the third-party recovery concerns the insurer's claim for future expenditures for treatment of claimant's right leg and foot, mechanical low back pain due to the amputation, a possible need for surgical revision to relieve ongoing problems with the stump of claimant's left leg, and personal stump care and accessories.

The carrier is claiming $25,000 for replacement of claimant's left leg prosthesis, and $2,925 for prosthesis maintenance. The claimant does not contest these claim expenditures but does contest the expenditures claimed for the above-referenced care and treatment. Although claimant concedes that EBI will incur future expenditures for replacement of claimant's leg prosthesis and prosthesis maintenance, claimant has taken issue with the amounts claimed by EBI based upon the language of ORS 656.593(1)(c), which provides that a paying agency is to be paid and retain "the present value of its reasonably to be expected future expenditures." Claimant contends that EBI is required to reduce to present value the future reserve that it seeks to withhold, based upon available investment interest rates. Claimant previously requested that the Board require EBI to provide him with all available documents indicating the interest rates that EBI has been able to obtain on invested money, for long and short term investments, from January 1, 1975 to the present. The Board denied claimant's request for production of this information.

The Board holds that the language of ORS 656.593(1)(c) does not require the paying agency to recalculate the present value of its reasonably to be anticipated future expenditures based upon available investment interest rates. The statute is satisfied if the paying agency establishes to a reasonable certainty that there will be future claim expenditures, and what the extent of those expenditures will be. LeRoy R. Schlecht, 32 Van Natta 261, 262 (1981), 33 Van Natta 475 (1981), 33 Van Natta 620 (1981).

Claimant has not taken issue with the projected amounts claimed by EBI for replacement of claimant's leg prosthesis and prosthesis maintenance, other than to contend that these amounts must be reduced to their "present value." Since we reject this contention, and there has been no contrary evidence concerning the amounts required for these expenditures which, as claimant concedes, will be incurred, we will allow EBI to recover these amounts from the proceeds of the third-party settlement.

In support of its claim of future expenditures for claimant's right leg and foot treatment, EBI has submitted a consultation report from Dr. Thomas P. Cochran, indicating that ". . . it is reasonable to assume the patient will intermittently experience some right leg and foot problems which would require an intermittent evaluation. I would suggest this could be approximated by perhaps $100 to $200 of medical care per year over the ensuing years until the patient reaches retirement age of 65." EBI claims intermittent care at $150 per year for the next 39 years, for a total of $5,850.

In a letter from L. Phaon Gambee, M.D., an orthopedic surgeon, the statement was made that "[i]t would be then within reasonable medical probability that no further treatment will be required in this area [claimant's right foot and right lower extremity]." In a letter report from Robert C. McKillop, M.D., an opthopedic surgeon, reviewing the other medical reports in support of the insurer's claim for lien, the statement is made that "I generally agree with the remarks that were made", in reference to the estimate of future medical expenditures made by the other two physicians.

Dr. McKillop's letter does not add anything to the opinion of Dr. Cochran or Dr. Gambee concerning the claim for expenditures or treatment of claimant's right lower extremity, since he states his agreement with two opinions which, in our view, are in opposition to one another. Furthermore, Dr. McKillop offers little explanation for his general agreement with other opinions, except to say that inflation should be taken into account in estimating future expenditures. As to the other disputed anticipated expenditures claimed by EBI, Dr. McKillop's statement offers no assistance.

In an affidavit, claimant indicated that although he has had occasional pain in his right leg, he has not required medical treatment or evaluation of his right leg for approximately two years, and that there has been no change in the condition of that leg for at least that period.

We find that EBI has not established to a reasonable certainty that there will be any future expenditures necessitated on account of the injury to claimant's right lower extremity, including his right foot, and, therefore, its claim for this anticipated future expenditure will not be allowed.

In support of its claim for future expenditures due to the possible need for surgery involving the stump of claimant's left leg, EBI relies upon Dr. Cochran's report that due to a distal exostosis, "[t]here certainly is potential for persistent ongoing stump problems though surgical revision would be unlikely to be needed more than once." Dr. Cochran also indicated that if great care was taken by the patient and by the prosthetist in insuring adequate fit of claimant's prosthesis, any potential stump problems could be obviated or kept to a minimum.

Dr. Gambee doubted that claimant would require an amputation revision because the thigh amputation was relatively high and because he did not foresee claimant to be a prosthesis wearer but rather a crutch walker. In his affidavit, claimant stated that the stump of his left leg had been basically stable for approximately two years, that he had been having no particular problem with it, and that no doctor had advised him that he would need surgery.

We conclude that EBI's claim for future expenditures due to anticipated surgery involving the stump of claimant's left leg has not been established to a reasonable certainty, and the $2,500 estimated cost of surgery, claimed as an anticipated future expenditure, is, therefore, not allowed.

EBI's claim for future expenditures for claimant's personal stump care and accessories, in the amount of $150 per year, for a total of $5,850 for the next 39 years, is almost totally unsupported. The only indication that claimant will incur any such significant expense is in Dr. Cochran's letter report. After stating that the total costs for prosthetic replacement would be roughly $25,000, Dr. Cochran goes on to say: "In addition, a cost of $100 to $300 per year should be alloted [sic] for purchasing of stump socks and changing of liners and/or nylon stump slips if needed for padding over the lifetime of the patient."

No other professional, including the prosthetist whose letter report appears in the file, indicated that personal stump care and accessories would be a substantial cost. Claimant's affidavit indicates that he has incurred virtually no such costs in the last few years. "My expenses have been limited to the purchase of buying an ace bandage once or twice a year at minimal cost." Accordingly, EBI's claim for future expenditures for personal stump care and accessories, not having been established to a reasonable certainty, is not allowed.

We find that EBI's claim for anticipated future expenditures for treatment of claimant's low back problems has been established to a reasonable certainty, and we, therefore, allow the claim for this anticipated future expenditure.

Dr. Cochran reported that because of the nature of claimant's leg amputation, "[t]here is reasonable medical probability to assume he will have persistent mechanical low back pain requiring treatment from time to time as it is mechanically stressful for any patient to walk with an above knee amputation prosthesis." Dr. Cochran also indicated that it was reasonable to assume that claimant would need physiotherapy or some conservative form of treatment as frequently as once every twelve months if he was vigorous and fairly active, at an estimated cost of $200 to $300 per year. Dr. Gambee indicated in his letter report that "a young man with a high thigh amputation is undoubtedly going to have problems off and on with his back." Dr. Gambee theorized the possibility of disc disease problem; however, he said that it was most probable that claimant's low back problems could be handled on an out-patient basis. Dr. Gambee had also indicated that treatment of a low back problem with this type of amputation would be of a relatively frequent and regular nature.

Based on the reports of these physicians, we find EBI's claim for $250 a year for low back treatment to be reasonable, and that it has established to a reasonable certainty that this is an anticipated future expenditure that will be incurred. Accordingly, its claim for $9,750 is allowed.

CONCLUSION

Pursuant to ORS 656.593(1)(c) EBI is entitled to retain the following amounts from the balance of the third-party recovery obtained by claimant.

$25,000	-	Anticipated future expenditures for prosthesis replacement.
2,925	-	Anticipated future expenditures for prosthesis maintenance.
9,750	-	Anticipated future expenditures for low-back treatment.
$37,675	-	TOTAL: Anticipated future medical expenditures.

In addition to the aforementioned reasonably to be anticipated future medical expenditures, EBI shall retain from the balance of the proceeds of the third party recovery those amounts of reimbursable benefits paid to or in behalf of claimant after execution of the aforementioned Stipulation and Agreement; however, the total amount retained by EBI from the balance of the proceeds of the

third party recovery under the terms of this order shall not exceed the sum of $40,361.

ORDER

It is hereby ordered that the total proceeds of claimant's third party recovery shall be distributed pursuant to the formula set forth in ORS 656.593(1), and that EBI shall be paid and retain a maximum amount of $40,361, as set forth more fully above, in full satisfaction of its remaining lien for expenditures for compensation, including the value of its reasonably to be expected future expenditures for compensation and other costs of this claim.

It is further ordered that EBI shall pay to the Workers Compensation Department all sums previously paid to EBI by the Department pursuant to ORS 656.728(3), and that any such amounts recovered by EBI from the proceeds of the third-party recovery, pursuant to the terms of this order, shall be paid forthwith to the Department upon receipt by EBI.

RENEE L. RITTER, Claimant
Bischoff & Strooband, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 80-09520
November 24, 1982
Order on Reconsideration

The claimant has requested reconsideration of the Board's Order on Review dated November 9, 1982.

The request is granted. On reconsideration, the Board adheres to its former order.

IT IS SO ORDERED.

JAMES H. ROBERTS, Claimant
Malagon & Velure, Claimant's Attorneys
Steven Reinisch, Defense Attorney

WCB n/a
November 24, 1982
Order Approving Third Party Settlement & Third Party Distribution

This matter is before the Board on claimant's request for approval of a settlement of claimant's third party action, which has not been finalized in view of the paying agency's refusal to grant its approval. ORS 656.587.

On April 20, 1978 claimant sustained an injury in the course of his employment, for which EBI Companies paid workers compensation benefits in behalf of claimant's employer. Pursuant to ORS 656.154 and 656.578, claimant elected to pursue his remedy against alleged third party tortfeasors. Negotiations pursued, and claimant has now been offered the sum of $10,000 in settlement of his cause of action against the third parties. EBI has refused to approve this settlement unless it is fully reimbursed for its expenditures for compensation paid to claimant.

EBI's lien against the proceeds of the third party recovery is $5,891.43. EBI urges the Board to set claimant's attorney's fee in an amount less than 33-1/3% of the total proceeds of the

third party recovery, which will allow EBI to recover its entire lien. See OAR 438-47-095. We have previously held that, although the three parties to a settlement of a worker's third party action are free to agree upon any distribution of settlement proceeds, this Board will not deviate from the statutory formula in ordering distribution of a settlement. Marvin Thornton, 34 Van Natta 999, 1001-1002 (1982); ORS 656.593(1). In Thornton the Board refused to order an "equitable distribution" urged by claimant, which would have required the industrial insurer to compromise a portion of its lien and resulted in claimant's receipt of a larger percentage of the third party recovery. See also Donald Young, 34 Van Natta 1003 (1982).

Although similar, this case is different in that the Board is not being asked to deviate from the statutory distribution formula set forth in ORS 656.593(1). The Board is being asked to set claimant's attorney's fee in some amount which is less than the maximum allowable by administrative rule, in order to provide for a full reimbursement of EBI's lien.

ORS 656.593(1)(a) provides that, when a worker elects to proceed in the worker's own behalf to recover damages from a third party, the worker's litigation costs and attorney's fees are the first sums to be paid out of the total proceeds of the third party recovery. The attorney's fee is not to exceed the advisory schedule of fees established by the Board for third party actions. See generally ORS 656.388(4).

The Board's administrative rule governing attorney's fees in third party actions is OAR 438-47-095: "In third party claims, as outlined in ORS 656.593, the attorney's fees shall in no event exceed 33-1/3 percent of the gross recovery obtained by the claimant." See also OAR 438-47-010(2).

EBI contends that the Board has the authority pursuant to its administrative rules to order payment of an attorney's fee in an amount less than 33-1/3 percent of the total proceeds of the third party recovery. We agree; however, in this case we do not find it appropriate to order less than one-third of the third party recovery as a reasonable attorney's fee. Claimant's attorney has submitted an affidavit for services rendered in behalf of claimant in the course of the third party proceedings. Based thereon, we find that one-third of the total proceeds of the third party recovery is a reasonable attorney's fee, in accordance with counsel's retainer agreement with claimant.

There is a legislative policy in favor of the pursuit of third party actions, in order to allow the injured worker to recover from the ultimate wrongdoer. Cf. Marvin Thornton, supra., 34 Van Natta at 1002. The promotion of third party actions has a salutary effect upon the workers compensation system as a whole by providing for the recovery of claim expenditures by employers and their workers compensation insurers. Workers' attorneys, therefore, must be reasonably compensated if workers are to be able to pursue their rights of action against responsible third parties. A paying agency may bring an action against a third party in the name of an injured worker or worker's beneficiaries in the event that the worker either elects not to bring an action in the worker's own right or fails to exercise the right of election provided by ORS 656.578; however, the risk of the contingencies inherent in most of this litigation, which tends to arise out of motor vehicle accidents, products liability and

medical malpractice cases, as well as the costs of such litigation, must then be borne by the employer and its industrial insurer.

In addition to promoting the pursuit of third party actions, we believe the legislature intended to promote prosecution of such actions by workers with the assistance of their own legal representatives. This is evidenced by the fact that ORS 656.593(1) provides for the worker's attorney's fees and other litigation costs to be paid from any third party recovery, not only before the paying agency is reimbursed for its claim expenditures or a part thereof, but also before the worker receives a portion of the recovery. In other words, the industrial insurer is third in line: the costs of litigation, including the worker's reasonable attorney's fees, are paid first; the worker currently receives at least one-third of the adjusted balance of the third party recovery; and only then does the paying agency have the opportunity to satisfy its lien in whole or in part by payment from the remaining balance of the proceeds. "Nothing in the statutes governing third party actions guarantees or even contemplates that an industrial insurer will always have its statutory lien fully satisfied out of the proceeds of a third party recovery." Leon E. Cowart, 34 Van Natta 1597 (decided this date).

While we do not find fault with EBI in this case, industrial insurers should try to promote rather than impede settlement of third party actions by workers and their legal representatives. This is consistent with the policy the legislature has adopted in enacting ORS 656.576 to 656.595, a policy which the Board adopts as its own.

It should be noted that although this is initially a request for the Board to approve a settlement negotiated by and between the claimant and the third party, pursuant to ORS 656.587, the industrial insurer's refusal to approve the settlement is so interrelated with questions concerning the proper distribution of the proceeds of the third party recovery, ORS 656.593, that it has been necessary for the Board to address both issues in a single order.

ORDER

Settlement of claimant's third party action, arising out of an injury on April 20, 1978 is hereby approved, and claimant is authorized to accept the sum of $10,000 in settlement of his cause of action against the alleged third party tortfeasors.

The proceeds of the settlement of claimant's third party action shall be distributed according to ORS 656.593, and claimant's attorney shall be paid and receive a sum equivalent to 33-1/3 percent of the total proceeds of the third party recovery; claimant shall receive at least 33-1/3 percent of the adjusted balance of such recovery; and EBI shall be paid and retain the balance of the recovery, but only to the extent that it is compensated for its expenditures for compensation arising out of claimant's injury.

WILLIAM M. STILL, Claimant
Emmons, Kyle et al., Claimant's Attorneys
Lindsay, Hart et al., Defense Attorneys
SAIF Corp Legal, Defense Attorney

WCB 80-03041 & 80-01909
November 24, 1982
Order on Additional Reconsideration

Claimant has requested reconsideration of the Board's Order on Reconsideration entered herein on October 29, 1982.

Previously, the Board issued its Order on Review on August 18, 1982. Peter Kiewit & Sons and its insurer requested reconsideration. The Board abated its Order on Review by an order dated September 15, 1982, and issued an Order on Reconsideration on October 28, 1982. By letter dated November 8, 1982, the SAIF Corporation requested reconsideration of the Order on Reconsideration, by an Order on Further Reconsideration dated November 12, 1982. We adhered to our former Order on Reconsideration. By letter of November 15, 1982, claimant has also requested reconsideration of the Order on Reconsideration.

In our initial review of this case and our review on reconsideration, we took into account the evidence and the arguments now advanced by claimant. We are not persuaded to modify our Order on Reconsideration.

ORDER

On claimant's request for reconsideration of the Board's October 29, 1982 Order on Reconsideration, the Board adheres to that order.

BARBARA MEYER, Claimant
Michael Dye, Claimant's Attorney
Rankin, McMurry et al., Defense Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-06237 & 81-07208
November 26, 1982
Order

The Board issued an Order of Dismissal in the above matter on July 19, 1982, based upon claimant's withdrawal of her request for review.

SAIF Corporation had cross-requested review on May 12, 1982 and SAIF's cross-request is still before the Board.

The Board hereby establishes the following briefing schedule: SAIF Corporation, now the appellant, will have 20 days from the date of this order to file its appellant's brief; the claimant will have 20 days after receipt of SAIF's brief to file her respondent's brief and SAIF will be allowed 10 days to reply. The case will then be docketed for review.

IT IS SO ORDERED.

ALICE S. BREWER, Claimant
Eric R. Friedman, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-00687
November 29, 1982
Order on Remand

On review of the Board's order dated March 17, 1982 the Court of Appeals reversed that portion of the Board's order affirming SAIF's denial of claimant's bilateral carpal tunnel syndrome insofar as it denied the compensability of claimant's aggravation claim for a worsening of her right wrist condition.

Now, therefore, that portion of the above-noted Board order holding that claimant's aggravation claim for a worsening of her right wrist condition is not compensable is vacated, and the claim for a worsening of claimant's right wrist condition is hereby remanded to SAIF for acceptance and payment of benefits in accordance with law.

IT IS SO ORDERED.

LESTER F. CADY, Claimant
Harold Adams, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-04440 & 80-1438
November 29, 1982
Order of Dismissal

A request for review, having been duly filed with the Workers Compensation Board in the above-entitled matter by the emplcyer, 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.

HAROLD R. PATRAW, Claimant
Carney, Probst et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 80-05088
November 29, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

Claimant requests review of Referee Mulder's order which upheld the SAIF Corporation's denial of claimant's occupational disease claim for his hearing loss. The only issue claimant raises on review is legal, not factual; claimant argues the Referee applied the incorrect legal standard by relying on SAIF v. Gygi, 55 Or App 570 (1982), and instead that the proper test is that stated in Weller v. Union Carbide, 288 Or 27 (1981).

We agree with both the Referee and with the claimant because we have previously concluded that in this kind of case a claimant has to satisfy both Weller (was there any worsening) and Gygi (was work exposure the major cause of the worsening). Douglas S. Chiapuzio, 34 Van Natta 1255, 1256 (1982).

ORDER

The Referee's order dated March 8, 1982 is affirmed.

HOWARD L. ALKIRE, Claimant
Welch, Bruun et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-03133
November 30, 1982
Order on Review (Remanding)

Reviewed by Board Members Barnes and Lewis.

Claimant requests review of Referee Quillinan's order dismissing his request for hearing, apparently on the basis of failure to prosecute pursuant to OAR 436-83-310.

Although in the recent past we have upheld several dismissal orders entered under OAR 436-83-310, we conclude that the present, very limited record is insufficient to sustain dismissal on that basis.

ORDER

The Referee's order dated April 2, 1982 is reversed and this case is remanded for further proceedings.

BILLY BROOKS, Claimant
Welch, Bruun et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-00245
November 30, 1982
Order on Review

Reviewed by Board Members Ferris and Lewis.

The insurer requests review of that portion of the Referee's order which found claimant's right knee tibial osteotomy surgery performed on August 23, 1981 to be the insurer's responsibility, thereby vacating the denial of July 30, 1981 and remanding the claim for reopening.

The insurer contends that the Referee erroneously ignored medical evidence that indicated claimant had had a knee problem for over twenty years prior to his compensable injuries and that that history more probably caused the osteoarthritis and concomitant need for the disputed surgery than did the compensable 1973 and 1975 injuries and compensable 1975 and 1977 medial meniscectomies. The insurer further contends that Dr. Norton, its medical consultant, more accurately determined the contribution of claimant's twenty year old knee injury to the osteoarthritis than did Dr. Berselli, the treating physician and surgeon.

The claimant responds that his treating physician, Dr. Berselli, has related the need for surgery due to osteoarthritis to the compensable injuries. He adds that Dr. Berselli has been his physician since 1975 which has allowed him to develop a detailed and intimate knowlege of claimant's knee problem. Dr. Berselli was the surgeon that performed the total medial meniscectomy in 1975, removed the remaining fragments of the meniscus in 1977, and carried out the tibial osteotomy in 1981. All of the surgeries were related to the compensable right knee injuries. He has, therefore, had the most opportunity to examine claimant's right knee and watch the progression of the symptoms and conditions. Dr. Norton has never examined the claimant, although he has reviewed the records.

We find that while claimant did sustain a right knee injury in 1951 while serving in the military and may have had some infrequent problems with the knee up to his 1973 and 1975 injuries, the old injury was not the major contributing cause of claimant's present osteoarthritis. His right knee did not disable the claimant or cause him to seek appreciable medical attention until after his compensable injuries aggravated the condition. The claimant testified that the 1951 injury did not cause any time loss or necessitate any surgery. For example, subsequent to his 1951 injury he was a drill instructor during which he ran obstacle courses and ran two to six miles a day. Later, he did a tour in Viet Nam with the 1st Shore Party Battalion. At no time during his twenty years in the military did he require any medical attention for his knee. It was not until after the compensable injuries and surgeries that osteoarthritis was diagnosed as a disabling condition necessitating medical treatment. Therefore, we conclude that the August 23, 1981 surgery was performed to relieve recurrent right knee pain due to osteoarthritis. We find that the 1973 and 1975 injuries and the 1975 and 1977 surgeries were the major contributing cause of the osteoarthritis. Therefore, the 1981 right knee tibial osteotomy performed to relieve the effects of the right knee osteoarthritis is compensable and the responsibility of the insurer.

ORDER

The Referee's order dated March 25, 1982 is affirmed. Claimant's attorney is awarded $650 as a reasonable attorney's fee for services rendered on Board review.

N. MICHAEL CALKINS, Claimant
Hansen & Wobbrock, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 77-07594
November 30, 1982
Order on Review

This case is again before us on remand from the Court of Appeals for reconsideration in light of James v. SAIF, 290 Or 343 (1981).

Claimant filed an occupational disease claim for his psychological condition allegedly caused by work in July of 1977. The SAIF Corporation denied the claim. Referee Williams upheld the denial. The Board affirmed. Claimant appealed to the Court of Appeals which, as previously noted, remanded for reconsideration.

The present record refers to claimant having also been physically injured in a compensable motor vehicle accident and we take official notice of the fact that in WCB Case Nos. 81-02805 and 80-02575, currently pending on Board review, Referee Gemmell found claimant to be permanently and totally disabled as a result of those injuries. It thus may well be that the present occupational disease claim is moot, but we have proceeded with reconsideration in compliance with the appellate court's directions.

We have reconsidered not only in light of James, but also in light of the subsequent decisions in SAIF v. Gygi, 55 Or App 570 (1982), and McGarrah v. SAIF, 59 Or App 448 (1982).

The Board previously adopted Referee Williams' conclusion: "The ultimate complaint concerning his employment with the Workers Compensation Department is not that it damaged him emotionally but that it failed to rehabilitate him from the emotional trauma he was already suffering." We now adhere to that conclusion subject to two additional comments.

First, contrary to Referee Williams' findings, we have considerable doubt about the credibility of claimant's testimony concerning his work environment and experiences. We note, however, that the question of the extent to which credibility is now relevant in cases of this type is somewhat unclear under the current appellate court decisions. See Mabel Griffith, WCB Case No. 81-04743, 34 Van Natta 1553 (October 29, 1982) (Board Member Barnes Dissenting).

Second, we believe that significant elements of this case come within a passage from McGarrah v. SAIF, supra:

> "If the job stresses were 'the major contributing cause' of the paranoia, . . . it would be irrelevant for the purposes of compensability whether or not claimant's perception of events that, in fact, occurred was well founded. If claimant's perceptions were well founded, it would be debatable whether there was in fact a mental illness." 59 Or App at 457.

As set out more fully in Referee Williams' order, in this case claimant correctly and accurately perceived that he was unable to satisfactorily perform the job he was hired to do, either to his own very high standards or to his supervisor's reasonable expectations.

ORDER

On reconsideration, the Board adheres to the conclusion stated in its Order on Review dated September 18, 1980.

ALLEN D. DELLES, Claimant
Malagon & Velure, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-02630
November 30, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

Claimant requests review of that portion of Referee Shebley's order which found that claimant's psychological stress claim is not compensable. The sole issue on review is compensability. Although we agree with the result reached by the Referee, the law upon which he relied has been supplanted by more recent cases. We, therefore, affirm with the following comments.

Except as inconsistent with our findings of fact herein, we adopt the Referee's findings of fact which, in brief, are that claimant was employed by a carpet sales concern from about June or July, 1980 to January, 1981, at which time he was terminated. Claimant alleges that work conditions, particularly his relationship with the owner of the store, caused a psychological condition or an exacerbation of a preexisting psychological condition.

Under these facts, in order to establish compensability, the claimant must show by a preponderance of the evidence that work conditions were the major contributing cause of the onset of a new condition or the exacerbation of a preexisting condition. With respect to stress allegedly arising from the supervisory relationship between the employer and the employe, the test is not whether the supervision was unreasonable, but whether incidents happened in the course of employment which the claimant subjectively experienced as stressful. Maddox v. SAIF, 59 Or App 508 (1982).

We are satisfied that there were numerous incidents in the course of claimant's employment that claimant could have perceived as stressful. We also are satisfied that claimant is affected by some sort of psychological condition. However, we are unable to determine whether the condition is a new one or an exacerbation of a preexisting one, or whether the "condition", regardless of how old or new it is, had any compensable consequences.

Claimant's treating family physician, Dr. Sammons, diagnosed "acute anxiety stress reaction." Dr. Fried, the psychiatrist to whom claimant was referred by Dr. Sammons, initially diagnosed "borderline personality disorder." Dr. Luther, another examining psychiatrist, felt that claimant had an underlying "character disorder with some anti-social and some passive-aggressive features", but that as a result of his employment claimant also had "depressive neurosis." In 1960, claimant was diagnosed as having a "sociopathic personality, antisocial reaction." After being confronted with evidence strongly suggesting that claimant had lied to him, Dr. Fried changed his diagnosis to "malingering." Malingering is a diagnosis recognized by the American Psychiatric Association, but apparently only as a label for behavior and not as a condition attributable to a mental disorder. See Diagnostic and Statistical Manual of Mental Disorders, Third Edition, 1980.

In addition to this armada of inconsistent diagnoses, claimant's credibility is severely impaired. The Referee made a specific finding that claimant was credible in his testimony about the incidents that happened in the course of his employment. That finding was expressly based on the failure of the employer to dispute or refute claimant's allegations with respect to on-the-job incidents, despite ample opportunity to do so, which is an unusual basis for finding testimony to be credible. Nevertheless, the record as a whole graphically illustrates that at various times and places, claimant has grossly misrepresented such things as his age, his educational background and his military service.

Claimant's counsel makes the ingenious argument that since one of the "symptoms" of an antisocial, sociopathic personality is persistent lying, the resurgence of claimant's need to misrepresent himself in the grandiose manner evidenced in the record indicates a worsening of the underlying condition. The argument is not without superficial appeal. Although claimant had a tumultuous life through adolescence and young adulthood, including numerous convictions for felonies (including first degree murder), there was a period of several years following his release from prison in 1974 during which claimant had relatively stable employment and a stable family life. It can be said that during this period claimant's "underlying condition" was quiescent.

However, even if we accept the proposition that claimant's need to seriously misrepresent his background indicates a new manifestation of his underlying condition, that does not render the exacerbation of the conditions compensable. The symptoms for which claimant sought medical treatment were hemorrhoids, rectal bleeding, diarrhea, nausea, weight loss, body tremors and general tension. With the exception of the weight loss and hemorrhoids, proof of the existence of these symptoms depends primarily upon claimant's representations that he had them. Physical examinations and lab tests failed to objectively reveal diarrhea, nausea or body tremors.

With respect to the weight loss, Dr. Sammon's reports and chart notes indicate that claimant weighed 164 pounds in December of 1978, 158 pounds in January of 1981, 152 on February 6, 1981, 158 pounds on February 20, 1981, 149 pounds in May of 1981 and 144 pounds in August of 1981. This verifies weight loss of at most 20 pounds from long before claimant began the employment here in issue to long after that employment ended. We do not find a weight loss of that magnitude over that time period unusual, nor are we convinced that it is due to psychological disturbance.

Considering the record as a whole, and particularly Dr. Fried's very persuasive testimony concerning the extent to which claimant presents all the indicia of malingering, the preponderance of the evidence does not indicate that claimant experienced either a new psychological problem or an exacerbation of a pre-existing one.

ORDER

The Referee's order dated January 22, 1982 is affirmed.

KAREN L. FINK, Claimant
Rosenthal & Green, Claimant's Attorneys
David Horne, Defense Attorney

WCB 80-10425
November 30, 1982
Order on Review

Reviewed by Board the Board en banc.

Claimant requests review of those portions of Referee James' order which: (1) Upheld the denial of her occupational disease claim; (2) concluded that interim compensation was due and payable between October 1, 1979 and January 1, 1980 as temporary partial rather than temporary total disability because of claimant's other earnings, applying OAR 436-54-225(1) to determime the proper rate of temporary partial disability; and (3) concluded that claimant was not entitled to any form of compensation beyond January 1, 1980 because of her earnings. The insurer raises an additional issue -- that the Referee erred in admitting the deposition of Mary Clair Buckley into evidence over its objection.

We affirm and adopt the Referee's order on all issues raised, except the Referee's analysis concerning the issue of compensability.

Claimant asserts that stress caused by her work as an attorney for the Metropolitan Public Defender's office in Portland caused or aggravated her fibrositis. The Referee assessed this claim under pre-SAIF v. Gygi, 55 Or App 570 (1982), law. We apply Gygi and consider whether claimant proved that her work was the major cause of her condition.

More so than perhaps any other type of case, a fibrositis claim depends upon expert medical analysis. Both Drs. Bennett and Rosenbaum submitted reports and testified.

There are large areas of agreement. Fibrositis is a poorly defined and little understood condition. There is no known underlying pathology. A diagnosis of fibrositis is based entirely on a patient's subjective complaints to a doctor and is really a matter of exclusion, that is, excluding known pathologies. Typical complaints include fatigue, malaise, headaches, insomnia and diffuse pain. The cause is unknown; or, stated differently, fibrositis is a term used to describe a symptom complex for which at the present time medical science has not been able to find a cause. The two doctors involved in this case seem to generally agree that stress can increase fibrositis symptoms, although other doctors dispute that proposition.

Claimant's work for the Public Defender from May of 1978 to August of 1979 involved considerable stress. About half way through this period of employment, claimant began a relationship with a man she eventually married in September of 1980. One of Dr. Bennett's reports states that one aspect of this relationship was also a source of stress for claimant, although the parties dispute the period of time to which Dr. Bennett was referring.

Timing is a broader problem. Although claimant left work with the Public Defender in August of 1979, she did not seek medical attention until March of 1980. Thus, neither Dr. Bennett nor Dr. Rosenbaum had the opportunity to assess the situation until long after the alleged work-related cause of her claimed occupational disease had ended.

Despite this handicap, Dr. Bennett opines that the stress of claimant's work for the Public Defender did increase her fibrositis symptoms. Dr. Rosenbaum agrees at most in a very limited way: "In the sense that anyone who is ill with any illness, headaches being a good example, stress could make it symptomatically worse." Neither doctor could suggest any worsening in the underlying pathology since fibrositis has no known underlying pathology.

These medical conclusions were necessarily based, given the nature of fibrositis, solely on claimant's reports to the doctors. The Referee found claimant's hearing testimony "very credible" and we have no reason to disagree. We note, however, that there are some differences in the histories from claimant recorded by Drs. Bennett and Rosenbaum. We have no way of knowing whether either doctor would regard these differences to be of any significance, but the fact that the differences exist in a case of this type makes it hard to find a comfortable basis upon which to pick one medical opinion over another.

For all of these reasons, we are not persuaded that stress associated with claimant's work for 15 months for the Public Defender was the major cause of her fibrositis condition.

ORDER

The Referee's orders dated July 24, 1981 and September 15, 1981 are affirmed.

Board Member Lewis Dissenting:

I would affirm and adopt the Referee's findings and conclusions on all issues except the compensability of claimant's fibrositis.

The Referee found the symptoms of claimant's fibrositis were not brought on exclusively by her work exposure, and thus the fibrositis was not an occupational disease under the rule set forth by the Board in Robert Sanchez, 32 Van Natta 80 (1981). The Referee's order, however, was issued prior to the Court of Appeals decision in SAIF v. Gygi, 55 Or App 570 (1982), which states that a claimant need only show that the on-the-job exposure was the major contributing cause of a condition to prove a compensable occupational disease claim.

The medical evidence indicates that claimant's employment was the major cause of the onset of the symptom complex termed fibrositis and that this set of symptoms is in itself, in this case, a compensable condition. Dr. Bennett defined fibrositis as "a poorly defined muscular condition with important psychological components related to stress and unresolved conflicts." The record indicates that fibrositis is an unusual condition in that no underlying pathology has ever been shown to exist. Thus, the symptoms are the disease. Insurer argues that since no pathological worsening has been shown, the condition cannot be compensable. I disagree. The fact that medical science does not fully understand the mechanics of a condition does not mean that the condition does not exist and was not caused by injurious work exposure. Cf. Volk v. Birdseye Division, 16 Or App 349 (1974).

While claimant may have experienced similar symptoms prior to working for the Public Defender's office, and there may have been other minor sources of stress in her life, she has proven that her work was the major contributing cause of the worsening of her symptoms and, thus, in this case, her disease. Claimant has shown that her work was, in fact, a causative factor in her condition, and the record offers no other idiopathic or off-the-job major contributing cause; therefore, claimant has met her burden of proving a compensable occupational disease.

I, therefore, respectfully dissent from the majority opinion.

TONY GIURIOLO, Claimant
Robert J. Miller, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-05496
November 30, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

SAIF Corporation requests review of Referee Mulder's order which set aside its denial of claimant's occupational disease claim. The issue is compensability.

Claimant is suffering from degenerative joint disease in both of his knees. He contends that his work as a hod carrier for about 30 years was the major cause of this disease within the meaning of SAIF v. Gygi, 55 Or App 570 (1982).

We think the causation question in this type of case depends largely on medical expertise but, as is not unusual in cases involving degenerative joint disease, the medical evidence presents two very different theories about causation. Dr. Norton, SAIF's consultant, believes aging and genetic factors are the major cause of degenerative joint disease. Dr. Norton feels that claimant's work did not contribute to his condition.

On the other hand, Drs. Fitch, Seufret and the Orthopaedic Consultants place more importance on environmental factors. Dr. Fitch felt claimant's knee condition was the result of a bow-legged deformity and obesity, with claimant's work activity accelerating the progression of the knee-joint disease. Dr. Seufret agreed that claimant's obesity and work activity were causal factors. Orthopaedic Consultants opined that claimant's loss of function in his knee was 35%, with 15% being due to work activity.

While we do not necessarily expect doctors to use the magic words, "major cause", we find insufficient evidence in this record to support even the inference that claimant's work activity was the major cause of his degenerative joint disease. Dr. Fitch stated that he was unable to tell what fraction of claimant's knee disability was due to his employment. Orthopaedic Consultants did express such an opinion, finding less than half of claimant's knee disability due to work activity. On this record, we are not persuaded that claimant established his occupational disease claim under the Gygi standard.

ORDER

The Referee's order dated February 26, 1982 is reversed. The SAIF Corporation's denial dated May 27, 1981 is reinstated and affirmed.

KIM M. GRIFFIN, Claimant
Fallgren/McKee Associates, Claimant's Attorneys
Wolf, Griffith et al., Defense Attorneys

WCB 82-00664
November 30, 1982
Order Reinstating Request For Review

The employer requested review of the Referee's order dated August 31, 1982. By order of October 15, 1982, the Board dismissed the employer's request for review as untimely.

The employer's attorney has moved the Board for reinstatement of its request for review, indicating that, although the request for review was not actually received by the Board within the 30-day period provided in ORS 656.289(3), the request for review was mailed within the 30-day period in compliance with OAR 436-83-700(2).

The Board is satisfied that the employer's request for review was filed in a timely fashion, and that it was error to dismiss the employer's request for review as untimely.

This order serves as the Board's acknowledgement of the employer's request for review.

ORDER

The Board's Order of Dismissal dated October 15, 1982 is withdrawn, and the employer's request for review is hereby reinstated.

A transcript of the hearing proceedings will be ordered, and copies of the transcript will be mailed to counsel for the parties when the copies become available. A briefing schedule will accompany the transcript. Failure to file a timely brief will result in immediate docketing. All extensions require prior approval. Extensions of time for filing briefs will be granted only on written motion and only for good cause.

THOMAS HUDDLESTON, Claimant
Lyle C. Velure, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-08292
November 30, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

SAIF Corporation requests review of those portions of Referee Seifert's order which ordered it to pay compensation and expenses for claimant's back surgery and awarded a penalty.

We affirm and adopt the Referee's findings and conclusion on the issue of reopening for back surgery. On questions of the need for medical treatment, we give great weight to the opinion of a claimant's current physician of choice. Lucine Schaffer, 33 Van Natta 511 (1981).

We find, however, that the Referee erred in assessing a penalty against the insurer. On the day of the hearing, the parties stipulated that the amount of temporary total disability awarded by the Determination Order was erroneous and that

compensation should have been paid from April 10, 1980 through June 20, 1980. The Referee added a 25% penalty to this stipulated award. The Referee did not state the basis for this penalty in his order, and we find no evidence in the record that would indicate that a penalty is warranted.

ORDER

The Referee's order dated March 24, 1982 is affirmed in part and reversed in part.

That portion of the Referee's order which awarded a penalty equal to 25% of the temporary total disability due is reversed.

The remainder of the Referee's order is affirmed.

Claimant's attorney is awarded $250 as a reasonable attorney's fee to be paid by SAIF Corporation for prevailing on Board review on the medical treatment issue. This is in addition to the attorney's fee awarded by the Referee.

DANIEL LARGENT, Claimant
Malagon & Velure, Claimant's Attorney
Cowling, Heysell et al., Defense Attorneys

WCB 81-07958
November 30, 1982
Order on Reconsideration

The Claimant has moved the Board to reconsider its October 29, 1982 Order on Review which affirmed Referee Brown's April 6, 1982 order approving the employer's denial of aggravation dated August 25, 1981. Claimant has attached two doctors reports to his motion and asks the Board to take them into consideration.

The Board cannot consider evidence not made part of the record before the Referee. ORS 656.295(5). If the reports were offered with the intent that claimant's motion for reconsideration be regarded as a request for remand to a referee for further evidence taking, ORS 656.295(5), claimant's request for remand is denied. Claimant has offered no affidavit or other statement showing that, in the exercise of due diligence, the reports were not obtainable prior to the hearing. Robert A. Barnett, 31 Van Natta 172 (1981), aff'd., 59 Or App 133 (1982).

ORDER

On reconsideration of our Order on Review dated October 29, 1982, we adhere to our former order.

WILLIAM D. LILLEY, Claimant
Olson, Hittle et al., Claimant's Attorneys
Schwabe, Williamson et al., Defense Attorneys

WCB 81-05447
November 30, 1982
Order on Review

Reviewed by Board Members Lewis and Ferris.

The employer requests review of those portions of Referee Fink's order which set aside the employer's denial of claimant's request for claim reopening; ordered payment of temporary total disability compensation from August 25, 1980 through August 25, 1981; and awarded claimant's attorney a $1,000 attorney's fee in addition to claimant's award of compensation. The employer contends that the condition or conditions for which claimant now seeks compensation are unrelated to his March, 1980 compensable injury.

Claimant's original injury was accepted, and a Determination Order issued in October, 1980, awarding claimant compensation for temporary total disability only. Claimant requested a hearing concerning the extent of his permanent disability, and the Referee awarded no permanent disability. Claimant has not requested review of that portion of the Referee's order.

We adopt the Referee's findings of fact as our own.

Claimant's contention that his medical problems in August, 1980 and thereafter are related to his compensable injury, involves questions of medical causation which must be supported by medical evidence. See Uris v. Compensation Department, 247 Or 420 (1967); Madwell v. Salvation Army, 49 Or App 713 (1980). The claimant must establish the causal relationship between his original injury and subsequent medical problems by a preponderance of the evidence. Hutcheson v. Weyerhaeuser, 288 Or 51, 55 (1979). We find that claimant has failed to do so and, therefore, reverse the Referee's order finding to the contrary.

Claimant's original injury was to his neck and right shoulder. Dr. Wilson, who examined claimant in May, 1981 on referral from the employer, listed more than 20 different symptoms complained of by claimant. He indicated that, in his opinion, there was no organic basis for claimant's symptoms, that claimant was not suffering from any residuals of his original injury, and that he suspected hypochondriasis. The symptom most nearly related to claimant's original injury was that of muscle spasms. Dr. Wilson felt that these were entirely voluntary.

Dr. Bell, neurologist, who had initially examined claimant in March, 1981 and concluded that claimant's complaints were causally related to his original injury, indicated his inability to explain claimant's various symptoms after reviewing Dr. Wilson's report, agreeing with Dr. Wilson's recommendation that claimant be psychiatrically evaluated.

Claimant was subsequently examined by Dr. Quan, psychiatrist, who found no psychiatric condition caused or exacerbated by claimant's industrial injury, and no psychiatric impairment which would preclude claimant's working. Dr. Quan also observed that claimant clearly tended to exaggerate his symptoms and relate all or most to his industrial injury.

After the Orthopaedic Consultants examined claimant on August 25, 1981, diagnosing no residual impairment directly related to claimant's March, 1980 industrial injury, Dr. Bell indicated his agreement with the Consultants' findings.

Dr. Shambaugh, internist, began treating claimant in August, 1980. Dr. Shambaugh initially diagnosed "marked muscle spasm of the right trapezius area with a right supraclavicular node and history of recent lymphadenopathy." Dr. Shambaugh's later impression, in September, 1980 was "myositis vs. muscle spasm of right lateral and posterior cervical muscles." In October, 1980, Dr. Shambaugh expressed an inability to "explain what is going on," apparently with reference to claimant's various physical complaints, including claimant's complaint of continuing and "very persistent pain in the right posterior cervical muscles with some cervical lymph glands remaining quite tender." At that time, Dr. Shambaugh's impression remained "myositis of undetermined cause with dermatitis" and incidental irritable bowel symptoms.

Apparently because claimant's symptoms were continuing with no specific etiology, Dr. Shambaugh referred claimant for examination to Dr. Bell, the neurologist previously mentioned. It was Dr. Bell who requested reopening of claimant's workers compensation claim, by letter of April 14, 1981. As already noted, when Dr. Bell reviewed a subsequent report by Dr. Wilson, he indicated his inability to explain claimant's symptoms: "Frankly, I am not sure what this patient has."

Dr. Shambaugh's testimony was taken by deposition, and his statements were somewhat ambivalent. On cross examination by defense counsel, Dr. Shambaugh was questioned as follows:

> "Q. If in fact he did have an injury on the date that he said he did, and I think your notes said it was to the scapula, but if he did have that injury, and you know nothing else, other than what you observed and treated and what he told you in his history, do you feel you can state to a medical probability that the injury he described to you in March or April of 1980 was the cause of the symptoms that you treated him for in 1980 and '81 * * * *."

Dr. Shambaugh responded:

> "A. I think I would have to say yes, I mean, as things are reconstructed and all, that we do not have a medical probability."

On redirect examination by claimant's attorney, the following question was asked and answered:

> "Q: Okay. Now, assuming the accuracy of the history that Mr. Lilley gave you, concerning this injury in March of 1980, do you have an opinion, based upon reasonable medical probability, more likely than not, of the probable cause of the neck spasm, shoulder spasm that you have described and which you have seen over the period of time that he was your patient?

"A: I think in trying to reconstruct from a retrospective point of view, that could be probable. I guess that's not very good wording, but it is probable that he had an injury that initiated pain some place in the area, maybe it was scapula, maybe it was -- but that, it was on that side, in the shoulder girdle area and all, which is allied to the neck area, which could then have been associated, at least, with the symptoms that he was having when I first saw him, and throughout the year that I followed him."

Given Dr. Shambaugh's equivocal opinion on the causal relationship between claimant's original injury and subsequent physical symptoms, as well as other medical opinions in the record, expressing either uncertainty as to the cause of claimant's symptoms during the year August, 1980 to August, 1981 or the certain conclusion of no causal relationship, we find that claimant has failed to sustain his burden of proving the compensability of his claim for reopening.

ORDER

The Referee's order dated February 26, 1982 is reversed in part. Those portions of the order setting aside the employer's May 27, 1981 denial, awarding claimant compensation for temporary total disability from August 25, 1980 through August 25, 1981, and awarding claimant's attorney a reasonable attorney's fee of $1,000 are reversed. The employer's aforementioned denial is hereby reinstated and affirmed. The remainder of the Referee's order is affirmed.

RONALD L. POTTER, Claimant
Hayner, Waring et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-02560
November 30, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

SAIF Corporation requests review of Referee Mongrain's order which increased claimant's award of unscheduled permanent partial disability for his neck and low back to 35% and ordered SAIF to pay for a medical report written by Dr. Luce in response to interrogatories from claimant. SAIF requests that the 20% disability award granted by the Determination Order be reinstated and that claimant be required to pay for Dr. Luce's report on the grounds that claimant obtained it for litigation purposes. Claimant has cross requested review, contending that the Referee's award of permanent partial disability was inadaquate.

We affirm and adopt those portions of the Referee's order on the extent-of-disability issue. The Referee also correctly found that Dr. Luce's response to claimant's interrogatories was the equivalent of cross examination and thus SAIF was responsible for its cost. OAR 436-83-400(5); Michael N. McGarry, 34 Van Natta 1520, WCB Case Nos. 81-07324 & 81-07325 (October 28, 1982).

ORDER

The Referee's order dated January 22, 1982 is affirmed.

Claimant's attorney is awarded $550 as a reasonable attorney's fee for services rendered on Board review, to be paid by SAIF Corporation. This is in addition to the attorney's fee awarded by the Referee.

JAMES ALBERS, Claimant
Richard Klosterman, Claimant's Attorney
Schwabe, Williamson et al., Defense Attorneys

WCB 80-08745
December 3, 1982
Order on Review

Reviewed by the Board en banc.

The employer requests review of Referee Fink's order which awarded claimant 30% unscheduled permanent partial disability for the low back, that being an increase of 20% over and above the July 16, 1980 Determination Order. The employer contends that the Referee's award was excessive, and additionally argues that the Referee erred by admitting into evidence the report and testimony of claimant's witness, Mr. Rhoades.

We adopt the Referee's findings of fact as our own.

We first address the evidentiary issue. Claimant produced Mr. Rhoades as a witness on his behalf at the hearing. Mr. Rhoades was both a close friend of the claimant and a graduate student in a clinical counseling psychology program. In conjunction with the curriculum of a learning disability class, Mr. Rhoades prepared a report entitled, "Psychological Case Study Report." This report contained the results of several tests Mr. Rhoades administered to the claimant. Mr. Rhoades' testimony and report basically dealt with the claimant's preexisting dyslexia condition. The Referee admitted this report and the testimony of Mr. Rhoades into evidence over the employer's objection. The Referee concluded that the employer's objections as to the qualifications of the witness as an expert had a bearing upon the weight to be given the witness's testimony, but not upon the preliminary question of admissibility.

The employer argues that the witness was not qualified to testify on the subject of claimant's dyslexia as he could not properly be considered an expert on that subject, that his testimony was incompetent and the report hearsay.

ORS 656.283(6) provides:

> "Except as otherwise provided in this section and rules of procedure established by the board, the referee is not bound by common law or statutory rules of evidence or by technical or formal rules of procedure, and may conduct the hearing in any manner that will achieve substantial justice."

In Brown v. SAIF, 51 Or App 389, 394 (1981), the court held that the above-quoted statute:

> ". . . gives the referee broad discretion concerning the admission of evidence at the hearing. The referee's decision to admit or exclude evidence is limited only by the consideration that the hearing as a whole achieve substantial justice."

See also Cristofano v. SAIF, 19 Or App 272 (1974).

The employer, however, urges the Board to adopt standards governing the qualifications of a witness in the particular area of expertise in relation to which the testimony and/or documentary evidence is being offered.

It has generally been held that in order to qualify as an expert, the witness must have "such skill, knowledge or experience in the field or calling in question as to make it appear that his opinion or inference-drawing would probably aid the trier of facts in his search for the truth." Sandow v. Weyerhaeuser Company, 252 Or 377, 380 (1969). Perhaps a more subtle and probably more relevant distinction in this regard is found in State v. Fry Roofing Co., 9 Or App 189 (1972), wherein two witnesses employed as "smoke readers" testified as to the facts of their observations regarding the amount of background obscuration generated by emissions from the defendant's manufacturing plant. The court stated:

> "As we view the testimony, the two smoke readers were not offered as expert witnesses in the sense that they were asked to express opinions. Rather the question is whether they were competent to testify as to the facts of their observations of the degree to which the background was obscured by the plume of smoke at defendant's plant." 9 Or App at 198. (Emphasis added.)

In other words, the court found that the evidence being offered was not opinion evidence, but rather evidence as to the witnesses' personal observations. The court, therefore, found that the only qualification that was necessary was that a witness have personal knowledge or training, experience or education if it is required. 9 Or App at 198.

We conclude that it is not necessary to address the issue which the employer urges regarding the qualifications of witnesses as experts to express opinions, as we find that the facts of the current case present us with a situation analogous to that in Fry. The hearing transcript reveals that, although there may have been some instances where Mr. Rhoades' testimony was somewhat of an amalgam of fact and opinion, by far the predominant components of the testimony were factual recitations relating to his personal observations of the claimant. For example, Mr. Rhoades testified as to the claimant's reading and arithmatic abilities, motivation and general history of his contact with the claimant. Mr. Rhoades' report consists of a division containing general background information and "Diagnosis" section broken down into subdivisions entitled "Behavioral Observations", "Sensory-Motor Functioning",

"Visual-Perceptual Functioning", "Auditory Perception and Language Functioning", "Cognitive Functioning" and "Social-Emotional Functioning." All of these subdivisions contain little more than a summarization of the claimant's performance on a series of tests administered to him.

Part of the court's opinion in Fry dealt with the question of whether a witness must have experience, education, or training before he can testify as to his observations. The court in that case discussed the necessary qualifications of "smoke readers" and applied the rule that competency is a matter for determination by the trier of fact whose determination of admissibility will only be reviewed for clear abuse of discretion, which the court did not find present in Fry. 9 Or App at 199.

The witness in this case was, at the time of the hearing, a graduate student at the masters level in clinical counseling psychology, had obtained a Bachelor of Arts degree at Hawaii Pacific College, and was concurrently studying in a psychology program at the University of Hawaii. He also engaged in graduate studies in clinical psychology at the University of Hawaii and was working as a clinical psychologist with a counseling service, supervised by a licensed clinical psychologist. If it is necessary for the witness in this case to possess training, experience or education in order to testify as to his observations, we find that he had adequate education and training to be competent to testify as to his observations concerning the claimant.

We believe that we can do no better than reiterate the general standard set forth by the court in Brown regarding admissibility of evidence or, for purposes of this case, the more specific standard articulated in Fry. The Referees have broad discretion on evidentiary matters, subject to the Board rules. That discretion should generally be exercised in favor of the admission of evidence; and when there are no Board rules on point, a Referee's decision to admit challenged evidence will only be upset if the objecting party establishes a clear abuse of discretion.

With regard to the issue of the extent of claimant's disability, we affirm and adopt the order of the Referee.

ORDER

The Referee's order dated April 29, 1981 is affirmed. Claimant's attorney is awarded a fee of $400 for services rendered on Board review, payable by the employer.

ANTONE ALEXANDER, Claimant
Bischoff & Strooband, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-06906 & 81-06907
December 3, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

SAIF Corporation seeks Board review of Referee Galton's order which granted claimant compensation for 50% left shoulder and neck disability and 20% left arm disability. SAIF contends both awards are excessive.

We make the following findings of fact:

(1) Claimant's injuries in January of 1979 injury produced permanent physical impairment in the minimal to mild range both in his neck and left shoulder (unscheduled) and in his left arm (scheduled).

(2) Claimant was able to continue working at his pre-injury job as a dryer feeder for approximately one year after the injury. Based on credible testimony at the hearing he did have to modify the job somewhat due to pain.

(3) Claimant became a boiler tender for the same employer sometime in late 1979. We find no evidence that the change in job was due to his injury. This job, too, was done with minor modifications.

(4) Claimant was laid off in December 1981, after three years of post-injury employment with the employer. The layoff was due to the company's economic problems.

(5) Claimant has a varied work background including work as a commercial fisherman, a dock worker, an automotive mechanic, a service station attendant, supervisor of 30-50 security guards, dryer feeder and boiler tender. He has also taken course work in income tax, small business record keeping and supervisor training.

(6) The medical consensus is that claimant's physical impairment is relatively minor with some exaggeration of symptoms.

Based on the findings of fact above, it is evident that the awards granted by the Referee were excessive. With respect to claimant's scheduled arm disability, the weight of the evidence is that loss of use is only minimal. We are not persuaded claimant has proven entitlement to a scheduled award greater than the 10% disability awarded by the Determination Order.

We conclude that the unscheduled neck and shoulder award is also too high. We turn to OAR 436-65-600 et. seq. for guidelines for reaching a more appropriate award. We conclude claimant's impairment is 15% of the whole person. Claimant is 52 years old (+7 value). He recently received a GED (0 value). His job at the time of the injury (dryer feeder) has a specific vocational preparation of 2 (0 value). The majority of his work has been of medium strength, with some evidence that he is now restricted to light work (+5 value). Claimant's intelligence is assumed to be normal in the absence of any contrary evidence (0 value). Claimant's varied background becomes of major significance when considering the last

category. Using a SVP of 7 (boiler tender and automotive mechanic), GED of 4 and considering his apparent restriction to light work, claimant still has 41% of the general labor market still open to him (-25 value). When all factors are combined, we find a more appropriate award for claimant's unscheduled neck and left shoulder disability to be 64° for 20% loss of wage earning capacity.

ORDER

The Referee's order dated May 3, 1982 is modified.

The October 16, 1981 Determination Order is affirmed as to the 10% left arm award.

Claimant is granted compensation equal to 64° for 20% unscheduled neck and left shoulder disability. This award is in lieu of that granted by the Referee.

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

LeROYCE D. BURGINGER, Claimant
Harold Adams, Claimant's Attorney
Schwabe, Williamson et al., Defense Attorneys

WCB 79-04223
December 3, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

The employer requests review of Referee James' order which set aside its partial denials of March 30, April 5 and May 10, 1979, which denied responsibility for claimant's psychological condition and seizure disorder. The sole issue is the compensability of those conditions.

I

Claimant, a then 29-year-old dental assistant, sustained an industrial injury on March 8, 1978. The Form 801 dated March 13, 1978 reports that claimant slipped on a wet carpet, fell against a wall and then fell over a chair backwards. Dr. Lawton's April 3, 1978 report diagnosed a contusion muscular and ligamentous type strain.

Claimant's history presents a complicated picture of numerous injuries (some industrial) and medical and psychological conditions, as evidenced by chart notes from Dr. Heister covering the period from 1960 through 1980. As early as 1969 claimant exhibited symptoms of depression due to her seeming inability to have a child. The 1972 chart notes indicate that claimant was suffering from "weak spells." These "spells" included numbness, dizziness and collapse of her legs. Dr. Greer's initial impression was a spinal cord lesion, but he later concluded that claimant's symptoms were emotional in origin. Psychiatric consultation was recommended. All diagnostic tests performed by numerous physicians were normal. Claimant, however, continued to suffer from a spectrum of symptoms. Claimant testified at the hearing that these symptoms were the result of frustration at her inability to become pregnant and that the symptoms disappeared when she later became pregnant.

In 1973, following a somewhat tumultuous marriage, claimant was divorced. She also underwent a hysterectomy. A child custody battle took place in 1975 between claimant and her former husband, which claimant lost. Claimant continued to suffer various types of symptomatology and underwent a tonsillectomy and breast biopsy. Claimant also remarried. In 1976 she was admitted to a hospital in California suffering from mild dehydration and an anxiety state. In 1977 claimant was again admitted to a hospital. At that time Dr. Heister diagnosed chronic and acute anxiety with depression, paranoia and schizophrenia. Dr. Heister reported that claimant's social situation had deteriorated, that she had separated from her husband, moved in with friends, but was forced to take an apartment on her own when her friends moved away, and that she was unable to cope with reality. Claimant testified at the hearing that her second husband was both a wife beater and a child abuser which caused her world to fall apart.

In 1977 claimant moved from California to Oregon and worked for a short period of time for several dentists. In January of 1978 claimant went to work for Dr. Bernard. In February claimant began living with her boyfriend, Mr. Stanley Bartlett. In March claimant sustained the injury which is the subject of the current litigation.

In his April 3, 1978 report Dr. Lawton diagnosed, as previously noted, a muscular and ligamentous strain. Dr. Lawton fitted claimant with a back brace and noted claimant's emotional overlay problem. Claimant returned to work ten days after the injury and continued working through August of 1978, although she continued to receive treatment for her back complaints from Dr. Christensen. On August 17, 1978 claimant was examined by Dr. Schwarz. Claimant reported to him that she suffered four episodes of unconsciousness beginning in June or July. She related to Dr. Schwarz that she suffered her first spell in her home, a second spell in Dr. Christensen's office (which Dr. Christensen later reported was not a seizure but a hysterical spell), a third spell that she had no idea when or where it happened and a fourth in August. There is no indication that any "seizure" occurred at work. At the hearing, however, claimant testified that she first suffered seizures in April and she had to quit work because of them.

Dr. Schwarz stated: "It is my feeling that this lady probably does not have epilepsy and does have some non-neurological findings in her examination." Claimant was referred to Dr. Spady who felt that he could not define any relationship between claimant's alleged seizure disorder and her prior back injury. An October 25, 1978 electroencephalogram was normal. Claimant was then evaluated

at the University of Oregon Health Sciences Center in December of 1978. Claimant, for the first time, stated that she sustained a head injury at the time of her at-work fall the prior March. In eight days of monitoring at the University, claimant exhibited no seizures and all EEG's and other diagnostic studies were normal. The University physicians were unable to determine if claimant had any seizure disorder. Oddly enough, however, anti-convulsants were prescribed. There is no indication that claimant was suffering any personality or emotional difficulties during this period of time.

In February of 1979 claimant began treating with Dr. Smith, a neurologist. Dr. Smith was initially suspicious that claimant's alleged seizure disorder was functional in nature. Another EEG demonstrated no abnormalities. Claimant also underwent a lumbar myelogram during this same period due to her continuous complaints of back pain. The myelogram was normal.

In February of 1979 claimant was examined by Dr. Lazere, a psychologist. Dr. Lazere reported that claimant was having emotional difficulty with her boyfriend, Mr. Bartlett, and suffered strong guilt feelings over the loss of custody of her daughter. He found claimant to have a profile typical of persons who suffer attacks of emotional distress, accompanied by physical symptoms. Nowhere in Dr. Lazere's report is it noted that claimant related any of her emotional difficulties to her injury and/or its sequelae.

Claimant was admitted to Good Samaritan Hospital on February 10, 1979 with complaints of seizure disorder. Based on the history obtained from claimant and her boyfriend, Dr. Smith felt that claimant had a grand mal seizure disorder, although neither he nor any other physician had ever witnessed such a seizure. His diagnosis appears to be based only on the history taken from claimant and her boyfriend. Claimant also began seeing Dr. Daley, a psychiatrist, in February of 1979 who initially was retained to help determine the nature of the hysterical component of claimant's alleged seizure disorder.

On March 26, 1979 Dr. Lawton reported that he had no record of claimant sustaining any head trauma in her March, 1978 fall.

On March 27, 1979 Dr. Dow, a neurologist, examined claimant's medical records at the employer's request. Dr. Dow stated that it was his opinion that claimant's alleged seizure disorder was hysterical in nature.

On April 6, 1979 Dr. Smith reported that he agreed with Dr. Snodgrass' evaluation of claimant and her alleged seizure disorder. He again stated that the only account of the seizures came from claimant's boyfriend. He felt that it would be difficult to establish a link between her work injury and her seizure disorder and that it would be highly unusual to develop post-traumatic seizure disorder after a head injury that did not involve a loss of consciousness. According to claimant's later - and third - version of the March, 1978 injury, she definitely lost consciousness after the fall.

In April of 1979 claimant began working as a dental assistant at McLaren School. On May 7, 1979 Dr. Parvaresh performed a comprehensive psychiatric examination of claimant. Dr. Parvaresh felt that claimant exhibited no significant degree of psychiatric impairment, and stated:

> "As far as causal relationship is concerned, if you review the records closely, you will find evidence of emotional disturbance associated with psychomatic disorder to include asthma, migraine, hypertension, pelvic dysfunction, and hysterical

> paralysis, which all have antedated her accidental injury of March, 1978. In today's exam, I find nothing new in terms of psychiatric symptomatology which can reasonably be attributed to the accidental injury."

On September 7, 1979 claimant sustained another low back injury with her new employer (insured by SAIF). Claimant again slipped on water and, again, the accident was unwitnessed. Numerous complaints and new symptoms followed, some confirmed and others unconfirmed.

Claimant was again examined by Dr. Lazere on February 11, 1980. Dr. Lazere felt that claimant's pending litigation would result in stress that would exacerbate her current complaints and lead to new physical symptoms. Dr. Lazere was proven correct by subsequent events.

Dr. Smith replied on March 24, 1980 to an inquiry from claimant's attorney. Dr. Smith reported that he felt claimant was probably suffering from a grand mal seizure disorder, but again noted that the description came from claimant's boyfriend and that he had not witnessed any seizure himself to date. He noted that all EEG studies except one were completely normal, but stated that a normal EEG did not rule out epilepsy. He ruled out the alleged head injury as a cause of the disorder, but then stated that claimant's emotional stress due to the injury played "a prominent role in precipitating what may have been a latent siezure disorder." It is unclear why Dr. Smith felt that claimant suffered emotional distress as a result of her 1978 injury and why he ruled out other stress factors, if he was even aware of them.

Claimant was examined at the Callahan Center in May of 1980. Overuse of prescription medication was noted. On July 1, 1980 Dr. Daly reported that claimant suffered from hysterical neurosis, conversion-type and depressive neurosis, which preexisted her 1978 injury, and which caused little difficulty prior to that injury. Dr. Daly refused to speculate as to whether claimant's alleged seizures were organic or functional in nature, but felt that claimant exhibited marked psychiatric impairment following, and as a result of, the 1978 injury. Dr. Parvaresh read Dr. Daly's report and replied by report dated July 11, 1980. Dr. Parvaresh seemed to indicate that claimant's seizure disorder was hysterical in nature and noted her previous problem of hysterical paralysis in 1972. Dr. Parvaresh felt that claimant's hysterical neurosis had nothing to do with her 1978 injury since he did not feel that the injury was traumatic enough in nature and did not result in a significant change in her lifestyle. Dr. Daly, however, disagreed in his report of July 21, 1980, feeling that the incident was sufficiently traumatic and resulted in a lifestyle change. He reported that:

> "Following the accident, she was unable to work at her chosen occupation, she was required to wear a back brace, take anti-convulsant medications, and was completely dependent for her financial well being on her companion, Mr. Stanley Bartlett."

II

Since claimant is contending that her preexisting psychological condition was worsened by her 1978 injury, she must establish the 1978 injury as a material contributing cause of such worsening. Patitucci v. Boise Cascade Corp., 8 Or App 503 (1972).

We conclude that claimant has not established that the worsening of her underlying psychological condition was the result of her 1978 injury. There are conflicting opinions contained in the record from Drs. Parvaresh, Daly and Lazere, with Dr. Daly being claimant's treating psychiatrist. We have previously stated that:

> "'Treating physician' is not a talismatic phrase that is a substitute for weighing the evidence. * * * The ultimate question in all cases is one of weighing the evidence, with some deference to the 'treating physician' being just one of the many yardsticks to guide the factfinder in that weighing process." Richard Schoennoehl, 31 Van Natta 25 (1981), aff'd without opinion, 54 Or App 998 (1981).

We find the opinions of Drs. Parvaresh and Lazere to be more persuasive than that of Dr. Daly.

Dr. Daly was deposed on May 8, 1981. Dr. Daly's testimony reveals numerous shortcomings in his analysis. In his report of July 21, 1980 he stated that claimant's lifestyle changed following her injury, that she was unable to return to work and that she was dependent on Mr. Bartlett for financial security. As we have previously noted, however, we find the fact of the matter to be that claimant returned to work ten days after the injury and worked continuously for about the next six months. Dr. Daly admitted at the deposition that such information would have been important to his diagnosis but he did not have it. Dr. Daly was further mistaken in his belief regarding when claimant first began ingesting anticonvulsant drugs. He also revealed that he had virtually no medical history regarding the claimant when he began treating her in February, 1979 and that, by the time of the deposition, the only records he had seen were two evaluations done on the claimant in 1975 in relation to her child custody battle and some records from Salem Memorial Hospital. He had no information concerning claimant's 1977 hospitalization which took place shortly before the 1978 injury. In view of claimant's extremely complicated medical history and tendency toward hyperbole, we view these as substantial shortcomings. Moreover, Dr. Daly identified numerous other sources of stress in the claimant's life and felt other sources which he was previously unaware of would also be stressful. These included the breakup of claimant's marriage, physical abuse, previous surgeries, loss of her grandparent, difficulties with her stepfather, "a good deal of turmoil with her relationship with" Mr. Bartlett, whom she began living with only one month prior to her injury, and the loss of custody of her child. A further difficulty with Dr. Daly's opinion is that he seems to fail to deliniate the contribution of the subsequent 1979 injury, an event which Dr. Parvaresh felt did worsen claimant's underlying psychological condition, and which Dr. Daly himself felt was a major source of stress.

Dr. Lazere, on the other hand, in his February, 1979 report, identified the loss of custody of claimant's daughter as the main source of her stress. He noted that she exhibited little distress reaction when discussing her physical problem. In fact, neither Drs. Lazere nor Parvaresh felt that claimant exhibited any noteworthy psychiatric difficulties such as would impair her functioning at the times of their respective examinations. These opinions seem to be supported by the fact that claimant returned to work for about six months following the 1978 injury and actually secured new employment in April of 1979 at McLaren. Dr. Parvaresh examined claimant's past medical history in much more detail than Dr. Daly and, in comparing past history with present symptoms, found nothing new in terms of symptomatology that could be reasonably related to the 1978 injury. Claimant had always exhibited a degree of psychological dysfunctioning and neither Drs. Parvaresh nor Lazere felt that the 1978 injury worsened that condition. In fact, Dr. Daly testified at the deposition that it was actually that underlying disorder that he was treating, rather than any acute manifestation. We, therefore, find that claimant has not established that the 1978 injury caused or materially worsened her psychological condition, if there was any worsening established at all prior to the 1979 injury, which is not in issue in this proceeding.

III

With regard to the claimant's alleged seizure disorder, our summary of the medical evidence, stated above, leaves substantial doubt in our minds that claimant suffers from any sort of organic seizure disorder at all. Dr. Smith was the only physician willing to commit himself to a diagnosis of grand mal seizures, even though he had never witnessed any seizure himself. Indeed, none of the numerous physicians by whom claimant was examined had ever witnessed any seizure, other than Dr. Christensen, who witnessed a "spell" which he felt was hysterical in nature. The only person who ever witnessed any of these "seizures" was claimant's boyfriend, Mr. Bartlett. He testified as to having witnessed four or five seizures mainly involving claimant "blanking out":

> "Q. How many times have you observed the blanking out part?
>
> "A. When I read a pamphlet on it and said 'Hey, this is what happened', then I started noticing it * * *." (Emphasis added.)

It is interesting that other physicians have commented on the virtual "textbook" description of claimant's seizures, and that seizures cannot be differentiated on the basis of descriptions given by laypersons.

Dr. Schwarz did not feel that claimant had epilepsy, and felt that her alleged seizures were not neurological in nature. Dr. Spady could define no relationship between the seizures and the 1978 injury, nor could the examiners at the University of Oregon either confirm the alleged seizure disorder or link it to the injury. Dr. Dow was of the opinion that claimant's seizures were hysterical in nature, as apparently was Dr. Christensen. Dr. Snodgrass reported on January 15, 1979 that:

> "First of all, I am unable to make a diagnosis of true seizures. * * * Also, I cannot make a diagnosis of seizure disorder in view of past experience which has proven to me that epileptic vs. hysterical seizures cannot be differentiated by laypersons."

Dr. Snodgrass was particularly impressed with the fact that claimant exhibited similar behavior in the past with regard to hysterical problems.

Dr. Smith reviewed Dr. Snodgrass' report and stated in his April 6, 1979 report that: "I cannot significantly disagree with his opinion." Neither could he relate the "seizures" to the 1978 injury. Dr. Smith, however, seemed to alter his opinion after being contacted by claimant's attorney. However, even in that report he reveals that he has relied totally on claimant's description of her seizures for his diagnosis. We have already pointed out the difficulty with regard to the claimant's tendency toward hyperbole.

Even assuming the claimant does suffer from seizures, no physician has been willing to relate this to the 1978 injury, save Dr. Smith's opinion that stress as a result of that injury precipitated the seizures. Upon deposition, however, Dr. Smith testified that any type of stress could have the same result and identified numerous other sources of unrelated stresses in claimant's life. The preponderance of the medical evidence does not establish that claimant suffers from any type of organic seizure disorder, or if she does, that it is related to the 1978 injury. We find Dr. Smith's opinion to be based almost completely on the history taken from claimant, with virtually no objective findings to support it. Additionally, we believe that claimant's attempt to fabricate a story regarding a head injury in 1978, and the numerous other inconsistencies in the histories she gave to the various examining physicians, in an apparent attempt to make her seizure disorder claim more believable, seriously impugnes her credibility. We believe that the claimant has failed to establish by a preponderance of the evidence that she suffers from a seizure disorder, or that if she does, that it is in any way related to the 1978 injury.

ORDER

The Referee's order dated October 16, 1981 is reversed. The March 30, April 5 and May 10, 1979 denials are reinstated and affirmed.

ANGELA V. CLOW, Claimant
Galton, Popick et al., Claimant's Attorneys
Wolf, Griffith et al., Defense Attorneys

WCB 80-10693
December 3, 1982
Order on Review (Remanding)

Reviewed by Board Members Barnes and Ferris.

The employer requests review of those portions of Referee St. Martin's order which ordered reopening of the claim on the basis of aggravation as of April 7, 1981, apparently modified the November 19, 1980 Determination Order by reclassifying the claimant's injury from scheduled to unscheduled and ordered the employer to pay claimant a 15% penalty and awarded claimant's attorney an employer paid fee of $1,000 on the basis of overcoming a de facto denial. Claimant requests affirmance of the Referee's order or, alternatively, specific enforcement of the June 2, 1981 stipulation.

Claimant was 61 years of age and employed as a custodian when, on October 31, 1978, she caught her foot on a mat, fell and sustained a fracture of the right femoral neck. Surgery was performed by Dr. Lisac on November 2, 1978, who reduced the fracture and fixed a Deyerle plate with pins over the fracture site. Claimant continued to experience pain, and by August 21, 1979 Dr. Lisac reported that claimant had developed a bursa (a fluid filled sac) over the plate site. Dr. Lisac later noted that avascular necrosis (tissue death due to deficient blood supply) of the femoral head could occur. On November 29, 1979, the Deyerle plate and pins were removed and the bursa was resected. Claimant was examined by the Orthopaedic Consultants on September 30, 1980 who found her to be medically stationary with a 49% loss of right leg function. A Determination Order issued on November 19, 1980 awarding claimant 35% scheduled disability for loss of the right leg.

On November 21, 1980, Dr. Lisac reported that claimant was still experiencing pain. He found a solid healing of the fracture site but suspected that avascular necrosis of the femoral head was present. He felt that claimant's hip would continue to be painful and that a total hip revision in the future would be necessary, but that "certainly one would not consider that at this time." He encouraged claimant to return to work with follow-up examination suggested in several months. On April 7, 1981, claimant returned to Dr. Lisac complaining of increased pain. Dr. Lisac noted that she was having little difficulty walking but found indications of femoral head deterioration. He stated: "I think she is going to come to total joint replacement, but she is not anxious to consider that at this time." He prescribed Tylenol #3 with continued observation. By May 5, 1981, Dr. Lisac reported that claimant was now anxious for hip replacement surgery to be done. Again, he noted that her walk and hip motion were "really quite good" and stated that he was reluctant to proceed with surgery. She was referred to Dr. Wade for a second opinion. Dr. Wade reported on May 6, 1981 that hip replacement may be necessary but deferred until he discussed the matter further with Dr. Lisac.

Claimant had previously requested a hearing in relation to the Determination Order of November 19, 1980. A hearing was scheduled for June 2, 1981. Prior to the date of the hearing and apparently based on the medical reports of April 7, May 5, and May 6, 1981, claimant's and defense counsel engaged in negotiations concerning the claim. Ultimately, it was agreed that the claim would be reopened as of May 5, 1981 for the provision of time loss benefits with closure to occur following the hip replacement surgery. In compliance with that understanding, claimant's attorney prepared the stipulation, mailed it to defense counsel on June 2, 1981 for signature and cancelled the June 2, 1981 hearing date.

While negotiations between counsel were in progress, claimant had returned to Dr. Lisac on May 29, 1981. Dr. Lisac reported that claimant walked with "an excellent gait" and that:

> "It is difficult for me to believe that she has as much pain as she describes. She is quite young . . . to consider total joint replacement with her symptoms. I am going to have her use salicylates (salicylic acid salts) and follow her along on a p.r.n. basis. There is not much question that she is probably going to come to total joint replacement at some time in the future."

Dr. Lisac concluded that surgery at that time was contraindicated and that only palliative care should be provided.

Dr. Lisac's May 29, 1981 report was received by the insurer on June 2, 1981. The stipulation prepared by claimant's counsel was received by defense counsel on June 3, 1981. Defense counsel informed claimant's counsel that they were not willing to execute the stipulation because of the conclusions in Dr. Lisac's May 29 report. On June 25, 1981, claimant's counsel wrote to defense counsel stating: "It is my understanding that the physicians have reversed their original opinion and recommended that a joint replacement is now inappropriate . . ." He suggested an independent medical examination of the claimant to help resolve the impasse. Nothing apparently came of that proposal. Claimant amended her original request for hearing on August 20, 1981 and sought a new hearing date. The hearing was ultimately convened on September 30, 1981.

The Referee ruled that the stipulation was predicated on the mutual understanding that claimant's hip replacement surgery was imminent and that, when Dr. Lisac subsequently retreated from that position, the stipulation could not be enforced since there was a mutual mistake of fact. However, the Referee seemed to imply that such agreements, even though not approved by this agency, are normally enforceable. He additionally found that the April 7 and May 5, 1981 medical reports established a worsening of claimant's condition, ordered the claim reopened as of April 7, 1981, and found a penalty and attorney fee due based on "failure to process the claim," which we understand in context to mean failure to accept or deny the aggravation claim within 60 days. Since the Referee found the claimant was not medically stationary, he

deferred ruling on the issue of extent of disability, but did state that: ". . . it appears that the award should be reclassified to the unscheduled area because the torso was invaded when the Deyerle plate and screws were removed and large bursa was encountered which was completely resected."

I

We first address claimant's alternative argument for specific enforcement of the stipulation and the issues of penalties and attorney fees for unreasonable resistance to the payment of compensation for failure to execute the stipulation. Claimant argues that, assuming we reverse the Referee's finding with regard to the aggravation claim, we should find claimant and the insurer entered into a valid and binding agreement when the stipulation was reduced to writing, although not signed by all parties nor approved by a Referee or the Board. We would point out that this Board has stated on several previous occasions that there is no binding and enforceable settlement of a case unless and until a stipulation or settlement is signed by all parties and approved by the Board or a Referee. Jack R. Hadaway, 34 Van Natta 669 (1982); Phyllis J. Moore, 33 Van Natta 703 (1981); Minnie K. Carter, 33 Van Natta 574 (1981). Claimant's argument normally could be disposed of by citation to those cases alone.

However, claimant does bring up one additional point -- that she took action in reliance on the insurer's representation that a settlement had been reached by cancelling the June 2, 1981 hearing date, requiring her to wait nearly four months for another hearing date. We agree that, in appropriate circumstances, such detrimental reliance could support some form of remedy; we disagree that reliance or estoppel are valid reasons to either enforce the unconsummated settlement or to assess a penalty and attorney's fee for not consummating it. Rather, claimant's proper remedy once it became clear "the deal was off" -- which must have been known to all concerned at some point prior to claimant's counsel's June 25, 1981 letter -- was to ask for another hearing date on a preferential basis pursuant to OAR 436-83-220.

II

We turn to the main issue raised by the insurer concerning the propriety of the Referee's reopening the claim on an aggravation basis. The Referee found that the April 7 and May 5, 1981 medical reports established an aggravation, and that the insurer failed to accept or deny the claim. We assume the Referee's order contemplated the payment of temporary total disability begining on April 7, 1981 and continuing until closure pursuant to ORS 656.268.

We agree with the Referee that the April 7, 1981 report of Dr. Lisac constituted a valid claim for aggravation under ORS 656.273(3). However, ORS 656.273(6) states that no compensation is due unless the employer has received notice of medically verified inability to work. The April 7, 1981 report, although establishing a worsening of claimant's condition, fails to state in any way that claimant is unable to continue working. The fact that Dr. Lisac treated claimant with only Tylenol #3 supports this interpretation. The May 5, 1981 report of Dr. Lisac is basically

repetitive of the April 7 report and again only speaks in terms of surgery sometime in the future. Since Dr. Lisac had previously released claimant to return to some type of work, it would seem that he would have stated in these reports that she was precluded from work if he had felt that to be the case. The May 6 and May 15, 1981 reports of Dr. Wade also only express an opinion concerning the need for future surgery. We find that none of these reports provide a medical verification of inability to work and that the employer was not required to pay temporary total disability benefits. Although a worsening has been noted, there is no basis for reopening the claim since only additional medical care is recommended. Such benefits are payable under ORS 656.245.

III

With regard to the issue of failure to accept or deny the April 7, 1981 aggravation claim, we reverse. The duty-to-respond issue in this case has a novel twist. We agree that Dr. Lisac's April 7, 1981 report constitutes an aggravation claim. However, before the statutory period to accept or deny that claim had passed, Dr. Lisac's May 29, 1981 report was submitted in which the doctor reversed his position and, in effect, withdrew the aggravation claim. Under these circumstances, was there nevertheless a duty to issue an acceptance or denial of the aggravation claim?

We doubt it, but if there was any such duty we think the insurer's conduct substantially complied with it. We find that the employer did initially express willingness to accept the claim when the parties entered into their tentative agreement in early June of 1981. When the insurer subsequently declined to execute the stipulation and communicated this fact to claimant's counsel, this was adequate to serve as a denial of aggravation reopening. In Stroh v. SAIF, 261 Or 117 (1972), the issue was whether the circuit court had jurisdiction to hear a case if the appeal was sent by regular mail instead of by certified mail as required by the statute in effect at that time. The Supreme Court ruled that even though there was not literal compliance with the statute, the fact that the appeal had been actually received was sufficient for the purposes of the statutory notice requirement. In this case claimant's counsel understood that the employer was denying the aggravation claim since he amended the original hearing request to put that in issue. Therefore, all parties were aware that the insurer had denied reopening of the claim and proceeded to take the matter to hearing. Although the literal requirements of the statute were not complied with, we find that all parties had adequate notice of the insurer's position and that the deviation from the statutory requirements was harmless. To conclude otherwise would be to elevate form over substance. We, therefore, reverse the Referee's award of penalties and attorney fees.

IV

With regard to the issue of the extent of the claimant's disability, the employer urges us to make that determination. We decline to do so as we find that issue was not sufficiently developed at the hearing. With regard to the Referee's apparent

determination that claimant's award should be unscheduled rather than scheduled, we note the Orthopaedic Consultants' report of May 7, 1979 indicates that the Deyerle plate and pins lay wholly within the neck of the femur; there is no indication that the acetabulum was invaded. It is unclear, however, whether the bursa resection involved anything beyond the femoral neck. We are confident that the Referee will apply the Board's holdings in Chester Clark, 31 Van Natta 10 (1981), and Eugene C. Rhodes, 34 Van Natta 481 (1982), when he makes his decision on the extent of disability on remand.

ORDER

The Referee's order dated October 30, 1981 is reversed. The claim for aggravation and penalties and attorney fees is denied, and this case is remanded to the Referee for a determination on the issue of the extent of claimant's disability.

RAY FINN, Claimant
Rick Roll et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 82-02212
December 3, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

Claimant requests review of Referee Menashe's order which upheld SAIF Corporation's partial denial of his cervical condition and affirmed the rate used for the computation of his temporary total disability benefits.

We affirm and adopt the portions of the Referee's order that address the issue of the proper rate of temporary disability benefits. We adopt the Referee's findings of fact on the denial issue, but those findings lead us to a different conclusion.

Claimant was injured when he fell on his back at work on September 10, 1981. The resulting claim, for what was initially diagnosed as lumbosacral strain, was accepted and is not here in issue. Approximately two months later claimant's complaints of neck, shoulder and left arm pain led to a myelogram which revealed a herniated cervical disc. The issue raised by SAIF's partial denial is whether that disc problem is a compensable consequence of claimant's September 10, 1981 injury. Analysis of this issue depends to a large degree on the weight to be accorded the temporal gap between the September fall and the November cervical symptoms.

There are three medical opinions in the record on the question of causation. Dr. Ordonez, a neurosurgeon, initially felt the type of injury claimant sustained would not ordinarily cause a ruptured disc. The time lapse between the injury and claimant's first visit to him with cervical complaints did not concern Dr. Ordonez. A subsequent report by Dr. Ordonez indicated he had again heard the history of the accident and he was now persuaded that it was serious enough to cause the cervical problems.

Dr. Macy, claimant's family doctor, did not know whether claimant's injury could have caused the cervical complaints, although he felt it was unlikely. In a statement that seems to contain an internal contradiction, Dr. Macy said:

"It would seem unlikely that symptoms would start approximately sixty days after the injury. In disc injuries no one knows when the actual time of injury may be, since the pain may not be a major factor at that particular time and the process continues until the nerve irritation occurs."

We think Dr. Macy's opinion is essentially neutral. But the second sentence of Dr. Macy's statement lends at least some support to claimant's theory of a causal relationship between his fall and cervical condition despite the "late" cervical complaints.

Dr. Short, acting as a consultant for SAIF, testified at the hearing that he failed to find a relationship between the September 1981 injury and claimant's cervical complaints two months later. He stated that most disc ruptures happen without trauma. Claimant suffered from a bronchial condition in November of 1981, and Dr. Short felt that the coughing and sneezing at that time could have caused the rupture. He felt that, if a rupture had occurred at the time of the injury, claimant would have felt the symptoms immediately. Normal wear and tear of life was also mentioned as a possible factor.

Dr. Short's theory, as we understand it, was based in part on the absence of any cervical symptoms between September and November. On this record, we do not completely agree with Dr. Short's premise. Claimant testified that he had upper back/neck discomfort immediately following the September 10 fall, but that it was minimal and his lower back complaints were the more serious. A co-worker corroborated claimant's testimony about some immediate neck symptoms. On a form that he filled out about ten days after the fall, claimant recorded that his symptoms included pain between the shoulders. A chiropractor's chart note from that same period indicates "positive cervical syndrome." While it is true there is little evidence of cervical symptoms relatively contemporaneously with the September 10 fall, it is not true -- as Dr. Short seems to imply -- that there is no evidence of contemporaneous cervical symptoms.

We conclude that the weight of the evidence preponderates in favor of finding a causal relationship between claimant's at-work fall and his subsequently discovered herniated cervical disc. The opinion of Dr. Ordonez supports that conclusion. The opinion of Dr. Macy, although generally equivocal, supports that conclusion on the critical subsidiary issue of the delayed onset of serious cervical symptoms. And the contrary opinion of Dr. Short is, we find, based partly on a factual foundation that is inconsistent with this record.

ORDER

The Referee's order dated May 26, 1982 is reversed in part.

The March 3, 1982 denial is set aside, and claimant's claim for cervical complaints is remanded to SAIF Corporation for acceptance and payment of compensation to which claimant is entitled until closure under ORS 656.268. The remainder of the Referee's order is affirmed.

Claimant's attorney is awarded as a reasonable attorney's fee for his services at the hearing and before the Board the sum of $1,750 payable by the SAIF Corporation.

LAWRENCE RYAN, Claimant
Starr & Vinson, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney
David Horne, Defense Attorney

WCB 82-00494 & 80-11051
December 3, 1982
Consolidated Order on Review
& Own Motion Order

Reviewed by the Board en banc.

The Board, on its own initiative, has consolidated two WCB cases that present the two interrelated matters of claimant's new injury claim which was denied by the SAIF Corporation on Febrary 5, 1982 and claimant's request for own motion relief against Employers Insurance of Wausau based on the theory that claimant's current condition is the result of an aggravation of his 1974 industrial injury, for which Wausau is responsible.

On September 19, 1980 claimant petitioned the Board for own motion relief. Wausau advised the Board on November 18, 1980 that claimant's current condition might represent a new injury incurred with his last employer, L & L Repair. The Board then remanded the matter for a hearing on the issue of aggravation versus new injury. The Board's order noted that claimant's counsel advised it that he intended to file a new injury claim against claimant's last employer. The Board's order concluded: "If that claim is denied and a hearing is requested, that hearing should be consolidated with this hearing." Claimant filed his new injury claim on January 12, 1981. The claim was denied by SAIF on February 5, 1981.

On January 30, 1981, i.e., before SAIF's denial of the new injury claim was issued, claimant's attorney filed a motion to join SAIF in the then-pending referred own motion matter. The Referee to whom the matter was then assigned did not rule on the motion but, instead, had his secretary enter an Amended Notice of Hearing on February 4, 1981 which stated that SAIF was being joined as a party in the pending own motion proceeding. The case was reassigned and the hearing postponed a number of times; it was ultimately heard by Referee Johnson on June 23, 1981. So far as we can tell from the present record, claimant has never requested a hearing on SAIF's February 5, 1981 denial.

Referee Johnson ruled in the appealable portions of his order that SAIF was properly joined as a party and, on the merits, sustained SAIF's denial of the new injury claim. Referee Johnson also recommended that the Board exercise its own motion authority and order claimant's 1974 Wausau claim reopened based on the theory that claimant's current condition represents an aggravation of that industrial injury.

The Referee concluded that SAIF was properly joined as a party and that the claim against SAIF was not barred based on Hanna v. McGrew Bros. Sawmill, Inc., 44 Or App 189 (1980). He stated that the February 4, 1981 Amended Notice of Hearing "obviated claimant's need to file a Request for Hearing from the denial," since it served to put SAIF on notice that litigation was pending and since SAIF was a necessary party to that litigation. He refused to grant SAIF's motion to dismiss it as a party to the proceedings.

We disagree. ORS 656.319(1) provides:

> "With respect to objection by a claimant to denial of a claim for compensation under ORS 656.262, a hearing thereon shall not be granted and the claim shall not be enforceable unless:
>
> (a) A request for hearing is filed not later than the 60th day after the claimant was notified of the denial; or
>
> (b) The request is filed not later than the 180th day after notification of denial and the claimant establishes at a hearing that there was good cause for failure to file the request by the 60th day after notification of denial." (Emphasis added.)

Claimant failed to request a hearing on SAIF's denial within 60 days, 180 days, or thereafter. In Nelson v. SAIF, 43 Or App 155, 157 (1979), the court stated:

> "The benefits awarded under the worker's compensation law are purely statutory, and a claimant must strictly follow the prescribed procedures in order to recover under the law. * * * Time limitations prescribed by the law are limitations upon the right to obtain compensation and are not subject to exceptions contained within the general statute of limitations."

Thus, under ORS 656.319(1) and Nelson, the fact that claimant failed to request a hearing on SAIF's denial means that he has lost his right to a hearing on that denial. It follows that no jurisdiction exists over SAIF in connection with claimant's new injury claim.

We do not accept the Referee's conclusion that the Amended Notice of Hearing obviated the need for claimant to file a request for hearing from the denial. This case is not similar factually to Hanna. That case involved a proceeding pursuant to ORS 656.307 and there was no question concerning the compensability of the claim. That is not the situation here. There was no request by any of the parties pursuant to ORS 656.307, and it is questionable that an order pursuant to that statute could have been entered since the aggravation aspect of this case is within the Board's authority under ORS 656.278.

Even assuming the Amended Notice of Hearing could obviate the need for claimant to file a Request for Hearing, we would find Syphers v. K-W Logging, Inc., 51 Or App 769 (1981), to be applicable. In Syphers, the court stated:

> "The statutory scheme does not reasonably permit a hearing on compensability of the claim prior to a timely acceptance or denial or prior to the expiration of the time in which the carrier may investigate and consider the claim without risking penalties." 51 Or App at 771.

Here, the claim was filed on January 12, 1981. The Amended Notice of Hearing issued on February 4, 1981. SAIF denied the claim on February 5, 1981. Thus, even assuming the Referee was correct and the Amended Notice of Hearing obviated the need for claimant to file a Request for Hearing, the Amended Notice of Hearing was premature under Syphers, because SAIF's denial had not yet issued. Cf. John R. Thomas, 34 Van Natta 1207 (1982). SAIF's motion to dismiss should have been granted.

With regard to the Referee's conclusion that claimant's current condition represents an aggravation of his 1974 injury, we completely agree with the Referee's recommendation.

ORDER

That portion of the Referee's order dated January 30, 1982 which refused to grant the motion to dismiss filed by the SAIF Corporation in this proceeding is reversed, and it is recognized that this agency has no jurisdiction over the issue of the propriety of SAIF's denial dated February 5, 1981. This portion of our order is appealable in accordance with the first "Notice to Parties" paragraph stated below.

Claimant's request for own motion relief against Employers Insurance of Wausau is granted, and claimant's 1974 claim is hereby ordered reopened effective July 26, 1980 and until closure is authorized pursuant to ORS 656.278. This portion of our order is appealable in accordance with the second "Notice to Parties" paragraph stated below.

ARCHIE M. ULBRICH, Claimant
Welch, Bruun et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-04633
December 3, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

The SAIF Corporation requests review of those portions of Referee Mulder's orders that set aside its denial of medical services in the form of acupuncture treatments and awarded an insurer-paid attorney's fee of $1,000. Claimant cross-requests review of those portions of the orders which upheld SAIF's setoff of an overpayment of temporary total disability against claimant's award for permanent partial disability.

After claimant received considerable acupuncture treatment from a doctor in Washington, SAIF denied further out-of-state treatment in that form. That denial is not here in issue. Claimant then began receiving acupuncture treatment in Oregon from Dr. Chiasson and from Mr. Chen G. Shen, a "registered acupuncturist." No issue is raised about the credentials of the persons rendering this treatment. The only question is whether claimant proved, pursuant to ORS 656.245, that his acupuncture treatment was causally related to his 1979 industrial back injury and reasonably necessary. We affirm and adopt those portions of the Referee's orders answering that question in the affirmative. See also Allen Davis, 33 Van Natta 564 (1981).

Claimant does not dispute that he was previously overpaid time loss benefits nor the amount of the overpayment. Claimant argues only that SAIF could not setoff the overpayment against his award for permanent partial disability, citing Wilson v. SAIF, 45 Or App 993 (1980). In Telphen N. Knickerbocker, 33 Van Natta 568 (1981), we noted that Wilson was decided before the Workers Compensation Department adopted OAR 436-54-320, which we concluded does permit an insurer to take a setoff just as SAIF did in this case. Claimant's argument does not even mention OAR 436-54-320 and thus does not in any way suggest the setoff here in issue was not authorized by that rule. We agree with the Referee on the setoff issue.

The final issue involves the Referee's award of an insurer-paid attorney's fee of $1,000 to claimant's attorney for prevailing on SAIF's denial of medical services. The controlling standards are efforts expended and results obtained. OAR 438-47-010(2). Claimant's attorney submitted two of the 99 exhibits admitted at the hearing. Claimant was the only witness; the transcript is 30 pages long. Some of these limited efforts were directed toward the setoff issue, not just the issue of denial of medical services. As for results obtained, apparently what was at stake at the hearing was a total of seven acupuncture treatments, the charge for some of which was $30 each. We have referred to an award of attorney's fees that substantially exceeds the amount of compensation benefits in controversy as "anomalous." Curtis L. West, 31 Van Natta 106 (1981). Based on the efforts expended and results obtained just on the medical services issue, we conclude the Referee's attorney's fee in this case is too anomalous to be sustained.

ORDER

The Referee's orders dated January 8, 1982 and February 9, 1982 are modified. Claimant's attorney is awarded $600 for services rendered at the hearing level for prevailing on a denial of medical services; this award is in lieu of that granted by the Referee. In addition, claimant's attorney is awarded $200 for services rendered at the Board level in defending the Referee's decision on denied medical services. All attorney fees awarded are to be paid by the SAIF Corporation in addition to claimant's compensation. The remaining portions of the Referee's orders are affirmed.

MADONNA DUMAN, Claimant
Drakulich & Carlson, Claimant's Attorneys
Tooze, Kerr et al., Defense Attorneys

WCB 81-08565
December 7, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

The employer/insurer requests review of Referee Seymour's order which set aside the Determination Order of May 1, 1981 as premature, reversed the September 1, 1981 denial of aggravation and further chiropractic care and awarded claimant's attorney a fee equal to 25% of the additional temporary total disability benefits and $300 for overcoming the denial of further chiropractic care.

Claimant, a then 17 year old employee of Nike Corporation, sustained a back injury while lifting boxes on September 26, 1980. She sought chiropractic care from Dr. Stilson who diagnosed lumbar disc strain/sprain on October 1, 1980. He expected claimant to return to work in four or five days. Instead, on October 30, 1980, Dr. Stilson reported that claimant's recovery was taking longer than anticipated. Claimant did not return to work and treatments continued with Dr. Stilson reporting that on November 19, 1980, claimant suffered an "acute aggravation" and that X-rays revealed L-4 and L-5 "disc swelling". He recommended that claimant go to a spa for therapy. There are no further reports from Dr. Stilson until August 19, 1981. Claimant continued receiving temporary total disability benefits while undergoing this therapy at the spa. In January of 1981 claimant moved to Arizona, where she states she treated with a Dr. James. There are, however, no reports in the record from Dr. James. Claimant remained in Arizona for about five months, returning to Oregon in June of 1981.

While in Arizona, claimant was examined by Dr. Goldsmith, an orthopedist, at the request of the insurer. The doctor's findings were completely within normal limits, with full ranges of motion and active reflexes. All X-rays were completely normal. Dr. Goldsmith recommended exercises and nerve relaxants for any functional portions of claimant's symptoms. He encouraged claimant to return to her usual and regular employment immediately, found no permanent disability and recommended against further manipulative therapy. Based on Dr. Goldsmith's report, a Determination Order issued on May 1, 1981, allowing benefits for temporary total disability only. At the hearing, claimant testified that Dr. Goldsmith only examined her for five or ten minutes. The length of Dr. Goldsmith's report and the findings contained therein speak for themselves.

Shortly after returning to Portland, claimant returned to Dr. Stilson, who submitted a form 827 dated August 19, 1981, which indicated that claimant was not medically stationary and would require three to six months of further manipulative and adjustive therapy. By April of 1982 Dr. Stilson was still providing treatment. The insurer issued a denial on September 1, 1981, with the denial specifically noting that Dr. Goldsmith had recommended against further manipulative therapy. Claimant was examined on October 28, 1981 by the Orthopaedic Consultants. The results of that examination were basically the same as Dr. Goldsmith's -- all

findings were normal. The history taken from the claimant by the Orthopaedic Consultants reveals that Dr. Stilson had released claimant to modified work approximately one month prior to the date of their examination, and that claimant was working 40 hours per week with little if any difficulty.

The Orthopaedic Consultants found claimant medically stationary with no permanent impairment and felt that she had received maximum benefit from manipulative therapy. It was felt that claimant could return to her regular work although sheltered lifting was suggested for six to eight weeks. Further manipulative treatment was felt to be deleterious. On November 16, 1981 Dr. Stilson reported that claimant had never been medically stationary and that she would need monthly care for at least one year -- all of this, to repeat, for a minor back strain suffered in September of 1980.

The Referee found that he could not accept the report of the Orthopaedic Consultants since it stated that claimant was medically stationary, but also that she should engage in sheltered lifting for six to eight weeks. He concluded that since Dr. Stilson felt that claimant was not and had not been medically stationary since the date of the injury, and since the Orthopaedic Consultants report could be read as saying she was not medically stationary, that the preponderence of the evidence indicated that claimant had never been stationary and that the May 1, 1981 Determination Order had been issued prematurely.

We disagree. The May 1, 1981 Determination Order was issued on the basis of Dr. Goldsmith's April 7, 1981 report stating that he found the claimant medically stationary. Dr. Stilson's November 19, 1981 report to the effect that claimant had never been stationary since the original accident date is simply not persuasive. Dr. Stilson had not seen the claimant for at least eight months prior to her return to his office in August of 1981. In fact, the last report in the record from Dr. Stilson prior to the August, 1981 report is dated November 19, 1980. Dr. Stilson does not explain how he reaches such an opinion without having examined the claimant for the last eight months and makes no comments that detract in any way from the cogency of Dr. Goldsmith's report. We find that the claim was properly closed by the May 1, 1981 Determination Order.

Since the Referee found that the claim had been prematurely closed, he found the question of permanent partial disability and aggravation to be moot. Our contrary finding requires us to address those issues. In order to establish a claim for aggravation the claimant must establish a worsening of her condition since the last award or arrangement of compensation, which in this case is the May 1, 1981 Determination Order. We find, although not without some trepidation, that the August 19, 1981 report of Dr. Stilson constituted a valid claim for aggravation. Claimant received manipulative treatment from Dr. Stilson and returned to work in late September or early October of 1981. By October 28, 1981, when examined by the Orthopaedic Consultants, claimant had achieved a medically stationary status, with maximum benefit from manipulative therapy having been achieved. We do not share the Referee's concern that the Orthopaedic Consultants report is internally inconsistent. Dr. Jones, a member of the examining panel

testified at the hearing that the sheltered lifting recommendation was basically intended just as a precautionary measure. We accept the conclusion of the Orthopaedic Consultants that claimant was medically stationary as of October 28, 1981 with no permanent impairment.

With regard to the insurer's denial of further chiropractic treatments, ORS 656.245 provides that the medical services for conditions resulting from the injury will be provided for such period as the nature of the injury or the process of recovery requires. In Wait v Montgomery Ward Inc., 10 Or App 333, 338 (1972), the court interpreted that statute as applying to medical expenses that are reasonably necesssary for the continued treatment of the injury. We do not find a reasonably strong basis in the record for concluding that the services provided by Dr. Stilson after the date of the claimant's examination by the Orthopaedic Consultants are not reasonable or necessary. Although Dr. Goldsmith and other consultants all recommended against further manipulative treatment, it appears that Dr. Stilson's treatments were of some benefit in enabling the claimant to continue working in 1981. The only evidence which the employer has presented with regard to the reasonableness of continued chiropractic care following claimant's return to Portland comes from the Orthopaedic Consultants. We do not think that this is sufficient to allow us to find that the treatments are not reasonable and/or necessary, especially in view of the fact that the treatments did seem to benefit the claimant. We believe that continued treatments are palliative and not curative in nature, and thus may be provided for pursuant to ORS 656.245, without the necessity of reopening the claim. The insurer's denial of further chiropractic treatments is, therefore, reversed. That is not to say that the employer is forever responsible for providing continuing chiropractic care. However, we believe, as the Referee noted, that there are other remedies also provided under OAR 436-69-201.

We consider one additional issue. There is a significant conflict of opinion on most issues in this case between, on the one hand, Dr. Stilson, claimant's treating chiropractor, and, on the other hand, Dr. Goldsmith, an orthopedic surgeon, and a panel at Orthopaedic Consultants consisting of two orthopedic surgeons and a neurologist. In assessing this conflict in evidence, the Referee's order contains a passage that can be interpreted to mean that orthopedic surgeons are not qualified to express opinions on the need for chiropractic care.

We disagree with any such implication. Even in malpractice actions, which are subject to stricter rules of evidence than are workers compensation cases, ORS 656.283(6), the courts have permitted medical doctors to testify against osteopaths, chiropractors and podiatrists:

> "Where the principles, techniques, methods, practices or procedures of one branch of the healing arts concur or are generally the same as those of another branch of the healing arts, ... opinion evidence on a point concerning such matters from a practitioner in another branch is admissable." Creasey v. Hogan, 292 Or 154, 156 (1981).

We think it follows that, in appropriate cases, orthopedic surgeons are qualified to express opinions on the need for chiropractic care and it further follows that, in appropriate cases, the opinion of an orthopedic surgeon could be found to be the more persuasive on that issue.

ORDER

The Referee's order dated May 24, 1981 is affirmed in part and reversed in part. The May 1, 1981 Determination Order is affirmed in all respects. The September 1, 1981 denial of claimant's aggravation claim and denial of further chipropractic care is reversed. The insurer is ordered to provide claimant with benefits for temporary total disability from August 19, 1981 to October 28, 1981, less time worked; to pay for chiropractic services rendered from August 19, 1981 to October 28, 1981 pursuant to ORS 656.273; and to pay for chiropractic services rendered subsequent to October 28, 1981 pursuant to ORS 656.245.

Claimant's attorney is allowed a fee of 25% of the temporary total disability made payable to the claimant by this order not to exceed $750 and claimant's attorney is awarded a fee of $700 for services in overcoming the denial at the hearing. This fee is in lieu of that allowed and awarded by the Referee.

The remainder of the Referee's order is affirmed.

LORRIE L. WIDMAN, Claimant WCB 81-04271
Harrington, Anderson et al., Claimant's Attorneys December 7, 1982
Wolf, Griffith et al., Defense Attorneys Order on Review

Reviewed by the Board en banc.

The employer requests review of Referee Braverman's order which set aside its denial of claimant's claim. Claimant contends that exposure of her hands at work to the chemical trichloroethylene (TCE), caused her to develop what is known as Raynaud's Phenomenon, a vascular condition of the hands characterized by pain, discoloration, numbness, and cold. The employer contends that claimant has not established that her condition is the result of work exposure.

I

Accompanying her brief on review, claimant submitted a motion for consideration of newly discovered evidence. We initially reserved ruling on the motion until the time of Board review.

The evidence in question is a report from Dr. Bardana of the University of Oregon Health Sciences Center. Dr. Bardana was on a sabbatical leave and out of the country from May through mid October, 1981, and that he was not accepting appointments for consultations until November, 1981. The last hearing in this case was held in October of 1981, while Dr. Bardana was away or very shortly after his return. We are satisfied that the report in question could not have been obtained prior to the hearing. However, we are concerned that, despite knowing that Dr. Bardana would be accepting patients within a short time after the last hearing, claimant's counsel made no mention at the hearing of any potential need to keep the record open for this additional information. There was also no request prior to the closure of the record on December 3, 1981 that the record be left open for this new information. No mention at all was made of a report by Dr. Bardana until April, 1982. The appointment with Dr. Bardana was arranged in February and Dr. Bardana examined claimant in March.

From these facts, we conclude that, with due diligence, the record before the Referee could have been left open long enough for the receipt of this evidence. Accordingly, claimant's motion is denied. Robert A. Barnett, 31 Van Natta 172 (1981).

II

This case presents a complex question of causation. The facts however are quite simple to summarize. Claimant, who was 31 years of age at that time, began working at Peco Manufacturing Company on February 19, 1981. Her initial job consisted of placing vinyl tips on the ends of some type of copper tube or thermosatatic device, after allowing the tips to soak in a small can of TCE. The TCE helped soften the tips enough to allow them to be placed on the copper tube. Claimant wore forearm-length rubber or plastic gloves to protect her hands from the chemical. On her first day on the job, claimant began to suffer what she described to be numbness and pinkish discoloration of her hands, very shortly after beginning

her shift. She related this to her supervisor but completed her shift for that day. She resumed the same job the following day for about two hours, after which she was assigned to different job duties. Claimant quit work a few days later. Claimant was seen at Willamette Falls Hospital on February 28, 1981 and by several other physicians thereafter and a tentative diagnosis of Raynaud's Phenomenon was made. She eventually transfered most of her treatment and care to Dr. Leveque, an osteopath and forensic toxicologist.

The basic difficulty with this case lies in the conflicting medical opinions of the claimant's treating physician, Dr. Leveque, and the employer's expert, Dr. Armbruster, a specialist in occupational medicine. The Referee acknowledged the difficulty in resolving this case, but concluded that the opinion of Dr. Leveque was more convincing and that it was more probable than not that the claimant developed Raynaud's Phenomenon due to her exposure to TCE at work. He found that, "on balance, claimant is credible", and that even though the exposure to TCE was based on circumstantial evidence (legal cause), that the Volk v Birdseye Division, 16 Or App 349 (1974), line of cases was controlling. We disagree and reverse.

One of the main factors in the claimant's favor in this case, and strongly argued by her in her brief, is the apparant temporal connection between her alleged exposure to TCE and the appearance of her symptoms. Claimant was allegedly suffering no problems with her hands prior to the claimed TCE exposure, but began manifesting symptoms in her hands within hours of her initial contact with that chemical. This temporal relationship argument is also tied to the reliance on Volk. The court has also cautioned, however, that temporal relationship standing alone is generally not sufficient to prove compensabilty; and more is usually required in situations where complex medical questions are raised. Edwards v SAIF, 30 Or App 21 (1977). The need for caution is especially great in this case because the employer also relies on a "temporal defense"; it is a main defense of the employer/insurer that only long-term, chronic exposure to TCE could cause the claimant's condition.

The main support for claimant's contention that she has established a compensable claim comes from the reports and testimony of Dr. Leveque. He based his opinion that claimant's condition was a result of exposure to TCE at work on the history taken from the claimant, the temporal relation of the supposed exposure and symptoms and medical literature which he felt to be supportive of his theory. It is his opinion that the TCE dissolved the fatty material of the nerve sheaths or the nerve itself, causing hypersensitivity and the effects of which the claimant complained. He believed that the TCE was absorbed through claimant's fingers because claimant stated that she could taste the chemical while she was working.

Dr. Armbruster, on the other hand, testified unequivocally that he did not believe that the claimant's condition was caused by work exposure to TCE. Dr. Armbruster based his opinion on his familiarity with the chemical and the fact that there is no

support in any medical literature which would associate TCE and Raynaud's Phenomenon except with long-term, chronic exposure, meaning over periods of weeks, months, or years. He did not believe that the extremely short duration of the alleged exposure in this case could possibly be sufficient to cause the necessary absorption of the chemical and damage to take place.

The fact that no previous case of Raynaud's Phenomenon has ever been reported from such a short period of exposure to TCE does not necessarily negate the possibility that claimant may have experienced a unique response. Nor is it necessary for medical science to be absolutly certain as to the etiology of the condition. These are, however, additional factors for consideration along with the remaining evidence.

From the standpoint of expertise, we find Drs. Leveque and Armbruster to be roughly equal. However, we give an edge to Dr. Armbruster and we find his opinions in this case to be generally the more convincing. We do not believe this to be a case where the treating physician is in any better position to render an opinion than a consulting physician. Dr. Armbruster testified that the most common form of exposure to TCE is through inhalation of fumes. (Claimant is not contending inhalation of fumes caused her condition.) Dr. Armbruster testified that the only reported cases of Raynaud's Phenomenon caused by skin contact occured as a result of long term, chronic exposure. His testimony in this regard is supported by the medical literature admitted as exhibits. Dr. Leveque was unable to point to any medical journal articles admitted at the hearing which supported his theory that Raynaud's Penomenon could be caused by the specific type and amount of alleged exposure present in the current case. Dr. Leveque also seemed to be basing his theroy in part on the similarity of vinyl chloride to TCE, and the fact that there are unusual responses to exposure to vinyl chloride. Dr. Armbruster agreed that vinyl chloride and TCE have a similar molecular structure, but stated that they have very different physical properties; that the amount of percutaneous absorption or TCE is of a small degree; and that it thus could not result in any kind of general systemic disorder without long term exposure.

Although we generally find Dr. Armbruster to be more convincing, there are several other factors which we believe tip the scales against compensability in this case. The first factor concerns legal cause. Did claimant actually sustain any skin contact with TCE? Claimant originally reported to the physicians who examined her that the gloves which she was wearing while performing her job had holes in them, which allowed the TCE to get on her hands, or that TCE somehow seeped into the gloves. (Dr. Leveque's entire theory is premised on the assumption that claimant had skin contact with TCE.) However, one of claimant's co-workers, Ms. Bailey, testified that she replaced claimant at the workstation where TCE was used and put on the exact same pair of gloves that the claimant had been using. Ms. Bailey testified that the golves had no holes or tears in them; that they were perfectly dry inside; and that, if they had had any holes, she would have picked up a new pair of gloves immediately. It does not seem remarkable to us that a worker instructed to wear gloves to prevent exposure to a potentially hazardous liquid would remember whether the gloves were dry

inside. Ms. Bailey's testimony is in direct conflict with the claimant's testimony. As the Referee indicated, he found claimant to be credible "on balance." We believe that this is an area where claimant's testimony appears to be somewhat less credible than others and, because of the basis of Dr. Leveque's opinion, this is an extremely critical area.

A second factor which weighs against compensability in this case is found the April 20, 1981 report of Dr. Ebert, a neurologist who examinined the claimant. Dr. Ebert states:

> "The patient was diffusely hypesthetic in a non anatomical distribution to the wrist in a glove hypesthesia pattern. Her hands were quite cold and there was cyanotic discoloration, both of the hands and feet. In fact, when the patient was more active with her hands; i.e., as in gripping and grasping, much of the discoloration disappeared. After her socks were taken off, the discoloration of both the hands and feet was the same." (Emphasis added).

There is no mention of claimant's foot condition in any other medical report. However, it would seem from Dr. Ebert's findings that claimant was suffering some of the same symptoms in her feet as she was in her hands. It is claimant's theory of the case that contact with TCE on her hands was the cause of the condition on her hands. If that were the case, how does this explain the fact that she was suffering similar symptomatology in her feet? The fact that this question is unanswered creates some doubt about Dr. Leveque's theory that fat dissolution in the hands due to the TCE exposure caused the condition to occur in the hands.

A third factor weighing against compensability in this case has to do with the etiology of Raynaud's Phenomenon. Dr. Armbruster testified that Raynaud's Phenomenon is a condition which is usually gradual in onset. He stated that symptoms normally occur in stages:

> "They will develop a whiteness or pallor of the finger, and this is primarily limited to the digits of the fingers. That is accompanied by pain. Then, following that period of time they will be -- that blanching will diminish and there will be a reverse change in the coloration of the skin, to a bluish and reddish feature, and when the hand is warmed up the symptoms usually disappear and the colors return to normal."

As we understand Dr. Armbruster's testimony, Raynaud's Phenomenon is not a condition that a person does not have one day and then has the next day, as apparantly is being claimed here. Dr. Armbruster also testified as to the possible causes of Raynaud's Phenomenon. These causes include vibration trauma, various forms of medication, diabetes, chronic TCE exposure, exposure to cold (claimant worked as a bartender before her employment at Peco) and, in the majority of cases, the cause is simply unknown, which Dr. Armbruster felt to be the case with the claimant.

Also relevant to this last factor and related to credibility, is the testimony from another one of the claimant's co-workers, Ms. Beach, not mentioned by the Referee. Ms. Beach testified that on the morning of claimant's first day at work, and prior to the begining of the shift, she observed claimant lighting a cigarette and noted that her hands were bluish in color and shaking. She stated that she remembered this incident because claimant's hands "didn't look normal".

We additionally disagree with the claimant that the Volk line of cases is controlling in this case. The Volk line of cases stands for the proposition that a cause and effect inference may be drawn where the medical evidence is either inconclusive or where the cause of a condition is not known to medical science; in other words, something of a form of res ipsa loquitor. To draw the causal inference that claimant seeks in this case would require affirmatively rejecting Dr. Armbruster's opinion and analysis, a factor that was not present in Volk. Furthermore, and to repeat, Volk is limited by the considerations discussed in Edwards.

In summary, there is evidence that claimant's hands appeared abnormal before she could possibly have been exposed to TCE; there is evidence that claimant's gloves kept her from having any direct skin contact with TCE; there is the unexplained fact of similar symptoms in claimant's feet which were not exposed to TCE; and there is medical evidence that, even if there were TCE exposure, one-and-a-half days of exposure could not have produced the immediate appearance of the advanced stage of Raynaud's Phenomenon. At most, Volk would permit an inference of causation; it does not compel such an inference. And for all of the foregoing reasons, we are not pursuaded by this record that claimant has established the compensability of her claim.

ORDER

The Referee's order dated December 8, 1981 is reversed. The April 30, 1981 denial is reinstated and affirmed.

Board Member Lewis Dissenting:

I respectfully dissent from the majority opinion on both the evidenciary question and the compensability issue.

I.

With respect to the evidenciary issue, the evidence in question is a report from Dr. Emil Bardana of the University of Oregon Health Sciences Center. It appears from the affidavits of Dr. Bardana and claimant's counsel together with other evidence in the record that Dr. Bardana has treated approximately 300 patients affected by Raynaud's Disease and that he is a recognized expert on this condition. It also appears that one of the physicians who initially examined and treated claimant in his report indicated that he had talked with Dr. Bardana by telephone and referred to a statement made by Dr. Bardana during that conversation tending to indicate that this claim was not compensable. In its brief on Board review, the employer in part relies on this reference to Dr. Bardana's opinion.

I would infer from these facts that the proffered evidence is, very probably, highly relevant and probative concerning the critical and complex causation issue in this case. As noted by the majority, since Dr. Bardana was out of the country on sabbatical leave and not accepting patients until after the last hearing herein, the report could not have been obtained prior to the hearing. The law requires no more than a showing that with due diligence the evidence could not have been obtained prior to the close of the hearing. The majority reasons that claimant could have mentioned to the Referee at hearing that there was a possibility that claimant could get into see Dr. Bardana and, presumably, therefore the record could have been left open to await the outcome. I am personally satisfied that no Referee would or should leave the record open for an unknown length of time based upon a representation that a physician who was not accepting new patients at the time, might at some future time arrange an examination and submit a report which may or may not contain probative information.

For these reasons, I favor remanding this case to the Referee for inclusion of Dr. Bardana's report into the record and allowing the employer a reasonable opportunity to submit rebuttal evidence.

II.

On the merits of the claim itself, the majority identifies four factors which they believe militate against compensability. First, the majority notes that there is evidence that claimant's hands were abnormal before the exposure to TCE. The evidence in question consists of the testimony of an employee of Peco Manufacturing who recalled the appearance of claimant's hands when claimant lit a cigarette during the first day of her employment. Considering the mundane nature of such an act and the lapse of time between the alleged incident and the hearing, I find the witness's memory truly remarkable. Moreover, there is no other evidence that claimant has pre-existing problems with her hands, particularly, claimant never sought treatment for any condition affecting her hands. Lastly, even if claimant had pre-existing problems with her hands, I would find that the hand condition worsened so significantly after the exposure to TCE at Peco Manufacturing that it amounts to a new condition.

Second, the majority opinion discusses the evidence tending to indicate that claimant's gloves kept her from any direct skin contact with TCE. Despite the employer's characterizations of claimant's statements and testimony, and the majority's questioning of claimant's credibility on this issue, claimant never stated categorically that the gloves she was wearing had holes in them. She reported to examining physicians and testified that she felt the substance on her hands and surmised that there might have been holes in the gloves. For the same reason noted above, I find the testimony of the employe-witness who recalled that she used the same gloves as claimant when she took over that workstation indicative of an equally remarkable memory.

The majority opinion does not mention claimant's testimony that because of the discomfort she felt with whatever was on her hands when she was working with TCE she scrubbed her hands during

each break, about every two hours. More importantly, the majority opinion appears to give no weight to claimant's testimony that for a substantial period after she quit working with TCE she could still taste and smell it. The medical evidence indicates TCE can be absorbed into the body either as a vapor through the lungs or in its liquid form through the skin. When absorbed in liquid form, TCE is excreted slowly from the body in part through the lungs, resulting in the person who has absorbed the chemical being able to smell and "taste" the chemical for a substantial period after exposure ceases.

Moreover, there are cases in medical literature of persons who have experienced symptoms like those experienced by claimant after chronic and direct skin contact with liquid TCE or chronic inhalation of TCE in its vapor form. Although a Raynaud's Phenomenon-like reaction to TCE exposure is rare and considered to be an idiosyncratic response of the person affected by it, nevertheless, it is clear that exposure to TCE at some level of exposure can cause Raynaud's Phenomenom to develop. As noted by the majority, the fact that no previous case as been reported of Raynaud's Phenomenon resulting from a brief exposure to TCE does not negate the possibility that claimant may have experienced an idiosyncratic response to the chemical.

The majority further relies on an obscure reference by an examining physician who observed "cyanotic discoloration" of claimant's feet as well as her hand, noting that claimant neither alleges nor is there evidence of any TCE exposure to claimant's feet. Apart from the fact that Dr. Ebert was the only physician to have observed foot discoloration, even if true, that does not negate two other factors: (1) the more serious symptoms and impairment claimant experienced in her hands (e.g., burning sensation, parasthesia, and stiffness) were not present in her feet, and (2) one can literally have "cold feet" attributable to nervousness arising from a medical examination. Moreover, as noted earlier, claimant may have had Raynaud's Phenomenon-like symptoms before the exposure to TCE at Peco Manufacturing which subsequently affected her feet, but I am convinced that the TCE exposure caused or significantly worsened the condition in claimant's hands.

Fourth, the majority concludes that the length of claimant's exposure to TCE was insufficient to produce the advance stages of Raynaud's Phenomenon. Considering the absence of knowledge concerning the etiology of Raynaud's Phenomenon and the lack of information on how much TCE is enough to cause Raynaud's Phenomenon-like symptoms, I find Dr. Leveque's analysis more persuasive than that of Dr. Armsbruster who appears to agree that a person can have an idiosyncratic response to TCE but, without explanation, rejects the possibility that claimant could have had such a reaction. Dr. Leveque explained how he believed the TCE acted on the tissues of claimant's fingers and hands to produce the symptoms she experienced. Dr. Armbruster merely relied on the absence of a reference in the medical literature of Raynaud's Phenomenon symptoms occuring following a brief exposure to TCE.

I agree with the majority that the thrust of Edwards v. SAIF, 30 Or App 21 (1977) is to the effect that a temporal relationship alone frequently is insufficient to prove compensability, particu-

larly where complex medical issues are raised. However, here we have far more than a mere temporal relationship between exposure and the onset of symptoms. We have the testimony of Dr. Leveque, an expert in pharmacology and toxicology together with medical literature establishing that TCE exposure can result in the onset of Raynaud's Phenomenon symptoms.

The majority rejects Volk v. Birdseye Division, 16 Or App 349 (1974) as legal authority supporting compensability in this case because in Volk there was no medical evidence contraindicating a causal relationship between the chemical exposure and the eye condition that developed. This is a somewhat strained reading of the evidence in Volk. In any event, in Volk, it was unknown what the chemical was claimant got in her eyes; it was unknown what caused the condition she developed (conjunctivitis); and it was most assuredly unknown whether there was any causal relationship between the chemical the claimant was exposed to and the condition she developed. Here, we not only know the precise chemical claimant was exposed to but that the chemical in question, trichloroethylene, can cause Raynaud's Phenomenon.

The parties have cited a number of cases in support of their respective positions. By and large the cases stand for not much more than a factual determination by the Court of Appeals exercising its de novo fact finding function whether in light of the evidence in each cases established a causative relationship between an on-the-job event and a condition. Mandell v. SAIF, 41 Or App 253 (1979) and Riutta v. Mayflower Farms, Inc., 19 Or App 278 (1974) I regard as so factually different from this case that there are of little precedental value here. Raines v. Hines Lumber Co., 36 Or App 715 (1978) is clearly distinquishable because there it

was totally speculative whether the claimant had experienced any job-related event which could have caused the heart attack. Of the cases cited by the employer, Edwards v. SAIF, supra, is most on point. However, in Edwards, the Court noted that no doctor was willing to make a flat statement that there a causal connection between the injury and the onset of symptoms apparently at some substantially later time. Here, the onset of symptoms was immediate and Dr. Leveque not only opinend that there was a causal relationship but provided a cogent explanation how the TCE acted on claimant's fingers and hands to produce the symptoms she developed.

In summary, I believe that the most significant facts are uncontroverted: claimant's job involved working with TCE; in the course of working with TCE claimant felt something on her hands and scrubbed them repeatedly; claimant tasted the chemical in her mouth for a substantial period after she cease working with TCE; the onset of symptoms coincided with the exposure to TCE at Peco Manufacturing; it is known to medical science that TCE can result in the onset of the symptoms claimant experienced; and it is not known to medical science what level of exposure is necessary to produce the symptoms claimant experienced. This is more than sufficient in my mind and under the Edwards and Volk cases to establish compensability.

III.

The employer also raised the issue on Board review of the propriety of the Referee's award of an attorney's fee to claimant's attorney in the amount of $4500. The employer contends that the fee is excessive when compared to awards in comparable cases. However, the employer does not draw our attention to any other cases, comparable or otherwise. The hearing in this case involved 8 lay witnesses and two expert witnesses and required two half-day hearings. Claimant's counsel submitted an affidavit detailing the time he spent in the preparation and litigation of the case together with his hourly rate. The total claimed came to $6,106. The employer did not contend that any of the items listed on the affidavit were unnecessary to the preparation of the case. Moreover, the hourly rate used by claimant's counsel in the computation of the value of his services is a very reasonable one. Even as it is, claimant's counsel was awarded only about two-thirds of the amount claimed in the affidavit.

Claimant's counsel has not contended on review that the award was insufficient. It appears to me that the $4500 award reflects the product of a well researched, well prepared, and well litigated case. Without knowing what the employer considers to be a comparable case or in what specific way the fee claimed is excessive, I see no basis for reducing the award.

Further, I would award claimant's counsel a fee of $1000 for his services on Board review claim for his services on the merits of the claim and $250 for the motion requesting remand to consider newly discovered evidence.

For these reasons, I respectfully dissent from the Board's order herein. I would remand this case to the Referee for inclusion of Dr. Bardana's report or, in the alternative, I would affirm the Referee's order and award attorney's fees to claimant's attorney accordingly.

GREG A. BECKER, Claimant
Coons & Hall, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-03161
December 8, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

The claimant and SAIF Corporation both request review of Referee Mannix's order which: (1) upheld SAIF's denial of claimant's aggravation claim; (2) ordered SAIF to pay for claimant's back surgery pursuant to ORS 656.245; (3) ordered SAIF to pay temporary total disability from the time of surgery until claimant is medically stationary; (4) ordered temporary total disability to be paid from February 24, 1981 through April 14, 1981; (5) awarded a penalty equal to 25% of the amount of temporary total disability due; (6) awarded a penalty equal to 25% of the temporary total disability that would have been paid from June 19, 1981 through September 22, 1982 if the surgery had been performed when originally scheduled; (7) awarded an attorney's fee of $1,000 for prevailing on the issue of the denial of medical services; and (8) awarded an additional attorney's fee of $400 for prevailing on the penalty issues.

Claimant contends that the Referee should have ordered that the claim be reopened, that claimant is entitled to temporary total disability from January 14, 1981 until the claim is closed and that claimant's attorney should have been awarded a larger fee for services rendered at the hearing. SAIF asserts that the Referee was correct in upholding the denial of aggravation but was wrong in ordering SAIF to pay for the surgery and in awarding any compensation or penalties.

I

The first issue is whether claimant has suffered an actual worsening of his compensable condition. The record indicates that claimant is suffering from spondylolisthesis and spondylolysis in his low back and that these conditions were worsened by his 1976 industrial injury. While the objective tests show no significant pathological change, it does not automatically follow that claimant's condition has not worsened since the last award of compensation.

Claimant testified that, in November of 1981, the pain in his back was such that he could no longer work as a delivery man. The medical evidence indicates that his low back pain has worsened to the point that fusion surgery is the only option left that may provide relief. It is the consensus of the doctors who examined claimant that surgery is now the recommended treatment of choice. This recommendation that surgery is now indicated is, in itself, some evidence of a worsening. We find that claimant's pain, while subjective, is nonetheless real and that the increase in pain and need for surgery constitutes a worsening of claimant's condition.

II

Having found that claimant has suffered a compensable worsening of his condition, the next issue is whether claimant is entitled to temporary total disability compensation. While claimant failed to provide the carrier with sufficient medical verification of his worsening to trigger the payment of interim compensation at the time of the claim, we find that he did prove entitlement to temporary total disability compensation at the hearing. Based on claimant's credible testimony on the impact of his increasing pain on his ability to work and the diagnoses of his back problems in the reports of Drs. Hardiman, Wilson and Thompson, we find that claimant was unable to work at the time of Dr. Hardiman's January 13, 1981 request for reopening. Thus, claimant is entitled to temporary total disability compensation from January 14, 1981 until his claim is closed pursuant to ORS 656.268.

III

The next issue is whether SAIF's March 3, 1981 denial and termination of interim compensation were unreasonable. SAIF denied the request for reopening "due to lack of cooperation and response" on claimant's part. With the value of hindsight we find that there was not a lack of cooperation by claimant, but merely a breakdown in communication as to where claimant was living and whether or not he would be able to appear for a scheduled medical appointment.

However, given the information that SAIF had available to it at the time, we cannot say that the denial was unreasonable.

The Referee found SAIF's March 3, 1981 denial and cessation of temporary total disability payments were not in conformance with the requirements of OAR 436-54-281 and OAR 436-54-283.

On January 13, 1981 Dr. Hardiman reported to SAIF:

> "I think it is time to re-open Greg's claim. He unquestionably has a symptomatic spondylolysis that has not responded to nonoperative treatment and the patient seems to indicate that he would like to have surgery."

Nowhere in this statement nor in Dr. Hardiman's chart notes received by SAIF on January 23, 1981 was there any medical verification of claimant's inability to work as a result of the alleged worsening. Thus, SAIF had no duty to begin paying interim compensation. ORS 656.273(6). Since SAIF was under no duty to pay interim compensation, we conclude that it was not subject to the procedures set forth in OAR 436-54-281 and OAR 436-54-283.

The Referee also found that the March 3, 1981 denial was not a denial of the merits of the aggravation claim. We disagree. There was only one aggravation claim made by claimant and SAIF issued a formal denial of that claim. Once an insurer denies a claim, for whatever reason, the insurer is no longer obligated to make interim compensation payments. Therefore, there is no basis for penalizing SAIF for its processing of the claim or for the termination of interim compensation payments.

IV

The final issues involve attorney fees. The parties devote just a sentence or two to these issues in their briefs, claimant suggesting the Referee's award was inadequate and SAIF apparently contending it was excessive. Although the parties' positions are thus undeveloped, we think the appropriate analysis of attorney fees in this case is as follows.

First, since we disagree with the Referee's award of penalties, it necessarily follows that the $400 attorney's fee awarded for those issues cannot stand.

The Referee also awarded claimant's attorney $1,000 for prevailing on the issue of denial of medical services. Whether relief is granted for denial of medical services or denial of aggravation reopening, the efforts expended are the same; however, the results obtained are greater under our findings (entitlement to aggravation reopening) than under the Referee's findings (entitlement to medical services). All things considered, we conclude that claimant's attorney should be awarded $1,200 for services rendered at the hearing and $700 for services rendered on Board review.

ORDER

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

The SAIF Corporation's March 3, 1981 denial is set aside and claimant's aggravation claim is remanded for acceptance and processing, including: (1) SAIF shall pay for the recommended back surgery; and (2) SAIF shall pay claimant compensation for temporary total disability from January 14, 1981 until the claim is closed pursuant to ORS 656.268, less time worked and less amounts previously paid.

Claimant's attorney is awarded, as a reasonable attorney's fee, $1,200 for services rendered at the hearing (in lieu of the Referee's attorney's fee award) and $700 for services rendered on Board review, to be paid by the SAIF Corporation in addition to compensation.

All other relief claimant seeks is denied.

DUANE L. KEARNS, Claimant
Galton, Popick et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney
Wolf, Griffith et al., Defense Attorneys
John E. Snarskis, Defense Attorney

WCB 81-11626, 82-05409 & 82-16M
December 8, 1982
Order Denying Motion to Abate

The employer, Holman Transfer, and its insurer, EBI Companies, request the Board to abate Referee Williams' order of October 29, 1982 pending expedited review of that order by the Board. The Referee ordered EBI to pay interim compensation from the date of receipt of a November 9, 1981 medical report, through June 23, 1982, which amounts to approximately $9,100.00. The Referee also ordered Industrial Indemnity Insurance Co. to pay claimant temporary total disability benefits for the same period of time, totaling approximately $9,700.00. EBI contends that a hardship is created in that neither insurer will be entitled to offset or recoup the benefits under ORS 656.313(2) should the Board or court find that it was improper to order two insurers to pay temporary total disability benefits concurrently on a single claim, and additionally that ORS 656.210 requires that a claimant receive no more than 100% of the average weekly wage for any period of temporary total disability.

Even assuming that EBI's argument -- that a Referee cannot order the payment of time loss compensation to a claimant from two different insurers for the same period of time -- is correct, the legislature has nevertheless provided in 656.313 that compensation, even erroneously ordered compensation, must be paid pending Board review and appeal to the Court of Appeals. See Rak v SAIF, 31 Or App 125 (1977); Wisherd v. Paul Koch Volkswagen, 28 Or App 513 (1977). Under the statute and our authority, it is irrelevant whether a hardship to an insurer or a windfall to a claimant will ensue.

The motion to abate is denied.

IT IS SO ORDERED.

ROSE E. PEDERSON, Claimant
Welch, Bruun et al., Claimant's Attorneys
Schwabe, Williamson et al., Defense Attorneys

WCB 81-07895
December 8, 1982
Order on Review

Reviewed by Board Members Lewis and Barnes.

The claimant and the insurer have both requested review of Referee Fink's order which awarded a 10% unscheduled disability to claimant for her neck condition, approved the time loss payments already made to claimant, approved the insurer's collection of an overpayment, denied a request for penalties and awarded claimant's attorney 25% of the permanent disability award.

Claimant argues that the 10% permanent disability award is inadequate, that the Referee erred in refusing to admit the March 29, 1982 report of Dr. Berkeley, that the insurer should have been penalized for failing to produce a medical report after receiving a request from claimant and that the insurer should have been penalized for improper collection of an overpayment. Insurer asserts that claimant has suffered no permanent disability as a result of her compensable injury and that the Referee correctly decided the evidentiary and penalty issues.

We affirm and adopt the Referee's order on all issues except: (I) the issue of a penalty for failure to produce certain medical reports; and (II) extent of disability.

I

OAR 436-83-460 provides that an insurer or self-insured employer shall, upon demand by a claimant who has requested a hearing, "furnish to claimant or his representative without cost copies of all medical and vocational reports and other documents relevant and material to the claim." (Emphasis added.) In this case it is clear that claimant made such a demand. It is also clear that the employer did not provide copies of Dr. Platt's reports dated August 19, October 20 and December 18, 1981 in a timely manner in accordance with OAR 436-83-460.

The employer appears to argue that the three medical reports in question were not "relevant and material to the claim" within the meaning of OAR 436-83-460. If that is the employer's argument, we think it is based upon an incorrect reading of our rule. OAR 436-83-460 requires disclosure of "all medical and vocational reports and other documents relevant to the claim." As we interpret this passage, we think it is quite clear that the adjective "all" modifies "medical and vocational reports" and the adjectives "relevant and material" modify "other documents." Stated differently, the rules require disclosure of: (1) all medical and vocational reports; and (2) other relevant and material documents. It is thus no defense to contend that the medical reports here in question were "not relevant."

The Referee's analysis was that failure to disclose the reports in question was harmless, i.e., that the reports do not apprise anyone of anything not revealed by or contained in Exhibit

25A." We doubt that a requirement to disclose "all" medical reports leaves room for a "redundancy" exception; but even assuming the existance of such an exception, we do not agree in this case that the contents of the nondisclosed reports are completely and totally redundant of the contents of the disclosed reports. On the other hand, we agree with the Referee's analysis to the extent that a failure to disclose redundant information can certainly be relevant to the amount of a penalty that will be assessed. And because there was a considerable overlap between the contents of the disclosed and the contents of the nondisclosed reports in this case, we conclude that the penalty for nondisclosure should be fairly modest.

II

Claimant's cervical "condition" was found to be compensable by the Court of Appeals in Pederson v. Fred S. James & Co., 50 Or App 273 (1981). The court did not define the cervical "condition" it found to be compensable, but we infer that claimant's subsequent cervical fusion was part of her cervical "condition." We agree with the Referee's observation: "I do not understand the mechanics of how the neck became injured from claimant's description of her employment activities [but] that is the law of the case." Since compensability is thus established, we think that parts of the employer's present argument are not relevant to the issue of the extent of claimant's disability.

The low and mid back components of claimant's claim have resolved without permanent impairment. Pederson, supra. The medical reports regarding claimant's cervical impairment following her fusion surgery are not as complete or as clear as we would like, but we conclude that the preponderance of the evidence indicates that claimant has suffered a 10% loss of function as a result of the cervical fusion and its sequalae. When this impairment is combined with the social/vocational factors in accordance with the guidelines set forth in OAR 436-65-600, et seq., we find that claimant is entitled to an award of 20% unscheduled permanent partial disability.

ORDER

The Referee's order dated April 13, 1982 is affirmed in part and reversed in part. Claimant is awarded 64° for 20% unscheduled permanent partial disability for her cervical injury. This award is in lieu of that granted by the Referee. In addition, claimant is awarded a penalty of $150 for the employer's noncompliance with OAR 436-83-460, payable by the employer. The remainder of the Referee's order is affirmed.

The fee agreement between claimant and her attorney is approved, and claimant's attorney is allowed 25% of the increased compensation awarded by this order (10% permanent partial disability) as a reasonable fee for services rendered on Board review. This is in addition to the attorney's fee allowed by the Referee, but the total fee shall not exceed $3,000.

BILLY W. WASHINGTON, Claimant
Gary Berne, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-02295
December 8, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

The SAIF Corporation requests review of Referee Braverman's order which set aside its denial of claimant's aggravation claim. SAIF's position, as we understand it, is that claimant cannot now assert an aggravation claim because of the results of prior litigation.

We affirm and adopt the Referee's order with the additional notation that the Referee's conclusion that the doctrine of res judicata does not preclude successive aggravation claims is supported by Lewis Twist, 34 Van Natta 52, 34 Van Natta 290 (1982).

ORDER

The Referee's orders dated October 29, 1981 and November 24, 1981 are affirmed. Claimant's attorney is awarded $700 for services rendered on Board review, payable by the SAIF Corporation.

MARK G. BLANCHARD, Claimant
Michael B. Dye, Claimant's Attorney
Rankin, McMurry et al., Defense Attorneys

WCB 81-07861
December 10, 1982
Order on Review

Reviewed by the Board en banc.

The claimant requests review of Referee Seifert's order which upheld the employer's partial denial, based upon the Referee's finding that the employer was not responsible to provide medical services in the form of further weight loss assistance to claimant.

The facts are simple and undisputed. Claimant weighed about 240 pounds at the time of his compensable low back injury in October of 1980. His weight went up to about 280 pounds during a period of inactivity while recuperating from that injury. Claimant's doctors opined that it was essential for him to lose weight to fully recover from his chronic lumbosacral strain. Between April and July of 1981 the employer paid for claimant's enrollment in a diet program. Claimant faithfully followed that regime and reduced his weight to about 225 pounds. Dr. Kenyon then opined that claimant should get his weight down to about 195 pounds and requested that the employer continue to pay for claimant's participation in the diet program until that goal was achieved. The employer denied further weight loss assistance and claimant requested a hearing.

The Board recently considered the question of the duty of an industrial insurer or employer to provide medical services in the form of weight loss assistance to an injured worker in Joda M. Ruhl, 34 Van Natta 2 (1982). In that case, that involved basically the same facts as the present case, we concluded:

> "We know of no rule or logic which requires the workers compensation system to help solve a worker's non-injury related health problems in order to effectuate recovery

> from a compensable injury. In fact, the law requires the injured worker to assist to the fullest in promoting recovery, in this case meaning weight loss. The responsibility for weight loss was the claimant's not the employer's." 34 Van Natta at 2.

The Court of Appeals affirmed our decision in Ruhl without opinion. 58 Or App 389 (1982). See also Shirley Severe, 27 Van Natta 710 (1979); Daniel Tanory, 19 Van Natta 209 (1976); Francoeur v. SAIF, 17 Or App 37 (1974); cf. Patricia Nelson, 34 Van Natta 1078 (1982).

Claimant concedes that prior Board decisions are inconsistent with his position in this case but argues our decisions misconstrue ORS 656.245 and should be overruled. Claimant also relies upon Rebecca Hackett, 34 Van Natta 460 (1982).

Hackett also involved a medical services issue. The worker in that case had a congenital bone deformity in her foot that was not symptomatic in any way before a compensable injury to her foot. After the injury, claimant's doctors decided to surgically correct the bone deformity. The question was whether the surgery for this preexisting condition was compensable. In answering that question in the affirmative, the Board stated:

> "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 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." 34 Van Natta at 461.

The Court of Appeals affirmed our decision in Hackett without opinion. 60 Or App 328 (1982).

We agree with claimant that the general principle stated in Hackett appears to be inconsistent with our specific holdings in weight-loss cases like Ruhl. Perhaps these decisions can be reconciled on the basis that a person's weight usually involves at least some self-control, while a person's bone structure never involves any self-control. Perhaps Hackett and Ruhl simply cannot be reconciled; in that event, overruling Hackett, which claimant relies upon, should be as much an option as overruling cases like Ruhl, which claimant urges.

We come ultimately, however, to the fact that the Court of Appeals has affirmed our decisions in both Hackett and Ruhl. If the doctrines in question had been articulated only at the Board level, we would not hesitate to reconsider and refine them if

appropriate. But now that the Court of Appeals has put at least some imprimatur on both Hackett and Ruhl, we do not feel we have complete liberty to reconsider the rules stated in those cases.

We conclude we will follow the specific holding in Ruhl, which is "on all fours" with the facts of this case, rather than extend the more general holding in Hackett to the facts of this case.

ORDER

The Referee's order dated March 9, 1982 is affirmed.

Board Member Lewis Dissenting:

In this case the claimant weighed 240 pounds at the time of his back injury on October 15, 1980. He had never had back trouble before that time. He was taken off work by his treating doctor, C. Francis Kenyon, M.D.. Inactivity during recuperation caused his weight to climb to 280 pounds. On March 5, 1981, Dr. Robert Dow, neurologist, stated it was essential to the recovery of claimant's chronic lumbosacral strain, that he be put on a rigorous weight reduction program. On April 2, 1981, the claims processing company wrote the claimant warning him that if he did not stop the injurious practice of being overweight, that his benefits would be terminated pursuant to ORS 656.325. The letter related that Dr. Kenyon thought claimant should get his weight down to 225 pounds. The claims processing company enrolled the claimant in a diet program beginning April 16, 1981. The claimant faithfully followed the diet program and steadily lost weight. Claimant's back condition thereby improved so that Dr. Kenyon released him to light work to which he returned on June 30, 1981.

Meanwhile, on July 21, 1981 Dr. Kenyon reported to the claims processing company that the claimant had reached his preliminary goal of 225 pounds, but that the goal was only an estimate of the weight loss required and that he now felt claimant should get down to 195 to 200 pounds to completely clear up the back condition. Dr. Kenyon thereupon requested that the weight loss goal be lowered to 195 pounds.

On July 27, 1981, the employer denied further weight loss assistance stating they were under no obligation to provide it in the first place.

The holding in Joda M. Ruhl, 34 Van Natta 2 (1982), should not be applied in this case for two reasons.

First, the facts of that case and the present case differ. In Ruhl, there was no evidence that the claimant's obesity was aggravated by the compensable injury. However, in this case inactivity during recuperation caused the claimant to gain 40 pounds. Also, in Ruhl, there was evidence that the claimant's non-compensable obesity was the primary cause of the compensable condition. In this case, there is no evidence that claimant's weight in any way caused the compensable back injury.

Second, and more importantly, the rule in Rebecca Hackett, 34 Van Natta 460 (1982), decided subsequent to Ruhl, is the better rule to be applied in cases where treatment of the compensable injury incidentally corrects a non-compensable condition. The rule in that case was cited by the majority and will not be repeated here. Also, on the same day the Court of Appeals affirmed Rebecca Hackett without opinion, it issued an opinion in Aquillon v. CNA Insurance and Gould, Inc., 60 Or App 231 (1982). In Aquillon, the court required an employer to provide benefits, including payment for medical services, when the presence of the noncompensable condition prolonged the effects of the compensable condition. The court held it would have been reasonable to deny further treatment only if the claimant had fully recovered from the compensable injury. Similarly, in this case, had the claimant's chronic lumbosacral strain resolved before the claimant reached his weight goal, the reducing program would no longer be compensable even though the claimant remained overweight.

The employer asserted that further weight loss (below 225 pounds) was not required by the claimant's injury, or for the process of recovery therefrom, because the claimant had returned to his pre-injury job at his pre-injury weight. The claimant responded, I think persuasively, that ORS 656.245 requires that employers provide medical services as the process of recovery requires. It does not limit the responsibility of the employer to providing the minimum medical services that would enable the employee to return to his job. Dr. Kenyon has stated that to enable full recovery, the claimant must lose 30 more pounds.

Finally, the majority has suggested that cases such as Hackett and Ruhl can perhaps be reconciled on the basis that a person's weight usually involves at least some self control, while a person's bone structure does not involve any self control and, therefore, the employer should not be responsible for treatment that is within the claimant's self control or willpower. It is tempting to agree with that distinction until one realizes there are many types of medical services which are prescribed for patients that could be performed by the patients themselves at home, but for which a doctor feels it more advisable that they be in a supervised program where they can receive regular guidance, monitoring and encouragement. One common example is the treatment provided at pain clinics. The mental exercises, physical exercises, body mechanics knowledge, etc., are all things that a person could learn at home from reading a set of instructions, but the constant monitoring of progress and group participation and support are found necessary for the program to be successful. Another example might be the treatment programs administered at the Callahan Center. Claimants there are prescribed swimming exercises, flexion exercises, body building exercises, etc. All this treatment could be performed at home, or at a community pool or gym, but the program directors at the Callahan Center feel a monitored and guided program is the more successful approach. Similarly, participation in a diet program provides constant monitoring and guidance in meal planning and nutrition along with group participation and support from the counselor.

This approach should not open the flood gates for prescription of weight loss programs by doctors for their patients. Just as doctors do not prescribe pain clinics or the Callahan Center program for all their patients (preferring to recommend self administered treatment regimens), neither would doctors prescribe diet programs for all their patients. The doctor would assess the need for such a program by comparing the probable success of a home program with the probable success of a commercial program and determine which would be the most reasonable in the patient's case. The same kind of reasons that presently justify treatment at a pain clinic or the Callahan Center would justify treatment at a diet clinic. Of course, should a claimant unreasonably fail to participate in or adhere to the requirements of a diet program, benefits could be terminated pursuant to ORS 656.325. Here, the claimant faithfully followed the program and successfully reduced his weight.

I conclude that as long as a claimant's physicians believe in the need for and prescribe diet assistance that is reasonably necessary for the claimant's recovery from a compensable injury, that assistance should be the responsibility of the employer. Cf. Lucine Schaffer, 33 Van Natta 511 (1981); Glenn R. Pettey, 31 Van Natta ___ (June 8, 1981). Merely because it is possible that a claimant could self-administer the prescribed treatment is not enough to refuse the claimant enrollment in a program that could assist in recovery from the compensable injury. The employer's denial dated July 27, 1981 should be disapproved.

N. MICHAEL CALKINS, Claimant
Hansen & Wobbrock, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-02805 & 80-02575
December 10, 1982
Order of Dismissal

A request for review, having been duly filed with the Workers Compensation Board in the above-entitled matter by the SAIF Corporation, and said request for review now having been withdrawn,

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

GERALD DIETZ, Claimant
Olson, Hittle, et al., Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-06705
December 10, 1982
Order on Review

Reviewed by Board Members Lewis and Ferris.

The insurer requests review of Referee Menashe's order which found claimant permanently and totally disabled due to a compensable November, 1977 logging accident and preexisting disabilities. The Referee found that "the fact that claimant has not entered a Pain Center program will not be considered negative evidence of his willingness to reduce his disability." His treating doctor felt the program was not advisable and the claimant did not think it would help his condition.

The insurer contends that claimant's refusal to submit to a Pain Center program should cause his award to be reduced. In the alternative, the insurer contends that the claimant is not permanently and totally disabled because of recreational activities he has participated in, and because of a report from a consulting psychiatrist which stated claimant was not permanently and totally disabled.

The claimant responds that he is permanently and totally disabled based on the statements of his two treating physicians, Dr. Emori and Dr. Warren. The claimant contends that the psychiatrist's opinion should be given little weight as to claimant's physical disabilities. (Claimant is not claiming disability due to psychological problems, if any.) Claimant further contends that his refusal to participate in a pain center program was reasonable when applying the test found in Clemons v. Roseburg Lumber Co., 34 Or App 135 (1978).

We affirm the Referee's finding that claimant is permanently and totally disabled. Upon reviewing the record, including Dr. Emori's statement that "I do not think that given his injuries and personality that a pain clinic assessment would be of value", we believe that claimant's refusal to participate in a Pain Center program was not unreasonable.

ORDER

The Referee's order dated March 24, 1982 is affirmed. Claimant's attorney is awarded $600 as a reasonable fee on review.

FRANK KEVIN DUNDON, Claimant
Richardson, Murphy et al., Claimant Attorneys
Wolf, Griffith et al., Defense Attorneys

WCB 79-11017
December 10, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

The employer requests review of Referee Mulder's order which apparently set aside its January 5, 1981 partial denial (also referred to in the record as a denial of an aggravation claim) of responsibility for claimant's back condition subsequent to February 4, 1980. The only issue for review is the propriety of that finding.

Claimant, then a 27 year old custodial employe for the Portland Public School District, sustained a low back strain in an August 30, 1979 fall at work. Claimant was treated by Dr. Schwartz of Kaiser Permanente who diagnosed acute low back strain. Claimant was released to return to light duty work by Dr. Dougan, also of Kaiser, on September 19, 1979, with no lifting over 25 pounds. Claimant was thereafter seen by Dr. Henry, a physician not associated with Kaiser. Dr. Henry reported on November 28, 1979 that he saw the claimant on November 7, 1979 and that, due to claimant's subjective complaints, he gave him a note stating that it appeared he was not able to work at jobs requiring lifting or sitting for prolonged periods. Since claimant did not follow up Dr. Henry's

request to see an orthopedist or return to him for treatment, Dr. Henry stated that he no longer considered claimant to be his patient.

The next medical reports are dated January 2, and January 16, 1980 and come from Dr. Duckler, also of Kaiser Permanente. Dr. Duckler reports that claimant had been off work since August of 1979 and that he failed to keep his last three appointments. Dr. Duckler diagnosed a contusion in the lumbar area and found normal ranges of motion, reflexes and neurological findings. Dr. Duckler released claimant to return to his regular work on January 7, 1980 with no permanent disability.

Claimant was next seen on February 6, 1980 at the emergency room of the University of Oregon Health Sciences Center complaining of back pain. The emergency room report indicates that claimant had been assaulted and knocked to the floor, landing on his back. Severe lumbar sacral strain was diagnosed. Claimant returned to Dr. Duckler on February 20, 1980 again complaining of back pain that had suddenly worsened. Dr. Duckler reported on May 22, 1980 that he could not comment on any relation of claimant's February 20, 1980 onset of pain and the February 6, 1980 incident, and that he was not certain of the cause of the increased pain. On January 5, 1981 the employer denied responsibility for claimant's back condition after the February 6, 1980 incident and submitted the claim for closure.

The Referee recited the medical evidence and concluded that the symptoms claimant experienced following the February 1980 altercation were a compensable result of the original injury, citing Grable v. Weyerhaeuser, 291 Or 387 (1981). The Referee's order does not explain that conclusion. We find there is no evidence in the record to support such a conclusion.

Although this case is not a true aggravation case since the claim had not been closed at the time of the February 1980 incident and, therefore, there is no last award or arrangement of compensation from which to measure worsening, we nevertheless believe that the basic concept expressed in Grable applies generally to situations where a claimant has experienced a subsequent off-the-job injury to the same part of the body as was involved in the prior industrial injury. Grable states "* * * 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." 291 Or at 400-401. (Emphasis added).

The question to be answered in this case then is: Has the claimant established that the August, 1979 injury was a material contributing cause of his back problems subsequent to the February, 1980 incident? We think not. Claimant was medically stationary and was released to return to his regular work on January 7, 1980. All objective findings were completely normal. Claimant testified that on February 6, 1980, in an off-the-job incident, a person the claimant knew made a "pass" at his girl friend, and then knocked the claimant to the floor using his head as a battering ram. The

emergency room reports note pain findings which were not noted in any previous medical reports including radiating pain in both legs, equivocal straight leg raising and bilateral 2+ reflexes. Claimant also testified that he experienced pain in the mid-back after the assault. This is in sharp contrast to the findings reported by Dr. Duckler on February 4, 1980.

There is no medical evidence whatsoever in the record which establishes that claimant's August 1979 injury remained a material contributing cause of claimant's post-assault back symptoms. Dr. Barmache, the emergency room physician who examined the claimant after the assault, was deposed. He stated that he could not make any causal connection between claimant's industrial injury and his development of pain or the exacerbation of pain at the time he was seen at the hospital in February of 1980. Dr. Duckler stated in his May 22, 1980 report that he could not comment on the onset of claimant's symptoms in February of 1980. This is all of the medical evidence on the question of the relationship of the August, 1979 industrial injury and claimant's post-assault symptomatology. We do not believe lay testimony is adequate in this case to do that which the physicians cannot. We, therefore, find that claimant has failed to establish his 1979 industrial injury as a material contributing cause of his back condition subsequent to the February, 1980 assault.

ORDER

The Referee's order dated November 17, 1981 is reversed. The January 5, 1981 denial is reinstated and affirmed.

JACK N. KING, Claimant
Lindsay, Hart et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney
Reviewed by the Board en banc.

WCB 81-9238
December 10, 1982
Order on Review

The SAIF Corporation requests review of Referee Leahy's order which set aside its September 10, 1981 denial of compensability, remanding the claim to SAIF for acceptance, and awarded claimant's attorney a fee of $900 for overcoming the denial.

This is a case involving an unexplained fall. The only issue is compensability. SAIF contends that claimant has not sustained his burden of eliminating the possibility of idiopathic causation of his July 2, 1981 fall, while claimant defends the Referee's order and argues that he is entitled to a larger attorney fee than that allowed by the Referee.

We adopt the Referee's findings of fact as our own and agree with the Referee that claimant has established his claim as compensable under Peter J. Russ, 33 Van Natta 509 (1981), aff'd, Livesley v. Russ, 60 Or App 292 (1982). SAIF's argument that claimant has not eliminated the possibility of idiopathic causation is not convincing. The evidence relating to claimant's previous dizzy spells is simply too meager to defeat compensability.

In support of his request for an increased attorney fee, claimant argues that this case presented a complex issue and that

a substantial amount of time was required for investigation, i.e., interviewing numerous witnesses who were called to testify. Although we do not find this to be a particularly complex case, we do agree that this did involve testimony from more witnesses than is usual in workers compensation hearings. We, therefore, allow claimant's request for an increased attorney's fee, recognizing that the request for review by SAIF precluded reconsideration of the fee by the Referee.

ORDER

The Referee's order dated December 15, 1981 is modified. Claimant's attorney is awarded an additional $300 for services performed at the hearing in overcoming the denial, for a total fee of $1,200. The remainder of the Referee's order is affirmed.

Claimant's attorney is awarded a fee of $450 for services rendered before the Board, payable by SAIF.

JAMES A. LYONS, Claimant
Brink, Moore et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney
Wolf, Griffith et al., Defense Attorney

WCB 81-08944 & 81-10689
December 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.

DOROTHY M. McIVER, Claimant
Pozzi, Wilson et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-01251
December 10, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

Following its apparent policy of appealing all awards of permanent total disability regardless of the merits of the case, the SAIF Corporation requests review of Referee Galton's order which found claimant permanently and totally disabled effective July 24, 1980. SAIF's brief states the first issue is whether claimant is permanently and totally disabled, but then does not present any factual argument in support of a negative answer. SAIF's brief states the second issue is whether claimant should be permitted to "relitigate the extent of her disability prior" to an award for permanent partial disability granted by the Board in Dorothy McIver, 25 Van Natta 118 (1978).

We affirm and adopt the Referee's order with the following additional comments. We have considered only claimant's low back physical impairment; we have not taken into consideration claimant's cervical impairment because her claim for that condition was resolved by a disputed claim settlement. See Fred Hanna, 34 Van Natta 1271, 1276 (1982). We do not believe that this case in any way involves "relitigation" of our 1978 order. Since that order, claimant has been in surgery twice for low back operations and has

had her claim reopened and reclosed twice. Claimant now has, as the Referee found, "continuous, persistent and disabling low back pain radiating into her hips and legs." Claimant is now entitled to an award based on these present circumstances.

ORDER

The Referee's order dated May 10, 1982 is affirmed. Claimant's attorney is awarded $600 for services rendered on Board review, payable by the SAIF Corporation.

GENE SCHROEDER, Claimant
Malagon & Velure, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-03306
December 10, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

The SAIF Corporation requests review of those portions of Referee Danner's order which granted claimant 25% unscheduled disability for his traumatic neurosis condition and declined to grant SAIF's request for a ruling that claimant was not entitled to compensation for temporary total disability between March 3 and June 15, 1981.

We affirm and adopt the Referee's order on the issue of claimant's entitlement to time loss during the period in question.

Claimant's entitlement to an award for unscheduled permanent disability based on loss of wage earning capacity is a much more difficult matter.

Claimant sustained right leg fractures while working in the woods in 1979. The fractures healed reasonably well and the leg injury is not now in issue. Instead, the present problem involves claimant's feelings about returning to work in the woods. Although the parties have not phrased their arguments in exactly these terms, the fundamental issue involves the distinction between fear which can be overcome by the exercise of will power and phobia which cannot be overcome by the exercise of will power. Claimant argues in essence that he now has an uncontrollable phobia about working in the woods as a result of his compensable leg injury and, therefore, that he has lost some earning capacity. SAIF responds in essence that claimant's decision not to return to work in the woods is conscious and volitional; that although claimant may be fearful of that prospect, he could overcome his fear if he chose to do so; and that a cognitive decision not to pursue a given vocation because of possible dangers is a relinquishment of wage earning capacity, not a loss of earning capacity.

To illustrate the distinction between fear and phobia, as we understand those concepts: A person might be fearful about airplane travel, going to the dentist, downhill skiing or any number of other common activities but may "muster the courage" to overcome such fear and perform the activity in question; but a true phobia can produce a degree of paralysis that makes participation in the feared activity literally impossible. Whether claimant's attitude toward returning to work in the woods is more toward the end of the spectrum represented by fear that could be overcome or more in the nature of a phobia that cannot be overcome depends particularly, we think, on expert medical analysis.

Dr. Colbach expressed the first opinion in November of 1979, shortly after claimant's leg injury the prior July. Dr. Colbach noted that claimant "has decided he does not want to work at such a hazardous occupation," which sounds like a voluntary choice, because claimant is "too frightened to continue," which sounds more like a phobia. However, Dr. Colbach ultimately concluded: "Were he more motivated to return to work in the woods, I think he could probably overcome his fears."

Dr. Holland expressed the last and most comprehensive opinion in August of 1981, after claimant had received one-and-a-half years of psychiatric treatment from Dr. Brown (discussed below). Dr. Holland found that claimant satisfied only one of the diagnostic criteria for post-traumatic stress disorder and satisfied that criteria only by history. Dr. Holland thus concluded that a diagnosis of post-traumatic stress disorder "is vulnerable to the factual nature of the worker's reporting, as well as the incomplete filling of the diagnostic criteria." Dr. Holland agreed with Dr. Colbach's opinion that claimant should be able to overcome his fear and return to work in the woods if he were motivated to do so.

There are 13 letters in the record from Dr. Brown, who became claimant's treating psychiatrist in about March of 1980. These reports are quite unusual in content and in tone. Despite at one point being specifically asked by a SAIF representative to describe his treatment modality, Dr. Brown's reports contain virtually no information about the treatment he provided to claimant. Instead, a consistent theme that runs through Dr. Brown's reports is a preoccupation with claimant being retrained for a new job. The doctor urged at one point, for example, that: "Time loss benefits should continue until he receives rehabilitation."

Moreover, Dr. Brown's reports are extremely cryptic and appear to be contradictory. An earlier report states that claimant "is capable of working but not at his previous occupation." But Dr. Brown states in a later report: "I have never suggested. . . he is unable to work for medical reasons." Some of these comments were made in the context of the question of whether claimant was medically stationary, which Dr. Brown finally explained that he understood to mean: "The term stationary has primary reference to treatment as it pertains to a worker's ability or inability to return to work." Dr. Brown never directly responded to the opinions of Drs. Colbach or Holland that claimant could overcome his fear of working in the woods, but Dr. Brown did state without explanation: "His fears about returning to the dangers of working in the woods I don't view as permanent impairment."

We conclude that the evidence from Dr. Brown sheds very little light on the medical question now before us. That leaves the opinions of Drs. Colbach and Holland that claimant could overcome his fear, if he were motivated to do so, basically unrefuted.

Claimant testified that he did return to the woods once and tried to cut down one tree. Claimant testified that this "experiment" produced severe physical symptoms, including vomiting. Although the Referee made no credibility finding, we have no reason to doubt claimant's testimony; indeed, many of the medical reports

comment on claimant's sincerity. But there are some situations in which credible lay testimony has been found insufficient to prove contested issues in workers compensation cases, and we think that generally finding a condition as complex as true phobia to exist should depend on some medical corroboration. Dr. Holland's most recent report recites an awareness of claimant's experience during and after the one incident when claimant attempted to cut down one tree (that incident is not mentioned by any other doctor) but Dr. Holland still expresses agreement with Dr. Colbach's assessment that claimant could overcome his fear and return to work in the woods if he were motivated to do so. On this record, we are not persuaded to find to the contrary solely on the basis of claimant's testimony.

Claimant was certainly free to consciously and voluntarily decide he did not desire to continue in a vocation he viewed as dangerous. Claimant was also free to pursue (and did pursue) retraining for a new vocation. But unless claimant has proven he was unable (as distinguished from only unwilling) to continue in his former vocation as a result of his 1979 leg injury, there is no compensable loss of wage earning capacity. We are not persuaded on this record that claimant was unable to continue working in the woods.

ORDER

The Referee's order dated February 5, 1982 is affirmed in part and reversed in part. That portion that awarded claimant 25% unscheduled permanent partial disability is reversed. The remainder of the Referee's order is affirmed.

LAWRENCE WOODS, Claimant
Tamblyn & Bush, Claimant's Attorneys
Cheney & Kelley, Defense Attorneys

WCB 82-05299
December 10, 1982
Order of Dismissal

Claimant has requested review of "the Referee's order made and entered on October 1, 1982. . . ." The "Referee's order" which is the subject of claimant's request for review is a disputed claim settlement entitled "Disputed Claim Settlement and Order of Dismissal." Claimant had previously requested a hearing on or about June 15, 1982.

Assuming, arguendo, that this "order" is subject to review pursuant to ORS 656.295 and 656.289(3) we dismiss claimant's request for review for the reason that claimant entered into the stipulation which resulted in dismissal of his request for hearing. By stipulating to the dismissal, claimant has no standing to request review. A party is obviously not adversely affected or aggrieved by the entry of an order to which he stipulates, and we believe our review function should be limited to the review of orders at the request of a party who is adversely affected or aggrieved.

If claimant, by requesting review, seeks to have the disputed claim settlement set aside, his proper remedy is to request a hearing pursuant to ORS 656.283. See Mary Lou Claypool, 34 Van Natta 943 (1982); see generally James Leppe, 31 Van Natta 130 (1981).

ORDER

Claimant's request for review is dismissed.

KEVIN D. WHEELER, Claimant
Jolles, Sokol et al., Claimant's Attorneys
Schwabe, Williamson et al., Defense Attorneys

WCB 81-06963
December 13, 1982
Order on Review

Reviewed by the Board en banc.

The self-insured employer requests review of Referee Shebley's order which found claimant's atopic dermatitis to be a compensable occupational disease.

Claimant's apparent theory of the case is that he suffered a compensable worsening of his preexisting nonindustrial condition. However, at the hearing and on review claimant asserts that he has never had any form of dermatitis symptoms prior to his employment at Boise Cascade. We are, therefore, somewhat confused as to exactly what, if any, underlying condition claimant believes has worsened.

Although the record is unclear, claimant's first problem with skin rash appears to have been in late 1979 or early 1980. He apparently developed a rash on his upper body as a result of coming in contact with glue while working as a glue spreader at Anderson Plywood. He received treatment for the rash and it cleared up within a few days.

Claimant went to work for the current employer, Boise Cascade, in a plywood mill in June of 1980. In March of 1981 he developed a rash on his forearms, neck, eyelids and cheeks. He filed a claim which was initially accepted as a non-disabling occupational disease. However, the employer subsequently issued a formal denial for the condition on June 2, 1981.

Claimant was treated by Dr. Stark, a dermatologist, who diagnosed his problem as atopic dermatitis. Dr. Stark reported on May 26, 1981 that claimant had a history of atopic dermatitis prior to his exposure at Boise Cascade and that his current skin rash is "a symptom of a pre-existing underlying condition." There was no explanation of exactly what history Dr. Stark had obtained or whether there is any connection between his current rash and the earlier glue-contact incident. Dr. Stark further stated in the same report:

> "As far as working at Boise Cascade causing the underlying worsening of the pathological condition I think that's debatable. Probably not. The individual may become symptomatic any time that his skin becomes dry or he has excess perspiration or wears clothing that may be irritating to the skin. He will always have a skin which will be easily irritated and may flare up at any time."

The only other medical report in the record is Dr. Stark's report of August 31, 1981 in which he states:

"It is still my impression that Mr. Wheeler has a pre-existing condition of atopic dermatitis and it is aggravated by working in an area where there is dust and debris as well as the opportunity for him to perspire profusely."

Claimant relies on this latter statement as proof that he has suffered a compensable aggravation of a preexisting condition. In Douglas S. Chiapuzio, 34 Van Natta 1255 (1982), we concluded that in this kind of case the claimant has to satisfy the requirements of both Weller and Gygi, that is: (1) that work conditions caused a worsening of the underlying disease, Weller v. Union Carbide, 288 Or 27 (1979); and (2) that work conditions were the major cause of the worsening, SAIF v. Gygi, 55 Or App 570 (1982). Based on the very limited evidence, we are not persuaded that claimant has satisfied either requirement.

To establish worsening of an underlying disease or condition, it is at least helpful, if not necessary, to be able to identify that underlying condition or disease. This record is obscure about the existence and nature of claimant's condition before he developed a skin rash while working at Boise Cascade. Both of Dr. Stark's reports refer to a previously existing condition, which we infer probably means a condition that was previously symptomatic, but claimant basically denied previous symptoms in his hearing testimony. Alternatively, Dr. Stark might be saying that claimant's preexisting condition was only a sensitivity to developing atopic dermatitis symptoms without actual prior symptoms. Under either view -- preexisting symptomatic dermatitis or preexisting asymptomatic sensitivity -- there is simply no basis in the record for finding that work exposure was the major cause of a compensable worsening of the underlying condition except possibly the conclusory statement from Dr. Stark's August report. And we think the more plausable interpretation of Dr. Stark's August report, especially interpreted in context with his prior May report, is that claimant's work exposure contributed in part to an onset of symptoms and not a worsening of any underlying condition.

ORDER

The Referee's order dated March 12, 1982 is reversed and Boise Cascade Corporation's denial of June 2, 1981 is reinstated and affirmed.

Board Member Lewis Dissenting:

The majority states that this claimant must prove that work conditions caused a worsening of the underlying disease under Weller v. Union Carbide, 288 Or 27 (1979), before he can receive compensation for medical treatment and time loss. The Weller test requires proof of worsening of the underlying disease, and is

applicable only in cases where the underlying disease is symptomatic prior to the aggravating work exposure. Weller v. Union Carbide, 288 Or 27, 29 (1979), Patricia L. Lewis, 34 Van Natta 202 (1982). The Board has further held that, even if a disease was symptomatic at some time before the work exposure, those symptoms must have been of a significant nature and have occurred within a reasonably proximate time period of the work exposure before Weller must be applied. Lorena Iles, 30 Van Natta 666 (1981).

The logic behind the Weller requirement is to require greater proof of "work connectedness" by those claimants who, before the injurious work exposure, have already exhibited the need for medical care and an inability to work due to off-the-job diseases. In this case, the claimant had never exhibited a need for medical care or an inability to work due to his sensitive skin until he was exposed to plywood mill conditions. In other words, although the facts below show that the claimant exhibited symptoms while working for a plywood mill other than Boise Cascade (Anderson Plywood), he has never developed symptoms from non-work sources.

This claimant's underlying disease is one of skin sensitivity which makes it easier for him to develop atopic dermatitis when exposed to the right combination of conditions. The record contained evidence of only one episode of dermatitis before the claimant's work exposure at the Boise Cascade plywood mill. This episode occurred in late 1979 or early 1980 while working at Anderson Plywood. Claimant had a slight case of dermatitis on his arms from contact with glue, and it cleared up in one or two days. The claimant stopped working at Anderson Plywood in February, 1980, and began working for Boise Cascade in June, 1980. A portion of his new job required him to spread glue. During the ensuing summer, the claimant began noticing a slight case of rash on his eyelids and arms. This was the first time he had dermatitis since the episode at Anderson Plywood. The symptoms of dermatitis lasting one to two days at Anderson Plywood occurred at least six months prior to exposure at Boise Cascade and were not significant enough or close enough in time such that the Weller requirement should be applied.

On the other hand, the symptoms the claimant experienced while at Boise Cascade were significant and persistent. Between June and October of 1980, the claimant worked on the glue spreader part-time. That glue appears to have been the same type of plywood glue to which he had shown a sensitivity at Anderson Plywood. In October, he began working as a green chain off-bearer full time. His rash persisted, but eased somewhat in the winter as the weather cooled. In January and February of 1981, claimant's rash was evidenced by slight scars on his eyelids and arms with some intermittent itching. In March, 1981 the mill conditions became hotter as weather conditions warmed. At that time, a rash developed on the claimant's arms, neck, eyelids and cheeks. The rash on his neck developed lumps and bled. His rash had never before been so severe. The claimant sought medical treatment and filed a claim. In July, 1981, the claimant lost a week of work due to his rash. Thereafter, the claimant continued to work for his employer until December, 1981 when he was laid off. He testified that since leaving the mill his rash has almost completely cleared up.

Claimant's treating doctor, Dr. Stark, stated that although the mill conditions did not cause the underlying predisposition to sensitive skin, the claimant's skin is ". . . aggravated by working in an area where there is dust and debris as well as the opportunity for him to perspire profusely." The testimony at hearing was that the Boise Cascade plywood mill is very dusty, and that summer temperatures often reach 105 to 110 degrees in the working area. The climate is always hot and steamy due to the veneer dryers that operate in the work area at a temperature of 350 degrees. The air is hazy and thick with sawdust. It follows that the mill conditions were conditions that could and did aggravate claimant's sensitive skin and cause his atopic dermatitis. There was no evidence that the atopic dermatitis was caused by another source; therefore, the claimant has shown that the mill exposure at Boise Cascade was (at least) the major contributing cause of his atopic dermatitis. SAIF v. Gygi, 55 Or App 570 (1982). In Penifold v. SAIF, 60 Or App ___ (December 8, 1982), the court found that a claimant's contact dermatitis was compensable even though there was evidence that the claimant had similar dermatitis producing exposure outside of work. In this case, it could have been that the claimant could contract dermatitis in environments outside the plywood mill (hot, dusty and sweaty environments); however, the testimony was that the only environment that caused the dermatitis was that of the plywood mill.

In conclusion, I find that the requirements of Weller should not apply in this case because claimant's underlying skin sensitivity was not sufficiently symptomatic prior to the aggravating work exposure at Boise Cascade. Even though work exposure at Boise Cascade plywood mill did not worsen the claimant's underlying preexisting condition of skin sensitivity, the exposure did bring on symptoms in the form of atopic dermatitis, and, therefore, medical services required to treat and disability caused by the atopic dermatitis should be the responsibility of Boise Cascade. Their denial of June 2, 1981 should be disapproved. I would award claimant's attorney an attorney's fee of $450 for his services on Board review.

RICHARD C. BELL, Claimant
Anderson, Fulton et al., Claimant's Attorneys
Wolf, Griffith et al., Defense Attorneys

WCB 80-00489
December 15, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

The claimant requests review of Referee Leahy's order which: (1) disallowed temporary partial disability compensation from June 26, 1979 through July 27, 1979 which was awarded in a September 11, 1979 Determination Order; (2) disallowed temporary total disability compensation from January 1, 1981 through April 29, 1981 and May 8, 1981 through July 6, 1981 which was awarded in a July 21, 1981 Determination Order; (3) allowed no additional time loss; (4) allowed the employer to offset temporary disability compensation paid from July 6, 1981 through July 31, 1981; and (5) found claimant's right hand permanent disability did not exceed the 45% awarded by prior Determination Orders.

The claimant's contentions on review are not entirely clear, but he apparently contends: (1) that portions of temporary disability awarded in the September 11, 1979 and July 21, 1981 Determination Orders should not have been disallowed by the Referee; (2) that he should have been awarded temporary disability compensation from January, 1980 to June, 1980; (3) that his right hand is at least 75% permanently disabled; and (4) that the exact amount of overpayment, if any, should have been proved at the hearing before an offset could be approved. The employer defends the Referee's order, but also argues that the Referee should have admitted an additional medical report dated February 24, 1982 and tendered to the Referee after the February 19, 1982 hearing.

We affirm and adopt the Referee's order on the evidentiary issue. See Robert A. Barnett, 31 Van Natta 172 (1981); Minnie Thomas, 34 Van Natta 40 (1982). We affirm and adopt the Referee's order on all other issues except extent of disability.

The problem that the extent issue presents is that, between the date of claimant's industrial injury and the date of the hearing, claimant sustained an unrelated gunshot wound that, at the time of the hearing, was producing some right hand and/or arm impairment. Thus, the problem is to separate the compensable effects of the industrial injury from the noncompensable effects of the gunshot wound. Relying primarily on Dr. Button's reports written before the gunshot wound, we find as follows.

Loss of flexion in the metacarpophalangeal and interphalangeal joints of the thumb represents 7% loss of the hand. OAR 436-65-505. Loss of flexion in the interphalangeal and distal interphalangeal joints of the index finger represents 18% loss of the hand. OAR 436-65-510. Loss of flexion in the proximal interphalangeal joint of the ring finger represents 5% loss of the hand. OAR 436-65-510. Thus, the total impairment due to loss of motion is 30%. OAR 436-64-515(7). Additionally, claimant has lost one half of his right hand grip strength when compared with left hand grip strength and he has lost two thirds of his right hand pinch strength when compared with his left hand pinch strength. This

loss of strength represents 30% loss of the hand. OAR 436-65-530(5). Claimant's complaints at hearing of pain and numbness in his right hand were consistent with his complaints to his physicians prior to his gunshot wound, so we did consider that testimony in addition to earlier medical reports regarding disabling pain. We find the pain and related numbness and sensitivity to cold to be moderately disabling, representing 10% loss of the hand. OAR 436-65-530(3). Combining the loss of strength and disabling pain with the loss of motion yields a permanent disability rating of 55% for permanent loss of function of claimant's right hand. This represents 10% more compensation than that already awarded by the prior Determination Orders. (The Referee erroneously stated the prior awards totaled 47.5% rather than 45%.)

ORDER

The Referee's order dated February 26, 1982 is modified in part. Claimant is awarded 82.5° for 55% loss of his right hand; this award is in lieu of all prior awards. Claimant's fee agreement with his attorney is approved and claimant's attorney is allowed 25% of the increased compensation (10% loss of a hand) awarded by this order. The remainder of the Referee's order is affirmed.

BOBBY J. EVERAGE, Claimant
Starr & Vinson, Claimant's Attorneys
Cheney & Kelley, Defense Attorneys

WCB 80-10915
December 15, 1982
Order on Review

Reviewed by Board Members Lewis and Ferris.

The claimant requests review of Referee Johnson's order which found that claimant was not entitled to unscheduled permanent partial disability compensation over that awarded by the Determination Order dated September 14, 1981.

The claimant contends that comparison of medical reports before and after surgery for diskectomy show that the diskectomy at L4-5 on the right has deteriorated his condition. He also contends that the Referee focused too heavily on the fact that claimant is earning a slightly higher salary since the last Referee's order of October 14, 1977.

On de novo review, we consider the impact factors found in ORS 656.214(5) and the Department's Guidelines for Rating of Permanent Disability, found in OAR 436-65-600 et seq. We specifically include impairment due to surgery (OAR 436-65-615[2]), and limitations due to disabling pain. We agree with the Referee that 30%, or 96°, fairly approximates claimant's present loss of wage earning capacity.

ORDER

The Referee's order dated May 21, 1982 is affirmed.

DONNA MEADE, Claimant
Doblie & Francesconi, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney
Keith Skelton, Defense Attorney

WCB 81-04886 & 81-07780
December 15, 1982
Order on Review

Reviewed by Board Members Lewis and Ferris.

The SAIF Corporation requests review of those portions of Referee Leahy's order which found claimant's condition had worsened and that her psychological disability was caused in major part by her compensable injury sustained while SAIF was on the risk.

SAIF contends that the claimant's condition has not worsened; rather, that she is merely experiencing temporary exacerbations of pain due to her back injury. SAIF further contends that claimant's psychological disability is not related to her injury; rather, it is caused by nonwork problems that preexisted her injury.

The claimant responds that the preponderance of the medical evidence shows that claimant's condition due to her compensable back injury has worsened and that her present psychological disability is attributable to that injury.

ORDER

We adopt the Referee's findings dated April 20, 1982 and his order is affirmed with the following corrections:

1) The Referee ordered that SAIF's denial of May 26, 1981 is reversed. Rather, it is SAIF's denial of October 27, 1981 which is reversed.

2) The Referee ordered that SAIF's partial denial of November 5, 1981 is reversed. Rather, it is SAIF's partial denial of December 7, 1981 which is reversed.

Claimant's attorney is awarded $600 as an attorney's fee for services rendered on review.

ROGERS MURRAY, Claimant
Pozzi, Wilson et al., Claimant's Attorneys
Wolf, Griffith et al., Defense Attorneys

WCB 81-03954
December 15, 1982
Order on Review

Reviewed by Board Members Lewis and Ferris.

Claimant requests review of Referee Neal's order which found claimant was not entitled to have his claim reopened and granted him compensation totaling 20% unscheduled disability for an injury to his low back.

On de novo review, the Board affirms and adopts the Referee's order. Under the rationale in Harold Metler, 34 Van Natta 710 (1982), we would be inclined to assess a penalty against the insurer for its failure to accept or deny claimant's aggravation claims (especially that submitted by Kaiser in January, 1982). However, because the insurer's actions preceded the Board's decision in Metler, we will not impose a penalty in this case.

ORDER

The Referee's order dated March 3 1982 is affirmed.

PATRICK D. RIDDLE, Claimant
A.J. Morris, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-08585
December 15, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

The SAIF Corporation requests review of Referee Baker's order which awarded claimant 50% scheduled permanent partial disability for loss of use of the left leg, that being an increase of 15% over and above the April 7, 1980 Determination Order.

The Board previously remanded this case to the Referee with instructions to apply the relevant criteria for rating scheduled disability contained in OAR 436, Division 65. The Referee then entered an Order on Remand reciting, without elaboration, reliance on the administrative rules. The Referee also mentioned reliance on additional evidence from medical reports that were not available to the Evaluation Division when it considered the matter and the credible testimony elicited at the hearing. SAIF appeals, arguing -- also without elaboration -- that the amount of disability awarded by the Determination Order was correct.

The Board affirms and adopts the order of the Referee. See also Clyde V. Brummell, 34 Van Natta 1183 (1982); Hazel Ray, 34 Van Natta 1193 (1982).

ORDER

The Referee's Order on Remand dated April 6, 1982 is affirmed. Claimant's attorney is awarded an attorney's fee of $400 for services before the Board, payable by SAIF.

LAWRENCE RYAN, Claimant
Starr & Vinson, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney
David Horne, Defense Attorney

WCB 82-00494 & 80-11051
December 15, 1982
Order on Reconsideration of Consolidated Order on Review and Own Motion Order

Claimant's attorney requests reconsideration of our consolidated order dated December 3, 1982 on the ground that it failed to award or allow attorney's fees.

As matters now stand, claimant's 1974 industrial injury claim has been ordered reopened by the Board under its own motion authority. Claimant's attorney is entitled to a fee for obtaining claim reopening. OAR 438-47-070; Fred Gascon, Own Motion No. 82-0269M, 34 Van Natta 1551A (November 9, 1982).

As to the source of the fee, claimant's attorney argues the fee should not be a percentage of claimant's compensation but instead should be paid in addition to compensation by Employers of Wausau, the insurer on the 1974 claim, because "Wausau requested the hearing" and because "Wausau requested review." That argument

indicates some of the confusion that prompted us to consolidate these proceedings in the first place. The Board referred claimant's request for own motion relief against Wausau for a hearing and recommendation pursuant to OAR 436-83-810(1)(d). As between claimant and Wausau, neither could request a hearing after the expiration of claimant's aggravation rights, a Referee could not enter an appealable order and thus nobody could request review of a Referee's recommendation to the Board. Despite the complications that arise because of the involvement of another insurer, as between claimant and Wausau, the situation is rather simple: claimant requested own motion relief; the Board referred that request to a Referee for a hearing and recommendation; and then the Board decided to grant own motion relief based on the record made before the Referee. In these circumstances, attorney's fees are allowed from the claimant's increased compensation, not awarded in addition to compensation.

ORDER

On reconsideration, the Board's order dated December 3 1982 is amended to provide that claimant's attorney is allowed, as a reasonable attorney's fee for services rendered to date, 25% of claimant's compensation not to exceed $1,200, payable from claimant's compensation rather than in addition to claimant's compensation.

EARL A. SAFSTROM, Claimant
Galton, Popick & Scott, Claimant's Attorneys
Lindsay, Hart et al., Defense Attorneys

WCB 82-02213
December 15, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

The employer requests review of Referee Fink's order which set aside its partial denial of claimant's claim. The issue is whether claimant's symptoms after March 1, 1982 were causally related to his July 29, 1981 industrial injury.

We believe the Referee's findings of fact to be incomplete, and the Referee's analysis raises the possibility that he misunderstood the issues. We find the facts to be as follows:

(1) Claimant sustained an electric shock injury at about noon on Wednesday, July 29, 1981. At that time he was thrown, fell or jumped back and struck his upper body.

(2) Claimant was laid off at the end of his shift due to a reduction in force on Friday, July 31, 1981.

(3) During the two-and-a-half days between the electric shock incident and claimant's departure from the payroll, claimant continued to work. He had frequent contact during this period with Jim Cook, his supervisor, and Bill Baker, a co-worker. Neither observed any physical problems or signs of injury.

(4) After being laid off, claimant consulted Dr. Larson on August 6, 1981 and saw Dr. Larson about ten times over about the next three months. Claimant then transferred his care to Dr. Ho.

(5) There are two 801 claim forms in the record. A handwritten one, dated August 7, 1981, refers only to an electrical shock injury. A typed one, dated August 5, 1981, refers to claimant having been knocked backwards by the shock. The existence of two claim forms is unexplained. In any event, the claim/claims was/were accepted.

(6) On March 1, 1982, that is, more than eight months post-injury, the employer issued the partial denial here in issue: "After investigation into this matter, we find that continuing time loss and your present symptomatology are unrelated to the condition for which the claim was originally accepted."

The question, to repeat, is whether claimant's inability to work after March 1, 1982 and the medical services he was receiving after that date were due to his July 29, 1981 injury. We find the two reports from Dr. Ho in this record to be of virtually no assistance in answering that question. Dr. Ho's more recent report states:

> "The symptoms and signs the patient now manifests to me are certainly compatible with the events that he reported on the day of his injury. * * * [The] orthopedic problems for which I am now treating the patient may or may not have occurred as a direct result of 'electrocution' but in any case are likely to have been produced at least in part by his falling against a chair after experiencing electric shock."

As we understand this report, the only basis for Dr. Ho's "likely to have been produced" opinion is the compatibility of this opinion and the history claimant gave Dr. Ho. In other words, Dr. Ho's assessment has no independent basis, but instead, depends entirely on the history he received from claimant, which is understandable because Dr. Ho did not begin treating claimant until about three months post-injury.

The question of continuing compensation beyond March 1, 1982 depends then, we believe, on the subsidiary questions of claimant's credibility and an assessment of Dr. Larson's findings.

Considering the latter point first, both parties can point to a clause here or a phrase there in Dr. Larson's reports and testimony that supports their respective positions. Considering all of Dr. Larson's words together, however, the clear picture that emerges for us is: (1) Dr. Larson believes it is a reasonable medical probability that claimant's continuing symptoms after March 1, 1982 were not due to his electric shock injury eight months earlier; and (2) Dr. Larson believes it is a reasonable medical probability that claimant's continuing symptoms after March 1 were due to the upper-body trauma sustained at the time of the electric shock if there were immediate upper-body symptoms, but were not due to the upper-body trauma if there were not immediate upper-body symptoms.

We find Dr. Larson's opinions persuasive because of his, at least so far as this record reflects, more extensive treatment of claimant and, more importantly, treatment that was the most proximate to the injury date. Since Dr. Larson's opinion supports a finding of continuing compensability only under one set of facts (if there were immediate upper-body symptoms at the time of the July 29, 1981 incident), we turn to the question of claimant's credibility.

Claimant testified that he suffered immediate upper-body symptoms on July 29. The employer relies on the following circumstantial evidence for a contrary conclusion: (1) claimant continued working for two-and-a-half days after the July 29 electric shock incident; (2) claimant's supervisor, Mr. Cook, and co-worker, Mr. Baker, neither observed any manifestations of upper-body injury during these two-and-a-half days nor heard claimant complain of upper-body symtoms; (3) claimant did not assert a claim until after he had been laid off as part of a reduction in force; (4) at about the same time he filed his claim, claimant filed a union grievance seeking reinstatement to his job, from which it could be inferred that claimant felt physically able to work if his job were still available; (5) Dr. Larson comments in several reports that he is unable to objectively verify many of claimant's subjective complaints; and (6) claimant's testimony in this proceeding about a prior 1976 industrial back injury was significantly impeached when the employer introduced claimant's prior inconsistent testimony from an earlier proceeding.

The Referee reasoned that claimant's testimony that he did experience immediate upper-body symptoms and the testimony of Mr. Cook and Mr. Baker that symptoms were not apparent to them could be reconciled because it is not "uncommon for workers to work in discomfort." We too have seen many cases in which injured, but stoic workers continued working in discomfort, even in pain. But that does not fit the facts of this case. Claimant does not contend he was stoic; instead, he testified that Mr. Cook and Mr. Baker "knew that I was hurting," that is, knew that he was working in pain. In fact, Mr. Cook and Mr. Baker testified they knew no such thing. This conflict cannot be reconciled by speculation about possible stoicism.

After discussing the stoicism possibility and the uncontested fact that there was an electrical shock incident on July 28, 1981, the Referee concluded: "From my observation of claimant, I have no reason to question his credibility." However, credibility is not merely a matter of appearance. Richard A. Castner, 33 Van Natta 662, 663 (1981): "The Referee had the advantage of seeing the witness. The Board has the advantage of having a transcript, which was not available to the Referee." And the transcript in this case reflects, for example, significant discrepancies between claimant's hearing testimony about his 1976 back injury and his testimony in an earlier proceeding about that injury -- discrepancies that were not mentioned by the Referee in this case.

As we interpret the medical evidence, as stated above, in order to find that claimant's time loss and medical treatment

remained compensable beyond March 1, 1982, it is necessary to affirmatively find that claimant experienced immediate upper-body symptoms on and after July 29, 1981, meaning we would have to be actually persuaded by claimant's testimony to that effect. On the other hand, in order to reach the contrary conclusion it is unnecessary to affirmatively find that there were not immediate upper-body symptoms; rather, it is only necessary to find that claimant has not proven it more likely than not that there were such immediate symptoms. We so conclude.

ORDER

The Referee's order dated May 5, 1982 is reversed. The employer's partial denial dated March 1, 1982 is reinstated and affirmed. The employer is responsible for submission of claimant's claim for injuries sustained in July of 1979 for closure pursuant to ORS 656.268, if it has not already done so.

EMANUEL SISTRUNK, Claimant
Schwabe, Williamson et al., Defense Attorneys

WCB 82-02946
December 15, 1982
Order on Review

Reviewed by the Board en banc.

Claimant requests review of the Presiding Referee's October 12, 1982 Order of Dismissal. On review of the record, the Board affirms the Order of Dismissal.

ORDER

The Presiding Referee's Order of Dismissal is affirmed.

Board Member Barnes Dissenting:

On December 6, 1982 the Board mailed to the parties its standard call-for-briefs letter. That letter advised claimant that he had until December 27, 1982 to file his brief, and that it was possible to file a written motion for an extension of time in which to submit his brief.

Now, without even waiting to see whether claimant wishes to file a brief as we advised him he could do, the Board proceeds to review this case and issue a decision. While I have often stated that this agency's main problem is backlog and delay, I do not think that deciding cases before the parties have an opportunity to submit briefs is the best solution to that problem. I dissent from the issuance of a decision at this time.

JULIE A. SMITH, Claimant
Gary Bisaccio, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Kenneth Bourne, Attorney

WCB 81-3380
December 15, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

The noncomplying employer requests review of Referee Neal's order which found that the claimant sustained a compensable injury on September 28, 1980, prior to the effective date of the employer's workers compensation insurance coverage. The noncomplying employer also requests review of the Referee's Interim Order of December 17, 1981 which denied its Motion to Dismiss. The noncomplying employer argues that the Referee erred in failing to allow the motion and in finding that claimant sustained a compensable injury.

We adopt the Referee's findings of fact as our own, but summarize certain portions of those findings for purposes of this review.

Claimant began working part-time for the noncomplying employer on approximately September 15, 1980. Claimant was terminated from that employment on approximately October 5, 1980. On October 7, 1980 claimant was examined by Dr. Gray, who completed a form 827. On November 6, 1980 claimant filed a form 801 alleging a September, 1980 back injury. The Compliance Division of the Workers Compensation Department conducted an investigation and on November 19, 1980 entered a Proposed and Final Order finding the employer to be a noncomplying employer from September 15 to October 2, 1980. The employer did not appeal; that order became final by operation of law on December 9, 1980. The claim was referred to the SAIF Corporation for processing. SAIF initially deferred, but on February 4, 1981 notified the claimant and the employer of its acceptance of the claim. On April 1, 1981 SAIF notified the employer of its right to request a hearing on the compensability of the claim in accordance with OAR 436-52-040(c) and (d).

The employer's argument is framed in terms of laches, bar and estoppel -- all directed to the contention that the statutory and administrative scheme with regard to noncomplying employers is violative of the employer's rights to due process and equal protection of the laws under the Oregon and United States Constitutions. This Board has previously concluded, rightly or wrongly, that it does not have jurisdiction to rule on constitutional issues raised by the parties to a claim. Sidney A. Stone, 31 Van Natta 84 (1981), affirmed in part and reversed in part, Stone v. SAIF, 57 Or App 808 (1982). We, therefore, decline to determine the constitutionality or unconstitutionality of the statutory and administrative scheme that governs noncomplying employers.

The employer also argues that ORS 656.054, 656.262 and OAR 436-54-040 required SAIF to inform the employer of its right to request a hearing on the compensability issue within 60 days of the date of SAIF's receipt of the Form 827 from Dr. Gray. Although we would be inclined to say that, under ORS 656.054, SAIF had 60 days from the date of referral of the claim to it by the Director to

accept or deny, we find it unnecessary to reach that specific issue. Even assuming arguendo that the employer is correct in its assertion, we fail to see its relevance in this proceeding. Assuming that SAIF was required to notify the noncomplying employer in a more timely fashion than it did in this case, and that the employer was prejudiced by this failure, we think that any damage that may have been caused is a matter between the employer and the SAIF Corporation to be resolved in another forum. We find that the Referee correctly denied the employer's Motion To Dismiss.

With regard to the issue concerning the compensability of this claim, we affirm and adopt the order of the Referee.

Claimant's attorney is entitled to a fee for services rendered before the Board. See Kelly P. Britt, 34 Van Natta 1182 (1982).

ORDER

The Referee's order dated April 21, 1982 is affirmed. Claimant's attorney is awarded $350 for services rendered before the Board, payable by the SAIF Corporation and collectable from the noncomplying employer.

JOHNNIE L. STEPP, Claimant
Coons & McKeown, Claimant's Attorneys
Foss, Whitty & Roess, Defense Attorneys

WCB 81-00134
December 15, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

The SAIF Corporation requests review of Referee Johnson's order which found that claimant had established an aggravation claim, imposed a penalty and attorney's fee for failure to accept or deny it and awarded attorney's fees for prevailing on a denied claim. On review, the employer contends that the claimant failed to prove that he had an aggravation claim and that there was no unreasonable failure to deny the claim.

We affirm and adopt the Referee's order with the following additional comments. Based on the testimony of the witnesses that appeared at the hearing, including Dr. Boots, all of whom the Referee found credible, there is no doubt that claimant's condition worsened after the last award of compensation.

Whether there was a proper aggravation claim is a closer question. The Referee identified Dr. Boots' "progress notes" that were received by SAIF on June 30, 1980 as the aggravation claim. However, SAIF argues that these progress notes reveal "nothing more than periodic exacerbations and remissions obviously to be expected in someone with an award of 80% . . . unscheduled . . . disability." Claimant responds that Dr. Boots' report indicated a need for further medical services and that under ORS 656.273(3) a physician's report indicating a need for further medical services is an aggravation claim.

There is some merit to both positions. We think the principal thrust of the reference to "further medical services" in ORS 656.273(3) is a reference to curative treatment; by contrast, Dr. Boots' report could be interpreted to mean he was providing only palliative treatment. Although the question is close, we do not

agree that is the better interpretation. Dr. Boots' report records eight office visits in less than a one-month period, with a description of the first visit containing a reference to claimant's condition having "aggravated" and the description of the last visit containing a reference to claimant's condition having become "stationary." We believe that such a report triggered the duty for SAIF to do something more than just pay Dr. Boots' bills.

ORDER

The Referee's order dated April 30, 1982 is affirmed. Claimant's attorney is awarded $600 for services rendered on Board review, payable by the SAIF Corporation.

ROY J. FENTON, Claimant
Allen, Stortz et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 82-00074 & 81-08043
December 16, 1982
Order on Review

Reviewed by the Board en banc.

The SAIF Corporation requests review of Referee Howell's order which awarded claimant 25% unscheduled permanent partial disability due to a January 10, 1980 compensable injury and denied the insurer an "offset" for amounts paid pending review on a prior claim stemming from a March 22, 1974 compensable injury.

On March 22, 1974, while working for Normarc, Inc. (insured by SAIF), claimant suffered compensable injuries to his back and right hip. The claim was closed by Determination Order with no award of permanent disability compensation. The claimant requested a hearing and on August 10, 1976 a Referee awarded claimant 50% unscheduled permanent partial disability. The employer requested review of the Referee's order on September 2, 1976. Meanwhile, the claimant had requested lump sum payment of his award which was approved and full payment was made to him. Subsequently, by order of April 22, 1977, the Board reduced the award to 20% unscheduled permanent partial disability. SAIF, therefore, had paid 30% unscheduled permanent disability compensation pending review over and above what the Board ultimately determined to be the proper award for claimant's injury.

The claimant continued to have low back symptoms, but he was still able to perform occasional heavy work. On January 10, 1980, while working for the Lebanon Public Schools (also insured by SAIF), claimant suffered a new compensable injury to the same area of his low back. It was for this injury that Referee Howell awarded 25% unscheduled permanent partial disability compensation in addition to a 5% award granted by Determination Order.

Extent of Disability

SAIF contends that the Referee erred in determining the claimant suffered permanent disability due to his January 10, 1980 injury since the Referee specifically found the claimant's testimony to be unreliable regarding his subjective complaints. Referee Howell justified an increased award in the following manner:

"Despite the fact that I do not consider claimant's testimony to be credible, I find that medical evidence, along with the testimony of other witnesses, establishes that claimant has suffered permanent impairment as a result of his January 1980 injury."

SAIF argues that since the accuracy of the medical reports depends upon the truthfulness of the claimant, the medical evidence ". . . should not be considered proof of anything except that the trust doctors impose on their patients is sometimes misplaced. . . ."

We find no evidence in the record indicating that the claimant was untruthful with his doctors. We also find that the objective, as well as subjective, signs contained in the medical reports bear out a finding of permanent disability consistent with Referee Howell's determination.

Successive Awards

SAIF contends that the Referee misinterpreted and erroneously applied ORS 656.222 by awarding claimant compensation for 25% unscheduled permanent disability, in view of the fact that the claimant previously received compensation for 50% unscheduled disability for a prior injury to his low back pursuant to the terms of a Referee's order, which was modified by the Board on review and reduced to 20% unscheduled permanent disability. SAIF argues alternatively that, even if the Referee's award is justified, in spite of the claimant's prior awards, the present award should be "offset" against claimant's earlier award.

Claimant responds that SAIF may not claim an "offset" for benefits paid on an earlier claim incurred by claimant while in the employ of a different employer; that by virtue of ORS 656.313(1) and (2) claimant is not obligated to repay that compensation which was paid pending Board review of the Referee's earlier order; and that ORS 656.222 is inapplicable to this case because that statute applies only to successive injuries involving the same scheduled member, not unscheduled areas.

We do not agree with claimant that ORS 656.222 is inapplicable to a claim involving injury to an unscheduled area of the body. The Court of Appeals has recently held to the contrary. Cascade Steel Rolling Mills v. Madril, 57 Or App 398 (1982).

To the extent that both parties have argued this case in terms of "overpayments" and claiming an "offset", we disagree with both. This Board has previously held that overpayments on one claim cannot be offset against benefits due on another claim. Gary W. Brill, 34 Van Natta 489, 490 (1982). SAIF cannot offset its "overpayment" in connection with the 1974 claim against benefits due for this separate and distinct 1980 claim. The fact that SAIF happened to insure both employers was a mere fortuity.

It is less clear whether ORS 656.313(2) actually prohibits our taking into consideration claimant's prior award of 50% unscheduled

permanent disability to the extent that it was reduced by 30% on Board review, as claimant contends it does. If this is so, then ORS 656.313 is in direct conflict with the plain meaning of ORS 656.222.

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."

ORS 656.313 provides, in pertinent part:

> "(1) Filing by an employer or the insurer of a request for review or court appeal shall not stay payment of compensation to a claimant.
>
> "(2) If the board or court subsequently orders that compensation to the claimant should not have been allowed or should have been awarded in a lesser amount than awarded, the claimant shall not be obligated to repay any such compensation which was paid pending the review or appeal."

A basic principle of statutory construction is that statutes dealing with the same subject are to be construed together in order to effectuate the purpose of each. Davis v. Wasco Intermediate Ed. Dist., 286 Or 261 (1979); State v. Ebert, 10 Or App 69 (1972).

By enactment of ORS 656.313, the legislature has placed the burden for erroneously ordered compensation paid pending review or appeal on employers and their insurers. Jones v. SAIF, 49 Or App 543, 547 (1980). This does not mean, however, that such payments received pending review or appeal do not constitute a "past receipt of money" which must be taken into consideration pursuant to ORS 656.222. Cf Cascade Steel Rolling Mills v. Madril, supra, 57 Or App at 402. Furthermore, if ORS 656.313 is construed as a limitation upon ORS 656.222, it could result in an inequity to certain claimants. For example, a worker who received an award of compensation by a Referee which was not reviewed by the Board and who sustained a subsequent injury, would have the compensation received pursuant to the terms of the Referee's order considered as the "past receipt of money" in determining the appropriate award to be made on account of the subsequent injury. The same worker whose initial award of compensation was reviewed by the Board and whose award was either eliminated or reduced on review, would be able to argue that because all or a part of the Referee's award was paid pending review, the money received should not be taken into consideration in determining the appropriate award to be made for the

subsequent injury. This could result in unequal treatment of two similarly situated claimants, a result which the legislature could not have intended.

We find that ORS 656.313 has no bearing on our determination of the appropriate permanent disability award to be granted claimant for his 1980 injury. Claimant is entitled to be compensated for the permanent loss of earning capacity he suffers as a result of this compensable injury. ORS 656.214(5). However, in awarding compensation for this subsequent injury to the same area previously injured, we are obligated to consider the combined effect of these injuries and claimant's past receipt of money. ORS 656.222. ORS 656.313(2); Cascade Steel Rolling Mills v. Madril, Id.

Although we are not sure the Referee applied ORS 656.222, on our review of the record, taking into consideration claimant's prior injury and his past receipt of money for the disability attributable thereto, we find that the Referee's award of 25% unscheduled permanent partial disability is appropriate. The Referee specifically considered the residual effect of claimant's 1980 injury, finding that his physical impairment prior to this injury was less serious than his condition subsequent thereto and at the time of the hearing. The Referee awarded claimant compensation for the increased impairment resulting from his more recent injury, finding that because of this injury claimant has been precluded from returning to any of his former jobs involving heavy physical labor. The conclusion of our dissenting member Barnes, that claimant is not entitled to any additional compensation other than that previously awarded, is contrary to the holding in Cascade Steel Rolling Mills v. Madril, supra, 57 Or App at 402, that in cases involving unscheduled permanent partial disability, ORS 656.222 does not require a strict arithmetic offset between compensation paid for one injury and a subsequent injury; and, more particularly, that a worker who suffers successive injuries is entitled to receive compensation when a subsequent injury diminishes the worker's future earning capacity.

ORDER

The Referee's order dated April 19, 1982 is affirmed. Claimant's attorney is awarded $500 as a reasonable attorney's fee for services on review.

Board Member Barnes Dissenting:

The majority's "bottom line" conclusion is that claimant is entitled to an award of 80% permanent partial disability for the combined effects of his 1974 and 1980 industrial injuries under the following circumstances:

(1) Claimant's 1974 injury was a soft-tissue low back strain, without neurologic or orthopedic involvement, that was treated with only conservative chiropractic care and resulted in impairment only in the form of a 60-70 pound lifting limitation. See Roy Fenton, 21 Van Natta 31 (1977).

(2) Claimant's 1980 injury resulted in disc surgery at the L5-S1 level from which claimant recovered with, according to the medical reports, only a low back ache without pain in the sciatic distribution. Claimant's surgeon imposed a 30 pound lifting limitation.

(3) Claimant was 40 years old at the time of the present hearing and had obtained his GED. Much of claimant's work experience has been toward the heavier-labor end of the spectrum, work which a 30 pound lifting limitation would probably now preclude. On the other hand, claimant has successfully completed a vocational rehabilitation program and learned to be a truck driver, which he is physically able to do, and which represents an increase in his pre-injury earning capacity.

With all due respect, I submit that under these circumstances an award of 80% permanent partial disability is completely out-of-line with awards in other cases and is simply indefensible.

I

Before considering the complications that arise in this case because of claimant's 1974 injury, claim and award, I consider the more limited issue of claimant's unscheduled disability as a result of his January 10, 1980 injury that gave rise to these proceedings. That injury led to a laminectomy and discectomy at the L5-S1 level. The Referee states "that medical evidence . . . establishes that claimant has suffered permanent impairment as a result." The Board majority states: "We also find that the objective, as well as the subjective, signs contained in the medical reports bear out a finding of permanent disability consistent with" the Referee's order.

Neither the Referee nor the Board majority cites any medical reports that support these conclusions. As I read the record, the probable explanation for that omission is that no medical evidence exists that supports these conclusions.

The medical reports dated after claimant's 1980 surgery are Exhibits 41, 58, 78, 79 and 80. In Exhibit 41 Dr. Tasi reports that the surgery left only "residual right-sided low back ache without sciatica" and imposed a lifting limitation of 30 pounds. In Exhibit 58 Orthopaedic Consultants conclude: "the patient has already received a 50% unscheduled disability from a previous industrial injury. Based on today's examination we find no evidence objectively of any neurologic or orthopedic impairment that would exceed that award." (I find the conclusion of Orthopaedic Consultants that claimant's back impairment was "moderate" to be unsupported by the Consultants' reported findings.) In Exhibit 78 Dr. Tasi reports finding "paraspinal thoracolumbar muscle spasm on the right side" apparently caused by the exertion of the vocational rehabilitation program in which claimant was then enrolled. In Exhibit 79 Dr. Martens states a diagnosis of "recurrent strain" based on substantially the same findings as are stated in Exhibit 78. A cryptic report from a chiropractor, Dr. Lynch, appears as Exhibit 80; the findings stated therein are so discordant with the findings of all other doctors that I do not find Exhibit 80 probative of anything.

This is a summary of all of the medical evidence submitted since claimant's 1980 surgery. The Referee and majority refer generally to this evidence, without specific citation, to support the conclusion that claimant is entitled to a total award of 30% unscheduled permanent partial disability for his 1980 claim. Still putting aside for a moment the issue of claimant's earlier 1974 injury/claim/award, I submit that this evidence is no support for the conclusion that claimant suffered 30% permanent disability as a result of his 1980 injury.

Remembering that the Referee found claimant was not credible, a finding I agree with, and looking only at the medical evidence, the only possible conclusion is that claimant had a 60-70 pound lifting limitation before his 1980 injury and a 30 pound lifting limitation after his 1980 injury. I agree that this represents some increased physical impairment. I agree that this could be the basis for finding some decreased earning capacity, although even that proposition is debatable because of the social/vocational factors: claimant's relative youth (age 40); average education (GED); and the enhancement of his earning capacity by vocational retraining. But even assuming some decreased earning capacity after the 1980 injury and surgery, there was certainly not a loss equal to 30% permanent partial disability.

II

The majority's conclusion on the extent issue in connection with claimant's 1980 injury is conclusory without supporting explanation. The majority's analysis of the effect to be given to claimant's prior award for his 1974 injury is more fully developed and the fallacies are thus more glaring.

The majority expresses doubt about whether the Referee applied ORS 656.222 in this case. It could not be clearer that the Referee expressly refused to apply ORS 656.222 because of his findings: (1) that the statute is "inapplicable to successive injuries to the same general unscheduled area of the body"; and (2) that "the statutory scheme does not contemplate such an inter-claim offset." The majority's uncertainty about the basis of the Referee's conclusion is self-inflicted with no basis in fact.

The majority then proceeds to say that it is applying ORS 656.222 in this case, that is, doing the opposite of what the Referee did. But the majority arrives at the same result that the Referee did -- a total award of 80% permanent partial disability. I could agree that ORS 656.222 is probably the most difficult single section of the Workers Compensation Law, but it would have to come as a shock to the legislators who enacted that statute to learn that a Referee who refused to apply it and the Board, after applying it, both arrived at exactly the same result. Either the applicability of ORS 656.222 is irrelevant to the outcome of this case or the majority has misapplied it.

I believe the majority has misapplied ORS 656.222. The majority cites ORS 656.214(5) for the proposition: "Claimant is entitled to be compensated for the permanent loss of earning capacity he suffers as a result of [his 1980] injury." If ORS 656.214(5) were the only relevant statute, I would agree with that proposition. However, ORS 656.222 adds that claimant's award for

his 1980 injury "shall be made with regard to the combined effect of his injuries and his past receipt of" compensation for permanent disability. Despite some "mixed messages" in the appellate court cases interpreting these statutes, I submit that it is inescapable that, reading ORS 656.214(5) and 656.222 together, claimant is not entitled to be compensated for the additional loss of wage earning capacity caused by his 1980 injury unless his total loss of wage earning capacity is now greater than that compensated by his prior award. See Cascade Steel Rolling Mills v. Madril, 57 Or App 398 (1982).

Claimant received compensation for 50% permanent partial disability in connection with his prior award. A Determination Order awarded him an additional 5% in connection with his 1980 injury. The question before the Referee and before us is whether claimant's loss of earning capacity is now greater than 55% permanent partial disability. Considering claimant's minimal impairment (primarily, a 30 pound lifting limitation), age (40), education (GED), and other relevant factors, I think the only possible answer is "no."

The majority's contrary, affirmative answer is not supported by the ad hominem comment that I am engaging in a strict arithmetic offset. I submit that the fact that claimant's award for his 1974 injury was reduced by the Board is a complete "red herring" in this case. Stated differently, my analysis and conclusion would be exactly the same even if the Board had not reduced claimant's award for his 1974 injury. The question would still be whether claimant has proven a loss of earning capacity greater than 55% permanent partial disability. The answer would still be "no."

I would reverse the Referee's order and, therefore, respectfully dissent.

FRED GASCON, Claimant
Flaxel, Todd & Nylander, Claimant's Attorneys
R. Ray Heysell, Defense Attorney

Own Motion 82-0269M
December 16, 1982
Own Motion Determination

The Board issued its Own Motion Order in the above-entitled matter on November 9, 1982 reopening claimant's claim for a worsened condition related to his industrial injury of August 30, 1971.

The claim has now been submitted for closure. Claimant is granted temporary total disability from July 28, 1981 through August 24, 1981. No additional permanent partial disability is warranted.

IT IS SO ORDERED.

LAWRENCE RYAN, Claimant
Jack Polance, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
David Horne, Defense Attorney

WCB 80-11051 & 82-00494
December 16, 1982
Order of Abatement

The employer and insurer request reconsideration of our orders dated December 3, 1982 and December 15, 1982 in the above captioned case.

To allow sufficient time for reconsideration, those orders are hereby abated and claimant's attorney is directed to file a response to the motion for reconsideration within 10 days of the date of this order, particularly responding to the insurer's argument that it would be appropriate, at this point, in this case to issue a combined Own Motion Order and Determination.

IT IS SO ORDERED.

CECIL BLACK, Jr., Claimant
Cowling & Heysell, Claimant's Attorneys
Holmes, James et al., Defense Attorneys

WCB 79-03984
December 17, 1982
Order Correcting Transcript

Claimant, having made motion to correct transcript and the Board having heard no opposition to said motion, the transcript is hereby ordered corrected in accordance with claimant's request.

IT IS SO ORDERED.

MILDRED FRANCE, Claimant
Doblie & Francesconi, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-7797
December 20, 1982
Order on Review

Reviewed by the Board en banc.

The SAIF Corporation requests review of Referee Gemmell's order which set aside its denial of claimant's occupational disease (mental stress) claim, assessed a 25% penalty against SAIF on the compensation due claimant from June 2, 1981 to June 17, 1981 and awarded claimant's attorney a fee of $5,500 payable by SAIF for prevailing on a denied claim. SAIF contends the Referee erred in all of her findings.

Pursuant to a request from claimant's counsel, the matter came before the Board for oral arguments on September 1, 1982. Both parties stipulated at the oral argument that the attorney fees and penalty issues should be resolved by a reduction of the 25% penalty assessed by the Referee to an amount ranging from zero to 15%, and that a reduction of claimant's attorney's fee awarded by the Referee under ORS 656.382(1) in the amount of $200 would be appropriate if a penalty was found to be unwarranted.

With regard to the issue concerning the compensability of this claim, we affirm the order of the Referee. In McGarrah v SAIF, 59 Or App 448 (1982), the court held that criticism by a supervisor can be a contributing cause of compensable mental illness, and that the criticism need not amount to harassment, although in this case, we find claimant was the victim of actual harassment. The court

stated in McGarrah that a claimant need only show that supervisory action and criticism relating to performance on the job, to which the claimant is not ordinarily exposed other than during a period of regular employment, was the major source of stress triggering the disability. We agree with the Referee, that this is the situation presented here, and we affirm her finding of compensability.

With regard to the penalty and attorney fee issues, we find that the evidence indicates that there was no unreasonable resistance or delay sufficient to warrant a penalty and/or attorney fee, and we modify the Referee's order accordingly.

ORDER

The Referee's order dated April 27, 1982 is modified to comport with the parties stipulation. Those portions of the Referee's order which awarded claimant a 25% penalty on compensation due from June 2, 1981 to June 17, 1981 are reversed. Claimant's attorney's fee is reduced in the amount of $200, resulting in a fee for services rendered at the hearing in the amount of $5,300. Claimant's attorney is awarded a fee of $500 for services before the Board, payable by SAIF.

The remainder of the Referee's order is affirmed.

REX HARRIS, Claimant
Charles Paulson, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 79-07093
December 20, 1982
Order on Remand

This case is before the Board by Order of Remand from the Supreme Court. Harris v. SAIF, 292 Or 683 (1982). Claimant was originally determined to be permanently and totally disabled as a result of an industrial injury sustained on September 6, 1967. A reevaluation of claimant's disability was eventually requested in 1979 by SAIF. Following a recommendation from the Evaluation Division, the Board issued an order on July 31, 1979, reducing claimant's award to 15% unscheduled disability. Claimant thereafter requested a hearing, which was convened on April 10, 1980. The Referee concluded that the evidence indicated claimant was still permanently and totally disabled. SAIF requested review by the Board, and an order issued on December 19, 1980 reducing the award to 75% unscheduled disability. The Court of Appeals affirmed without opinion. Harris v. SAIF, 52 Or App 233 (1981). Claimant thereafter appealed to the Supreme Court.

A complete factual summary is contained in the Supreme Court's opinion, and will not be repeated here. The Supreme Court determined that under the rule of Bentley v. SAIF, 38 Or App 473 (1979), the employer or insurer bears the burden of establishing a change in a claimant's circumstances sufficient to justify a reduction of an award of permanent total disability. 292 Or at 692. Subsequent to the issuance of the Order on Review in the current case, this Board reached a similar conclusion. See Angel B. Alberez, 33 Van Natta 598 (1981).

In the order which reduced claimant's permanent total disability award to 75%, the Board relied in part on the fact that following his injury, claimant completed community college course work in real estate sales and successfully obtained a real estate sales license in 1972. Claimant thereafter, by borrowing and utilizing his own funds, invested approximately $92,000 in a large tract of land for subdivision and sale. Besides the return on his investment, claimant received a commission on each lot sold, even though sold by other agents. Claimant additionally purchased several rental houses and mobile home lots which he manages and from which he receives income. As a result of his investments, claimant was employed by a real estate sales agency. Claimant's income in 1973 totaled $11,019, $9,242 in 1974, $22,228 in 1976, $22,499 in 1977 and $55,366 in 1978. There is a discrepancy in the 1979 income figures. At one point it is indicated that the income totaled $25,197, and at another point it is indicated that claimant received $18,643 from the subdivision and $44,124 from other real estate. Due to difficulties encountered as a result of local zoning regulations, sales in the subdivision ceased in 1979. Claimant had made only one sale between February, 1979 and the date of the hearing in April, 1980.

The Supreme Court considered the issue of the effect of claimant's earnings on a determination relating to permanent total disability. The court stated that income is not the criterion for determining whether a claimant is permanently and totally disabled, despite the fact that his income may exceed to a large degree the wages he earned at his prior job. "The determination of permanent total disability status does not turn upon whether claimant has money-earning capacity, but rather upon whether claimant is currently employable or able to sell his services on a regular basis in a hypothetically normal labor market." 292 Or at 694-95. The court, however, cautioned that investment or self-generated income is not necessarily irrelevant to a disability determination, and that a worker capable of earning a significant income by mental labor alone may not be permanently and totally disabled despite his physical handicaps: "A claimant's ability to generate income is only relevant insofar as it tends to establish his or her employability at some such occupation." 292 Or at 697.

The issue then for our determination on remand is whether the SAIF Corporation has sustained its burden of proof in establishing that the claimant is no longer permanently and totally disabled, considering claimant's proven income generating ability only as a factor relating to his general employability. In other words, has SAIF proven that claimant's ability to earn money demonstrates his capability for gainful and suitable employment?

A determination of this issue requires careful examination and consideration of the circumstances surrounding claimant's income and associated activities. Following his successful licensing as a real estate agent in 1971, claimant was employed with Curt Briggs Realty. His income from sales in 1971 totaled $3,500. Claimant's 1972 income figures are missing, and as noted above, his income in 1973 was $11,019 and $9,242 in 1974. Although it is somewhat unclear, it appears that those figures represent income which

resulted from his work selling real estate, and do not include income from other sources such as his pension from Standard Oil, or compensation benefits. It would, therefore, appear that claimant did enjoy some initial moderate success as a real estate sales agent, prior to his involvement in the subdivision.

Claimant's first involvement in the subdivision-housing project occurred in 1974. He terminated his association with Curt Briggs and invested in the subdivision. As a result of his investment, claimant was "employed" by a real estate agency. As the Supreme Court noted in its opinion, claimant's activities at that time included determining which contractors could build, and where, showing homes, preparing earnest money agreements, advising on financing and advising his partner in financial dealings. Claimant has exclusive listing rights on homes and lots within the subdivision and receives a fee whenever and by whomever a house is sold. In 1979 claimant received commissions from five houses which he sold himself and was also involved in sales outside of the subdivision in that time period. Although claimant stated that he had sold only one house in the period from February, 1979 to the date of the hearing, April 10, 1980, he testified as follows:

> "Q. Could you explain to us why it appears that you haven't been able to do anything in real estate since February 1979?
>
> "A. It's just a lot of it is being involved in trying to get Arlene's [the subdivision] you know, back on the market. Dealing with the County and, you know, in real estate you've got to be able to follow through, you know, with the people that you're dealing with."

It would, therefore, appear that claimant's failure to sell any houses in the 14-month period prior to the hearing was due, at least in part, to his concentration of efforts to overcome the County imposed building moratorium in the subdivision.

Claimant has a reasonably good record in real estate sales, and has exhibited no small degree of business acumen and a good ability to apply his skills in a useful, profitable and salable manner, despite certain physical problems. Although the record indicates that he has not fully overcome his physical problems, he has been able to compensate and minimize the inconvenience which he otherwise would have encountered. Although the claimant's work schedule has been somewhat inconsistent and varied, that does not seem to have resulted in a particularly negative impact in his chosen area of occupational interest, real estate sales. We think that the record establishes that claimant is capable of engaging in various activities beyond his involvement in real estate sales alone. Many of claimant's abilities appear to be transferable to other forms of employment. We believe that SAIF has established that claimant is no longer incapacitated from regularly performing work at some gainful and suitable occupation. Gettman v. SAIF, 289 Or 609 (1980). We conclude that the 75% unscheduled permanent partial disability awarded in our previous order was correct.

Despite our conclusion that claimant is not permanently and totally disabled, at least on the date that the hearing record closed, we strongly recommend that claimant be provided with appropriate vocational rehabilitation services. Claimant has demonstrated his motivation and ability to work within his physical limitations in an admirable manner. Although we find claimant is capable of selling his services in the labor market, expansion and further development of his demonstrated abilities would serve to give him the maximum advantages to which he is entitled.

ORDER

On remand, having considered our Order on Review dated December 19, 1980, awarding claimant 75% unscheduled permanent partial disability, we adhere to that order, which is hereby reaffirmed and republished.

ANGELA V. CLOW, Claimant
Galton, Popick et al., Claimant's Attorneys
Wolf, Griffith et al., Defense Attorneys

WCB 80-10693
December 21, 1982
Order on Reconsideration

The claimant has requested reconsideration of the Board's Order on Review dated December 3, 1982.

The request is granted. On reconsideration, the Board adheres to its former order.

IT IS SO ORDERED.

LAVERTA O'NEIL, Claimant
Schwabe, Williamson et al., Defense Attorneys

WCB 82-08217
December 21, 1982
Order of Dismissal

The claimant has requested review of Referee's order dated October 25, 1982. The request for review was filed with the Board on November 29, 1982, more than 30 days after the date of the Referee's order. It is not timely filed.

ORDER

The claimant'srequest for review is hereby dismissed as being untimely filed.

ANTHONY W. BATTEN, Claimant
Olson, Hittle et al., Claimant's Attorneys
Brian Pocock, Defense Attorney

WCB 81-05095
December 27, 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.

ORA M. CONLEY, Claimant
Steven Yates, Claimant's Attorney
Schwabe, Williamson et al., Defense Attorneys

WCB 80-11603
December 27, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

Claimant requests review of Referee Johnson's order which upheld the SAIF Corporation's denial of his myocardial infarction claim. Claimant requests the Board to remand this case to the Referee for reopening of the record in order to take testimony with respect to claimant's allegation that evidence presented at the hearing concerning his job and work site was not accurate. Claimant also argues that the Referee erred in finding the claim not compensable on the present record.

We adopt the Referee's findings of fact as our own.

With regard to claimant's request for remand, the record reveals the following. Claimant suffered a myocardial infarction on October 22, 1980 and signed a Form 801 on December 5, 1980. The hearing on SAIF's denial was convened on May 20, 1981. Several days prior to the hearing, a representative from SAIF visited claimant's place of employment, Pope & Talbot, and took a videotape of claimant's work site and an employe performing work there. The videotape was offered by SAIF at the hearing, apparently as impeachment evidence. Claimant's counsel cross-examined the person who made the videotape closely, but did not offer any rebuttal testimony.

Following the conclusion of the testimony, the Referee kept the record open for the receipt of further evidence in the form of depositions from several doctors. On July 14, 1981 claimant's counsel wrote the Referee stating that he had come into possession of "new" information concerning the type of work performed by the claimant. On August 18, 1981 the Referee denied claimant's motion to reconvene the hearing and produce further evidence, and closed the evidentiary record. Claimant thereafter requested the Referee to reconsider, but reconsideration was denied on September 11, 1981.

On review, claimant argues that subsequent to the hearing he received information from parties employed at Pope & Talbot indicating that the videotape of claimant's work site was inaccurate; that the site was modified subsequent to claimant's heart attack but prior to the taking of the videotape; but that these modifications were not apparent upon viewing the videotape. Claimant alleges that these modifications made the job appear easier than it was in reality.

In Robert A. Barnett, 31 Van Natta 172 (1981), we set forth the requirements with which a party must comply before an order of remand will be entered by the Board. Barnett requires that a party seeking remand on the ground of newly-discovered evidence establish by affidavit that the proffered evidence is not only material, but also that such evidence was not obtainable through the exercise of due diligence prior to the hearing. A statement that such evidence was not available is not sufficient. Barnett, 31 Van Natta at 173.

All subsequent requests for remand received by the Board have been determined under the standards articulated in Barnett, including Lance Egge, 31 Van Natta 176 (1981), 32 Van Natta 180 (1980), and Wesley Muffett, 33 Van Natta 615 (1981).

Egge and Muffett are the first cases decided by the Board under the Barnett standards that have reached the Court of Appeals. Egge v. Nu-Steel, 57 Or App 327 (1982); Muffett v. SAIF, 58 Or App 684 (1982). In both cases the Board denied the claimant's requests for remand to the Referee on the ground of newly-discovered evidence. In both cases the court agreed with the claimants, reversed the Board and ordered the cases remanded to the Referee. The current case presents us with an opportunity to reexamine the Barnett standards in light of Egge and Muffett.

In Egge, the claimant's Oregon physician was unable to furnish a diagnosis for claimant's continued complaints of pain. Prior to the hearing claimant moved to Washington. On the day following the issuance of the Referee's order, claimant's Washington physician found a hairline vertebral fracture. The court concluded that the sequence of events furnished a reasonable explanation of why claimant was unable to obtain the evidence prior to closure of the hearing record and, therefore, allowed the motion to remand. In other words, the court concluded that the proffered evidence was unobtainable by the claimant at the time of the hearing.

In Muffett, the claimant was examined by a physician at the request of the insurer. The physician's report was received by the insurer nearly two weeks subsequent to the closure of the hearing record; a copy was not received by claimant's counsel until nearly three months later. The court stated that, although remand to the Referee is a matter of the Board's discretion, the Board abused its discretion by refusing to allow the remand, and that the claimant should have been allowed an opportunity to complete development of his case.

We do not believe that either Egge or Muffett effected a change in the standards articulated in Barnett. In Egge, the court simply disagreed with the Board and concluded that claimant had established that the evidence in question was not obtainable prior to the hearing. Especially when appellate review is de novo, different tribunals can and do reach different results applying the same legal standard. "If we differ . . . it is not that we are more final because we are infallible, but that we are more infallible because we are final." Hannan v Good Samaritan Hospital, 4 Or App 178, 195 (1970).

The Egge court did not consider -- or at least did not comment upon -- one aspect of our Barnett analysis:

> "Under current practice, no hearing is scheduled until the parties file an application to schedule. Thus, the parties more than the Board now control when a hearing is held. In ongoing medical treatment or vocational training situations--situations

> that frequently give rise to motions to remand--the parties should decide when they want disputed issues resolved based on the available evidence and not rely on motions to remand based on subsequently obtained evidence as a fallback possibility." 31 Van Natta at 174.

In other words, when the claimant in Egge transferred his care from an Oregon to a Washington physician, it could reasonably be asked why the claimant elected to proceed with a hearing before the results from the Washington physician were known.

We also conclude that Muffett is not at odds with Barnett. Rather, Muffett could be viewed as a further refinement of the Barnett standards. Muffett simply states that the Board should excercise its discretion in favor of remand in those narrow factual situations similar to Muffett; that is, where a claimant has been examined at the request of the insurer, he is obviously in no position to force the insurer's physician to prepare and mail a report prior to the date of the hearing. That type of evidence is thus generally unobtainable by a claimant.

The court's opinion in Muffett does not reveal whether the examination in question took place before or after the hearing, and the court does not address the possibility of keeping the record open. Assuming that the examination took place prior to the hearing, we would be inclined to require a claimant to establish why he could not simply have requested that the record be left open for the inclusion of the additional evidence. Barnett, supra, 31 Van Natta at 174. Normally, if a claimant were examined by a physician at the request of an insurer, the claimant would probably presume that the subsequent medical report would be adverse to his position, and would not only fail to seek a continuance for its admission, but would attempt to prevent the report from being admitted into evidence. It would seem that basic fairness would dictate that if the report turns out to be favorable to the claimant's position, the claimant should not be allowed to further delay proceedings due to his own initial tactical decision. Assuming those facts to be present, we would be inclined to deny remand in such situations, absent compelling reasons.

Further support for our conclusion that neither Egge nor Muffett changes the standards of Barnett may be found in the court's recent decision in Bailey v. SAIF, 61 Or App ___ (December 22, 1982). The Board denied claimant's motion for remand in that case, stating:

> "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." Catherine Bailey, 34 Van Natta 688 (1982).

For whatever guidance it offers, the court affirmed the Board's order without opinion.

We conclude that claimant's request to remand in this case does not satisfy the Barnett standard. As the employer correctly points out, it should have been quite obvious to claimant that his work activities and work site would be a subject of great concern at the hearing and it should have been anticipated that SAIF and the employer would produce evidence in relation thereto. Claimant can hardly claim surprise since it is he who put the matter in issue in the first instance. Since such evidence was not unexpected, claimant should have been adequately prepared to rebut it. Claimant's counsel, however, did not call a single witness other than the claimant himself, and apparantly did not even feel it necessary to elicit rebuttal testimony from the claimant following testimony from claimant's supervisor which was generally consistent with what was viewed on the videotape. Claimant offers no explanation why, in the exercise of due diligence, the testimony from witnesses, for which he now seeks to have the record reopened, could not have been secured at the hearing.

We agree with the employer that claimant is simply attempting to strengthen his case after the fact. We confronted a similar situation in Ruth M. Case, 33 Van Natta 490 (1981), affirmed, 57 Or App 565 (1982). There, applying Barnett, we concluded:

> "Claimant's attorney has yet to offer any explanation why the testimony of claimant's co-worker could not have been discovered before the hearing and produced at the hearing. All that has been contended is that claimant was unaware, until after the hearing, that her co-worker had overheard her report of injury. However, the reason clients retain and pay attorneys is to investigate the facts and marshal the evidence. * * * In an agency that has received an average of over 1,000 hearing requests per month through the first nine months of this year, the alternative of allowing attorneys to prepare for hearings after they are conducted does a greater harm to a greater number of people who must then be forced to wait longer for their own hearings." 33 Van Natta at 491.

We think that is the precise situation here, and claimant's request for remand is, therefore, denied.

With regard to the issue concerning compensability, we affirm and adopt the order of the Referee.

ORDER

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

JACK D. HIBDON, Claimant
Noreen Saltveit, Claimant's Attorney
Wolf, Griffith et al., Defense Attorneys

WCB 82-06018
December 27, 1982
Order of Dismissal

A request for review, having been duly filed with the Workers Compensation Board in the above-entitled matter by the insurer, 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.

NELSON LOVELY, Claimant
Noreen K. Saltveit, Claimant's Attorney
Wolf, Griffith et al., Defense Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-10501 & 82-01659
December 27, 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.

ROBERT A. LUCAS, Claimant
SAIF Corp Legal, Defense Attorney

Own Motion 82-0244M
December 27, 1982
Amended Own Motion Order

The Board issued an Own Motion Order on December 20, 1982 which, among other things, indicated claimant was entitled to have his medical expenses paid under the provisions of ORS 656.245. We note that at the time of claimant's injury (1956), continuing benefits under ORS 656.245 was not a part of the law. In actuality, our order meant to direct SAIF Corporation to pay claimant's medical expenses because of the proven relationship of his current problems to his 1956 injury. The reference to ORS 656.245 should be deleted. This does not, in any way, change the effect of the order.

IT IS SO ORDERED.

BARBARA MEYER, Claimant
Michael Dye, Claimant's Attorney
Rankin, McMurry et al., Defense Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-06237 & 81-07208
December 27, 1982
Order of Dismissal

A cross-request for review, having been duly filed with the Workers Compensation Board in the above-entitled matter by the SAIF Corporation, and said request for review now having been withdrawn,

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

MARIE E. RIDDLE, Claimant
Gerald R. Kolb, Claimant's Attorney
Wolf, Griffith et al., Defense Attorneys

WCB 81-06054 & 81-08094
December 27, 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.

IVAN C. ROMANOFF, Claimant
Olson, Hittle, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-02619
December 27, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

The SAIF Corporation requests review of Referee Johnson's order which set aside its February 2, 1981 denial of further medical treatment, awarded claimant a 25% penalty on all medical service bills which remained unpaid on the date of denial, awarded claimant's attorney a fee of $750 for overcoming the denial and a $350 attorney's fee pursuant to ORS 656.382. SAIF argues that the disputed medical treatment is unrelated to claimant's compensable injury of August 1, 1978 and that the penalty and associated attorney's fee of $350 were excessive.

We adopt the Referee's findings of fact as our own.

With regard to the question concerning the need for medical treatment, we affirm and adopt the relevant portions of the Referee's order, although we find it odd that no medical reports from Dr. Hung were in evidence.

With regard to the Referee's allowance of a penalty and attorney's fee of $350 for unreasonable delay in payment of compensation, we reverse.

The basis for the Referee's imposition of a penalty and attorney's fee was due to SAIF's alleged failure to pay medical bills submitted to it prior to the issuance of the February 2, 1981 denial. Claimant had been regularly treating with Drs. R. F. Schmidt and J. F. Schmidt, and SAIF had been regularly paying for those services prior to October 30, 1980. At that time SAIF made a partial payment of $40 on a bill for $96, and requested justification from the doctors with regard to the other $56. Dr. J. F. Schmidt responded by report of November 12, 1980. However, SAIF never paid the disputed $56 nor did it submit the matter to the Workers Compensation Department pursuant to OAR 436-69-201.

The hearing transcript reveals a certain degree of confusion as to which medical bills were not paid prior to the denial and the amounts of such bills. A close examination of the record indicates that the disputed $56 was the only medical service bill that was clearly unpaid at the time of the denial. Claimant apparently received further treatments subsequent to October 30, 1980 and

prior to the February 2, 1981 denial. But there is no evidence in the record as to whether SAIF was billed for such treatments, whether SAIF paid the bills or whether SAIF was responsible for payment of the bills.

We believe that it is incumbent upon the claimant to substantiate his claims with regard to unpaid medical bills, since it is he who must sustain the burden of proof. He has failed to do so for anything other than the $56 bill. We, therefore, believe the Referee's allowance of a 25% penalty and $350 attorney's fee to have been excessive. Since the amount of compensation that was not timely paid is trivial, since there is no evidence that claimant has suffered as a result, and since claimant's attorney otherwise has been reasonably compensated by the fee of $750 awarded on the denial, we conclude that the more appropriate penalty would be 15% and the more appropriate attorney's fee under ORS 656.382(1) would be $150.

ORDER

The Referee's order dated April 16, 1982 is affirmed in part and reversed in part. Those portions of the order which granted claimant a penalty of 25% and an attorney's fee of $350 are reversed. In lieu thereof, claimant is awarded a penalty of 15% of the amount of the $56 in medical bills which remained unpaid at the time of the February 2, 1981 denial and an attorney's fee of $150. The remainder of the Referee's order is affirmed. Claimant's attorney is allowed a fee of $250 for services rendered on Board review on the denial issue, payable by SAIF.

YVETTE SEMAAN, Claimant
Rask, Hall et al., Claimant's Attorneys
Wolf, Griffith et al., Defense Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-00641 & 81-03083
December 27, 1982
Order on Review

Reviewed by Board Members Lewis and Ferris.

EBI Companies requests review of Referee James' order which found it responsible for claimant's condition. The sole issue is responsibility, EBI contending that claimant's condition is the responsibility of the employer/insurer on the risk during a subsequent injurious exposure. Neither party at this time contests compensability. We affirm and adopt the Referee's order with the following comments.

EBI contends that the diagnosis for which claimant was ultimately treated, supraspinatus tendinitis, was not made until after the injurious exposure at the second place of employment, and that EBI is responsible only for those conditions diagnosed at the time of the first injury or exposure. Considering the nature of the symptoms claimant experienced following each episode, it is obvious that claimant's physicians at the time of the first incident simply misdiagnosed claimant's condition. The misdiagnosis merely reflects that the process of diagnosing musculoskeletal conditions frequently is difficult at best and often must await the failure of conservative treatment ruling out previous diagnoses.

EBI further contends that under Bracke v. Baza'r, Inc., 293 Or 239 (1982) and Inkley v. Forest Fiber Products Co., 288 Or 337 (1980), responsibility shifts to the second employer/insurer because claimant's work activities there could have contributed to the condition which caused disability and required medical services.

Here, unlike the situation in Inkley, the evidence is to the effect that the work activities and injury at the first employment caused the onset of symptoms of the underlying condition and that the second employment did not contribute independently to the condition but merely caused a resurgence of symptoms. This is precisely the kind of situation that led the court in Bracke to assign responsibility to the first employer, where the work activities initially caused the onset of symptoms. 293 Or at 250. See also, Willis v. Boise Cascade Corp., 58 Or App 636 (1982).

No attorney's fee on review will be awarded claimant's attorney, as no brief was filed.

ORDER

The Referee's order dated April 23, 1982 is affirmed.

STANLEY B. BROWN, Claimant
Welch, Bruun et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-06372
December 30, 1982
Order on Review

Reviewed by the Board en banc.

Claimant requests review of Referee Seymour's order which awarded him 128° for 40% unscheduled permanent partial disability, an increase over the Determination Order dated July 7, 1981 that awarded 48° for 15% permanent partial disability. Claimant argues that he is permanently and totally disabled and that the administrative rules relied upon by the Referee, OAR 436, Division 65, are invalid.

Claimant's compensable March 20, 1981 injury in an automobile accident resulted in a lumbosacral and cervical strain, i.e., a soft tissue injury without orthopedic or neurological involvement. Dr. Duckler and the Kaiser-Permanente Diagnostic Advisory Board found that claimant's compensable injury caused minimal permanent physical impairment, but that claimant's total impairment, also taking into account his preexisting arthritis, was moderate. Considering all of claimant's impairment, the doctors opined that claimant was capable of working at jobs variously described as "light to moderate" or "sedentary."

Claimant's education and experience would enable him to obtain such employment in a hypothetically normal labor market. He graduated from high school, has completed two years of business college and has completed one year of community college. He has worked for several years in hotel clerk, clerical and office-manager type of positions which included supervision, typing, dictation, filing and switchboard work. We agree with the Referee that claimant is not permanently and totally disabled.

Claimant's only argument for a contrary finding consists of a broad attack on the rules stated in OAR 436, Division 65. Claimant argues that all OAR sections mentioned by the Referee "are inconsistent with the statutory and case law," but then does not cite any statutes and cites only Owen v. SAIF, 33 Or App 385 (1978), apparently for the proposition that wholly "subjective determination [of disability] is the only equitable way to administer the compensation system." Claimant does not go on and argue how a wholly subjective determination would produce a different result than that reached by the Referee. For example, claimant paraphrases OAR 436-65-602 as creating a presumption that "every 60-year-old is equal in terms of how his age affects his disability." We agree with claimant's paraphrase of the rule. Claimant then argues: "Given two 60-year-olds with equal work experience, age may be a significant disabling factor in one and not the other. . . ." We also agree with that abstraction and have applied the relevant rules to take into account individual differences. See Charles Hanscom, 34 Van Natta 34 (1982). Claimant does not, however, follow up with any argument about why his own age of 60 should be considered to have a greater-than-normal impact on his own disability.

Claimant's other arguments are equally abstract. Claimant suggests something in the rules forecloses weighing "all the evidence and consider[ing] all relevant factors." But claimant does not state what factors have not been considered in this case or what evidence should now be weighed differently.

Claimant's arguments, as so phrased, have been resolved adversely to his position in Fraijo v. Fred N. Bay News Co., 59 Or App 260 (1982), and OSEA v. Workers Compensation Dept., 51 Or App 55 (1981).

On the question of claimant's permanent partial disability, the Referee's analysis highlighted five factors: claimant's physical impairment, age, education, work experience and labor market findings. We agree with and adopt the Referee's analysis of the factors of age, work experience and labor market.

The Referee's assessment of the impairment factor contains an ambiguity. The Referee referred at one point to assessment of claimant's physical impairment "caused by the compensable injury", which we agree is the correct standard. See ORS 656.214(5). At other points, however, the Referee's order seems to calculate in claimant's preexisting and noncompensable impairment due to his arthritis condition:

> "As stated previously, the medical report found that there was a 'mild permanent impairment . . . superimposed on the preexisting longstanding moderately impairing degenerative condition.' What we have is a mild impairment on top of a moderate impairment. While it is difficult to convert such language into percentage of impairment, it must be done."

While the matter is not free from doubt, it appears that the Referee's use of a 5% impairment figure was too high because it included consideration of preexisting and noncompensable impairment.

The Referee's assessment of the education factor contains an error. The Referee assigned a value of zero to this factor, which is appropriate for claimants who have attained "the median educational level, twelfth grade or its equivalent." OAR 436-65-603(2). As noted above, however, claimant attended business college for two years and community college for one year. It is, therefore, probably more appropriate to assign an impact value in the range of minus 5 to minus 15 to the education factor.

Because of the Referee's impairment and education findings, if his award of permanent partial disability erred in any direction, it was too high. We decline to pursue that possibility because the SAIF Corporation argues that the Referee's award should be affirmed and we conclude that, certainly, there is no basis for now increasing the partial disability award granted by the Referee.

ORDER

The Referee's order dated March 2, 1982 is affirmed.

Board Member Lewis Dissenting:

I respectfully dissent.

I agree with the majority that claimant has not proven that he is permanently and totally disabled. I also agree with the majority that the court has rejected the type of broadside attack claimant makes here on the validity of the administrative rules for disability evaluation. Where I differ with my colleagues is in the assessment of the extent of claimant's permanent partial disability. I believe claimant has lost at least 50% of his wage earning capacity attributable to the compensable injury.

Specifically, I disagree with the majority's assessment of the degree of impairment claimant has sustained as a result of his compensable injury. The record amply demonstrates that claimant's whiplash type injuries were superimposed on pre-existing arthritis of the neck. The closing medical report describes the preexisting cervical condition as "moderately impairing" and states that the injury worsened the condition only "mildly" or "minimally." First, "mild" and "minimal" impairment are words of art in disability evaluation denoting significantly more than the 1% to 5% impairment allowed by the Evaluation Division, the Referee and the majority. Moreover, there is no of evidence that prior to the compensable injury claimant suffered any impairment or disability because of the pre-existing condition. In his testimony, claimant described his activities prior to his industrial injury as involving the ability to walk and hike a great deal, drive constantly (including getting in and out of the car frequently), do yard work, lift objects in excess of 20 pounds and negotiate stairs without difficulty. Now, claimant is unable to do any of these things.

Moreover, it is not clear whether the Referee or the majority included the permanent impairment in claimant's back, as opposed to his neck. Claimant has sustained a loss of range of motion in his back and is now subject to lifting limitations. There is no evidence in the record that claimant has arthritis in his low back or any impairment due to pre-exisitng conditions in the lumbosacral area of the spine.

I simply do not understand how the injury could have resulted in impairment in the 1% to 5% range when claimant had no impairment before the injury and significant permanent impairment after the injury. I believe that an impairment rating of 30% is readily warranted by the record.

Parenthetically, I would note that there is no justification for the majority's allegation that the Referee erred in including impairment attributable to pre-existing, noncompensable conditions. I fail to see how the Referee could have been more explicit that he was rating only that portion of claimant's overall impairment attributable to the injury. The difference between the degree of impairment arrived at by the Referee and the majority, not to mention myself or the Evaluation Division, merely reflects that reasonable people may reach different conclusions on extent ratings where injuries are superimposed on pre-existing conditions.

I also disagree with the majority's assignment of a negative value with respect to the education factor. The two years of business college claimant had must have been taken some 30 years ago and not used for at least the last 20 years. I agree with the Referee that whatever skills claimant may have acquired in business college have long since atrophied. Also, contrary to the majority's finding that claimant finished one year of community college, claimant testified that he had to quit college to support his family. Also, one of the courses involved the study of French cooking. Under these circumstances, I believe that the education factor should yield a neutral value.

With respect to the labor market findings, it appears that the Referee thought that the Evaluation Division assigned a -25 value because the Division thought that claimant was capable of returning to the employment in which he was engaged at the time of his injury. Using the charts in OAR 436-65-608, the same -25 value is arrived at if one makes the following assumptions for which there is evidence in the record: That claimant has a general education development (GED) value of 4 based on his educational level and work experience, that he has a specific vocational preparation (SVP) level of 8 based upon the SVP value for a union agent position, and that he has a residual functional capacity (RFC) for light work. However, if we assume that claimant's RFC is "sedentary" instead of "light," the impact changes significantly, from -25 to +2. Based on the orthopedic restrictions placed on claimant by the closing medical report, I think that claimant's RFC is somewhere less than light but greater than sedentary. Also, given claimant's age (now 61 or 62) and his history of employment at jobs requiring two years to achieve proficiency, I believe there are comparatively few jobs available to claimant. Taking into account all these factors, I think the labor market findings factor should be considered at best a neutral factor.

Combining all these factors and considering awards of disability in similar cases, I would determine claimant's extent of permanent disability to be at 50%. -1708-

PAULINE CUTTER, Claimant
Brown, Burt et al., Claimant's Attorneys
Schwabe, Williamson et al., Defense Attorneys

WCB 81-05803
December 30, 1982
Order on Review

Reviewed by the Board en banc.

The employer requests review of Referee Baker's order which set aside its denial. The only issue is compensability.

At the time of her injury, claimant was 39 years old and worked as a display manager for Montgomery Ward. On or about May 26, 1981, claimant arrived at work at her usual time and worked throughout the morning without incident. At approximately 11:30 a.m., claimant decided to take her lunch break. Claimant testified that she had no designated time for her lunch period and that she could take a one-hour or one-half-hour lunch break. Although the employer maintained both an employe lounge area which was available for employes as a lunch room and a cafeteria, employes were not required to eat their lunch on the premises and were generally free to use their lunch period in any manner they desired. Claimant utilized her lunch period that day to drive to her bank. Following her return, claimant parked her car in the parking lot and began walking across the lot, intending to return to work in the store. Before she reached the store, claimant stepped into a pothole in the lot, fell and twisted her ankle. A claim was subsequently filed, which was denied by the employer on the grounds that the injury did not arise in the scope or course of claimant's employment.

The claimant worked for Montgomery Ward at its Lancaster Mall store, located in Salem. All the various commercial and professional concerns occupying the Mall share a common parking lot. Montgomery Ward and all other Mall tenants had lease agreements with the owners of the Mall which provided for a "common area fee." This money is used to pay the cost of maintenance of the general Mall parking, Mall security, etc. The employer required its employes to utilize the parking spaces on the outer fringe of the lot in order to allow the store customers closer parking and had claimant sign an agreement to do so.

On the day of the injury, claimant parked her car in the outer lot area behind the employer's automotive store, which is separate from but adjacent to the main building. This was a designated employe parking area, and employes generally used it, although customers on occasion also parked there. Testimony from the employer's representative at the hearing revealed that this was an area of the parking lot designated by the owners of the Mall as being for the use of Montgomery Ward employes. Although the employer did not directly exercise any form of control, nor have any direct responsibility for maintenance of the parking lot, it was clear from the testimony that it did have a right to require that any problems that it was aware of in the lot be corrected by the maintenance office of the Mall.

The Referee, finding no Oregon case directly on point, relied on 1 Larson, Workmen's Compensation Law, 4-70, § 15.41 (1978), which states that the "premises rule" is applicable to a shopping

center parking lot. The Referee additionally stated that, "the general rule is that an employee going to and from work, before or after working hours or at lunch time is covered for an accident occurring on the employer's premises," and found the claim to be compensable.

In Adamson v. The Dalles Cherry Growers Inc., 54 Or App 52 (1981), the court held that a claimant who was injured while crossing a public street did not sustain an injury in the course of her employment. Claimant arrived for work, parked on a public street and was injured while crossing the street. The injury did not occur on the employer's premises and there was no special risk involved in crossing the street. 54 Or App at 59.

In Gail L. Duckett, 32 Van Natta 284 (1981), aff'd. without opinion, 57 Or App 840 (1982), we ruled that a claimant who fell in a parking lot owned by a business adjacent to the employer was not entitled to compensation since the lot was not on the employer's premises and the employer exercised no control over the lot.

In Rohrs v. SAIF, 27 Or App 505 (1976), the court ruled that an injury sustained by a claimant who slipped and fell on her way to her car at the end of her work shift was not compensable. The court, although apparently adopting Larson's "parking lot rule" found that claimant was not injured on the employer's premises, as the parking garage was not part of the employer's premises.

Although the above cited cases all resulted in findings that claims were not compensable, we think the analysis in all of these cases compels the conclusion that Oregon has adopted what Larson calls the "premises rule." This rule states that "for an employee having fixed hours and place of work, going to and from work is covered on the employer's premises." 1 Larson, supra, 4-3 § 15.11. With regard to parking lots, Larson states:

> "As to parking lots owned by the employer, or maintained by the employer for his employees, the great majority of jurisdictions consider them part of the 'premises,' whether within the main company premises or separated from it. * * * Thus if the owner of the building in which the employee works provides a parking lot for the convenience of all his tenants, or if a shopping center parking lot is used by employees of businesses located in the center, the rule is applicable. * * * " Larson, supra, 4-62 to 4-70, § 15.41.

The employer contends that claimant's injury did not occur on its premises, citing Adamson, supra, and argues that use of the Mall parking lot did not expose claimant to risks greater than other members of the general public. Adamson is easily distinguishable on its facts, as the injury in that case occurred on a public street. The employer also confuses the "special risk" exception to the going and coming rule with the premises rule.

Special risk cases generally involve situations where an employe is exposed to a risk of injury greater than the general public, and that risk is generally found in an area incident to, but not actually on the employer's premises. The premises rule does not require that the risk of injury be greater than that to which the general public is exposed.

We agree with the Referee that claimant's injury in this case took place on the employer's premises. The employer contends that, as only one of many tenants in the Mall, the general Mall parking lot cannot be considered its premises. We are unpersuaded. Each Mall tenant pays into a general fund which provides for the security and maintenance of the entire Mall parking lot. The facts indicate that the employer had a certain amount of responsibility with regard to the lot and, even if he did not have actual control, it had at least to a limited extent the right to control in that it could require the Mall owners to correct problems in the parking lot. The employer allowed its employes to park in the lot as an incident of their employment. We believe that in situations such as this, where each tenant in a shopping center shares the benefits and expenses of a general common parking lot, that the entire parking lot is the functional equivalent of the employer's parking lot. See also Susan Parries, 32 Van Natta 19 (1981).

The employer also argues that even if the Board finds the injury to have taken place on its premises, that it is nevertheless not compensable since claimant was returning from a personal errand, citing Allen v. SAIF, 29 Or App 631 (1971). The facts of Allen are distinguishable. The claimant in Allen had left the employer's premises during his lunch break in order to perform a personal errand and was injured while driving his car. Had the claimant in the current case been injured while attending to her personal errand, following her departure from the employer's premises, we would agree that, based on Allen, the claim would not be compensable. Claimant in this case, however, had completed her personal errand and returned to her employer's premises when the injury occurred.

ORDER

The Referee's order dated February 26, 1981 is affirmed. Claimant's attorney is awarded $600, payable by the employer, for services performed on Board review.

Chairman Ferris, dissenting:

I respectfully dissent from the holding of the majority. I would reverse the Referee's order based on my opinion that claimant's injury did not arise out of and in the course of her employment as a display manager for Montgomery Ward. I disagree with the conclusion reached by the majority that claimant sustained an injury on the employer's premises, and I believe that my colleagues have created an unwarranted extension of employers' "premises" for purposes of workers compensation coverage.

An accidental injury is compensable if it arises out of and in the course of a worker's employment. ORS 656.005(8).

Traditionally, in Oregon and other jurisdictions, the two elements "arising out of" and arising "in the course of" employment have been regarded and analyzed as two distinct tests, each of which must be met in order to establish compensability. The first element -- arising out of -- points to the origin or cause of an accident. The second element -- in the course of -- refers to the time, place and circumstances in which an accident occurs. Rogers v. SAIF, 289 Or 633, 639-640 (1980).

In Rogers the Supreme Court applied a unitary "work-connection" approach in determining whether the worker's injury arose out of and in the course of his employment. In so doing, the court recognized that the two parts of the test of compensability are ultimately a single test, and that the "in the course of" element is "merely one aspect" of the "arising out of" element. Rogers, supra, 289 Or at 640.

The fundamental inquiry is whether an injury is work-related, and separate analysis of the two statutory elements, although helpful in making that determination in some cases, should not be approached mechanically. Rogers v. SAIF, Id. Although it is still proper to utilize well-established rules such as the premises rule in determining the nature and extent of the connection between an injury and employment, see, e.g., Adamson v. The Dalles Cherry Growers, Inc., 54 Or App 52, 56 (1981), strict adherence to such rules may be inconsistent with the rationale expressed in Rogers. I believe it is at least beneficial, if not essential, to examine the underlying purpose of such rules in order to determine whether application of a particular rule to the facts of a given case serves the basic purpose of the Workers Compensation Act.

In arriving at the conclusion that claimant's injury is compensable, the majority relies upon the "parking lot" rule discussed by Professor Larson, as set forth in the majority's opinion, and by the court (with apparent approval) in Rohrs v. SAIF, 27 Or App 505, 508-509 (1976).

The parking lot rule is part of a broader rule commonly known as the premises rule. Professor Larson's black-letter statement of the rule, as generally recognized in most jurisdictions is:

> "As to employees having fixed hours and place of work, injuries occurring on the premises while they are going to and from work before or after working hours or at lunch time are compensable, but if the injury occurs off the premises, it is not compensable, subject to several exceptions. Underlying some of these exceptions is the principle that course of employment should extend to any injury which occurred at a point where the employee was within range of dangers associated with the employment." 1 Larson, supra, 4-3, § 15.00.

This "going and coming" rule is recognized in Oregon, the general rule being that in the absence of special circumstances,

an employe injured while going to or coming from work is excluded from the benefits of the Act because such injury does not arise out of and in the course of employment. Teddy G. Tilley, 34 Van Natta 1304 (1982); Adamson v. The Dalles Cherry Growers, Inc., supra, 54 Or App at 56; White v. SIAC, 236 Or 444, 447 (1964); Kringen v. SAIF, 28 Or App 19, 21 (1977); Rohrs v. SAIF, supra, 27 Or App at 507. An example of the "special circumstances" which have given rise to the exceptions extending coverage to off-premises injuries is one in which the injury occurs on the only or most common route which employes must travel to reach the employer's premises. The special hazards of that route become the hazards of the employment. Montgomery v. SIAC, 224 Or 380 (1960); Willis v. SAIF, 3 Or App 565, 572 (1970).

In Montgomery, a worker sustained an injury arising out of and in the course of his employment when he was struck by a car while crossing a heavily trafficked public street located in front of the employer's plant; this street was the only approach to and from the plant; the employer had a key to operate a traffic light situated in front of the plant; the employer had been instrumental in having the city install the traffic signal in front of its gate; and the employer exercised control over the traffic and pedestrians using or crossing the street. The street was found to be a special risk of the claimant's employment. Given the elements of proximity to the employer's place of business and control by the employer, the employer's premises are, in effect, extended to include an adjacent public thoroughfare crossing, if it can be said that the employment exposes the worker to hazards of the road to a degree greater than the general public. Montgomery v. SIAC, supra, 224 Or at 389.

Willis v. SAIF, supra, involved a slip and fall in the park blocks area in Portland, a public area which the court found had become a "major adjunct" of the employer's premises by virtue of its frequent use by those having business with the employer (Portland State University), as a result of which the employer "had actually assumed substantial responsibility for upkeep and daily cleanup [of the area]." 3 Or App at 567.

The parking lot rule is similar to the rule of Montgomery v. SIAC, supra, and Willis v. SAIF, supra, in that certain parking lots are treated as part (i.e. "extensions") of the employer's premises. The parking lot rule is not so much an exception to the premises rule (like the "special risk" cases); it is more a way of defining exactly what constitute the boundaries of a particular employer's premises. Larson notes that the premises rule itself is "a compromise on the subject of going to and from work"; i.e., that although a worker's employment is admittedly the cause of the journey between home (or the locus of a luncheon engagement) and the workplace, it is equally as true that workers compensation is not intended to protect the worker against all perils of the journey. 1 Larson, supra, 4-3 § 15.11.

In my opinion, Larson's explanation of the premises rule exceptions also explains the conclusion of compensability reached by some courts in certain parking lot cases:

" * * * [In] this instance, as in many

> others, the concept of 'course of employment' follows that of 'arising out of employment'; that is, the employment-connected risk is first recognized, and then a course-of-employment theory must be devised to permit compensation for that obviously occupational risk.
>
> " * * * Claimant has been subjected to a particular risk because of his employment, the risk of crossing certain railway tracks near the plant entrance, for example. Since it is so obvious that a causal relation exists between the work and the hazard, the always-ill-fitting course of employment concept has got to be stretched at least far enough to prevent the injustice of denying compensation for an injury admittedly caused by the employment.
>
> " * * * We have, then, a workable explanation of the exception to the premises rule: it is not proximity, or reasonable distance, or even the identifying of surrounding areas with the premises: it is simply that when a court has satisfied itself that there is a distinct 'arising out of' or causal connection between the conditions under which claimant must approach and leave the premises and the occurrence of the injury, it may hold that the course of employment extends as far as those conditions extend." 1 Larson, supra, 4-42 to 4-43 § 15.15.

The premises rule relates to the "course of employment" element of the definition of compensability: Time, place and circumstances of an accident. Given the Supreme Court's adoption of Larson's unitary work-connection analysis, I can find no basis for a conclusion that an injury is compensable simply because it occurs on the employer's premises, without some inquiry as to whether the accident has arisen out of the employment. Cf. Clark v. U.S. Plywood, 288 Or 255, 267 (1980). This seems especially true in view of the Supreme Court's statement that "'in the course of' is merely one aspect of 'arising out of.'" Rogers v. SAIF, supra, 289 Or at 640.

An early parking lot case exemplifies my position. In Kowcun v. Bybee, 182 Or 271 (1947), the Supreme Court found that claimant sustained an injury arising out of and in the course of her employment when she was struck by a co-employee's automobile in the employer's parking lot as she was walking toward her car at the end of her work shift. The court concluded that this injury occurred on the employer's premises, 182 Or at 280, and their reasoning is set forth more fully below. I presently wish to point out that, as early as the date of this decision, the court

was applying the rule articulated in Rogers v. SAIF, supra. The fact that the injury occurred on the employer's premises was only one factor in the court's conclusion that the claimant's injury arose out of and in the course of her employment. The court examined all of the circumstances involved in Ms. Kowcun's injury, and did not stop in this analysis, as the majority has done in this case, once it was determined that the claimant's injury befell her upon the employer's premises. Kowcun v. Bybee, supra, 182 Or at 280.

More recently the Supreme Court has reasoned that "[an] injury not incurred in the course of employment does not arise out of it, as those terms have been contrued over the years. [See e.g., Hackney v. Tillamook Growers, 39 Or App 655 (1979).] If the injury is in the course of employment, the case is ultimately decided on the basis of the 'arising out of' prong, i.e., causation." Rogers v. SAIF, supra, 289 Or at 640. See also Blair v. SIAC, 133 Or 450 (1930); Allen v. SAIF, 29 Or App 631, 635 (1977); Robinson v. Felts, 23 Or App 126, 133 (1975).

Thus, I find it insufficient and unsatisfactory to rely upon a single factor to determine whether this injury arose out of and in the course of this worker's employment. As a general rule, it is necessary to consider the nature of the risk which results in or contributes to an injury, particularly when, as in this case, compensability is a close question. "There must be a causal connection between the employment and the injury which had its origin in a risk connected with the employment, and flowed from that source as a rational and natural consequence." Robinson v. Felts, supra, 23 Or App at 133 (emphasis in original). The mere fact that the employment brings the worker to the place of injury is not sufficient to establish a connection between the injury and employment. Blair v. SIAC, supra, 133 Or at 455. But see Phil A. Livesley Co. v. Russ, 60 Or App 292 (1982), discussed infra.

Larson discusses three categories of risk: Those associated distinctly with employment; those personal to the claimant; and neutral risks -- those having no particular employment or personal character. 1A Larson, supra 3-11, §§ 7.00 et seq. (1978). He also discusses five lines of interpretation of the "arising out of" component: Peculiar-risk; increased-risk; actual risk; positional risk; and proximate cause. 1A Larson, supra 3-3 to 3-10, §§ 6.20 et seq.

The proximate cause test has never been the law in Oregon. See Larsen v. SIAC, 135 Or 137, 140 (1931) and Stuhr v. SIAC, 186 Or 629, 636 (1949). Nor do I believe Oregon law has ever required that the source of harm to the worker be peculiar to the nature of the employment. But see Blair v. SIAC, supra, 133 Or at 455. The increased-risk doctrine has played a part in the development of this state's workers compensation law, as in the cases discussed above dealing with special risks to which the worker is exposed while going to or coming from work.

Hubble v. SAIF, 56 Or App 154 (1982), suggests to me that the actual risk doctrine has been the rule in Oregon: "Walking was part of claimant's job; hence the risk of injury from walking was a risk of that job." 56 Or App at 157. See also Halfman v. SAIF, 49 Or App 23, 30 (1980). I find support for this conclusion in

the decisions as early as Blair v. SIAC, supra, 133 Or at 455, and Stuhr v. SIAC, supra, 186 Or at 636. But see Phil A. Livesley Co. v. Russ, supra., Otto v. Moak Chevrolet, 36 Or App 149 (1978), Johnson, specially concurring at 156.

This Board recently adopted the positional risk (but-for) doctrine, but did so in the context of an "unexplained fall" case -- a fall for which no explanation could be found, idiopathic causation having been ruled out. Peter J. Russ, 33 Van Natta 509 (1981), affirmed Phil A. Livesley Co. v. Russ, 60 Or App 292 (1982). The claimant was on the employer's premises during regular working hours and engaged in work activity.

The court in Russ states: "A growing majority of jurisdictions place on the employer the burden of neutral risks in the course of employment that result in harm. When the accident would not have occurred and the injury would not have been received but for the employment and when the risk is not a personal one, there is a sufficient work connection to establish compensability." 60 Or App at 295. The court's holding is that claimant established a sufficient work connection between his injury and his employment by showing that "the injury occurred in the course of employment, that the employment caused the employe to be at the place where he was injured at the time when he was injured, and that there is no evidence of personal contribution to the injury." 60 Or App at 296.

If the court meant to adopt the positional risk doctrine in Russ, I do not believe that either the Court of Appeals or the Supreme Court would adopt the positional risk doctrine in a case such as this, where there is an issue as to whether the injury did occur in the course of employment and whether the employment caused the employe to be at the place where the employe was injured at the time of injury. If claimant's fall in the parking lot was not a fall on the employer's premises, then the claimant was not acting in the course of her employment, as to the time, place and circumstances of the accident. If claimant was on a personal mission, albeit on the way to resuming her employment activities, then claimant's employment did not cause her to be at the place where she was at the time she was injured, and she has failed to satisfy the course of employment test as to the activity in which she was engaged at the time of her injury.

Although the cause of claimant's injury -- a pothole in the parking lot -- is a neutral risk, because it is the known cause of claimant's injury I do not believe that the court would extend its apparent adoption of the positional risk doctrine to the circumstances of this case, and I do not believe that the Board should do so.

According to Larson, under the "actual risk" interpretation of "arising out of", a substantial number of courts are saying in effect: "We do not care whether this risk was also common to the public, if in fact it was a risk of this employment." 1 Larson, supra, 3-4 § 6.40. As to the connection between a risk and the employment, the inquiry under Oregon law has been whether the injury-producing activity was an ordinary risk of and incidental to employment. Brazeale v. SIAC, 190 Or 565, 577 (1951). See also Stuhr v. SIAC, supra, 186 Or at 636; Jordan V. Western Electric, 14 Or App 441, 444 (1970); Halfman v. SAIF, supra, 49 Or App at 29.

Claimant fell in a parking lot which she often traversed in performance of her regular work duties. The lot is located in between two of the employer's buildings -- the main store in which claimant worked most of the time and an auto store located to the north and east of the main store. The area in which claimant usually parked, and in which she parked on the day of her injury, is located closer to the auto store. Claimant testified that she would often walk across the area close to where she parked and where she fell, while carrying signs, shelves and such other display items from one building to another. She could have tripped and fallen in the same general area while engaged in her regular work activity. If that had occurred, no one would seriously question whether the resulting injury was compensable. No one would even stop to consider whether the parking lot was part of the employer's premises. The injury would clearly be compensable because of the activity in which claimant was engaged at the time of her injury. Under these circumstances, tripping over a pothole in the parking lot would certainly be considered a risk of this employment situation, and the claim would be compensable even though the risk was one common to the public. Under these circumstances no one would seriously doubt that the injury-producing activity was an ordinary risk of and incidental to the employment. Why, then, should the entire inquiry under the actual circumstances of this case begin and end with the question of whether this worker's injury occurred on her employer's premises, with no regard for the activity at the time of her injury. Apparently, because Larson says it is so in his statement and discussion of the premises rule.

This Board has previously stated that it would not allow itself to be escorted through the law according to Larson in parking lot cases, without critical analysis. Gail L. Duckett, 32 Van Natta 284, 285 (1981). Duckett was affirmed by the Court of Appeals in a Per Curiam opinion citing Adamson v. The Dalles Cherry Growers, Inc., supra, 54 Or App 52 (1981). Duckett v. SAIF, 57 Or App 840 (1982). Admittedly, the facts of Duckett do not present the same close question as do the facts of this case, and the Board's analysis focused on the premises issue, quite likely because the claimant was on a direct route from her car to her employer's restaurant to begin her day's work, as opposed to returning from a personal errand in the middle of the work day.

The facts of this case are that claimant was on a return trip from a personal errand. Claimant testified that she went to the bank at 11:30 a.m. to cover a check and was returning to work immediately after conducting her business at the bank when she fell in the parking lot at approximately 11:50 a.m. Claimant also testified that she did not eat lunch that day. The purpose of this trip -- the departure from and return to employment -- is less like the coffee break/lunch time situation of Jordan v. Western Electric, 1 Or App 441 (1970), and more like the circumstances involved in Allen v. SAIF, 29 Or App 631 (1977), where the decedent, a security patrolman for Mt. Hood Community College, took an early lunch hour to tend to a personal matter at his credit union. 29 Or App at 633. It may be argued that because claimant was free to do as she pleased on her lunch break, the purpose of the departure (i.e., running a personal errand as opposed to eating) should have no significance; however, "[the]

employer's acquiescence in the employe's use of lunch hour for a personal activity is only meaningful where there is a physical or purposive connection of the activity to the employment." Allen v. SAIF, supra, 29 Or App at 635. See also Clark v. U.S. Plywood, supra., 288 Or at 261-262. Furthermore, running to the bank in twenty minutes is of no benefit to the employer, whereas taking a coffee break or a lunch break is considered an indirect benefit to the employer because it refreshes the worker and better enables him or her to serve the employer's interests. Compare Allen v. SAIF, supra, 29 Or App at 635, with Jordan v. Western Electric, supra, 1 Or App at 447.

In my opinion, tripping in a parking lot on returning from a personal errand is neither incidental to nor an ordinary risk of claimant's employment.

In considering the premises issue, I am convinced that the parking lot in this case is not part of the employer's premises. Assuming the element of control is determinative, the evidence of the employer's control over the parking lot is insufficient to bring this parking lot within the perimeters of the employer's premises.

The indicia of control which lead the majority to conclude that the parking lot is part of the premises amount to little more than the fact that the employer had the right, "at least to a limited extent," to exercise control over the conditions existing in the parking lot by requesting that the owner of the parking lot, i.e., the lessor of the mall and its premises, remedy adverse conditions such as that which resulted in this injury to claimant. The other factors lending support to the majority's conclusion are the common area fee paid by the employer and other store owners in the mall, which is used for general mall maintenance and security, including the parking areas; and the employer's direction -- including a written agreement signed by claimant -- that its employes park on the fringe of the lot.

This evidence does not establish that the parking lot is part of this employer's premises. There was no evidence of any direct responsibility on the part of the employer for the conditions existing in the parking lot. Furthermore, there was no evidence that the employer ever actually exercised its limited right of control over these premises. Any control the employer actually might have is too indirect, not even amounting to a vicarious authority over the area in question, to bring this lot within the boundaries of that which realistically and practically can be regarded as the premises of this employer.

This becomes even more apparent by comparison with those cases in which the employer's premises have been extended to embrace an area, including a parking lot, not commonly thought of as part of the "premises". In Kowcun v. Bybee, 182 Or 271 (1947), the parking lot was situated on part of the employer's 375-acre tract. The lot was for the use of employees only, was not open to the public, and was in part a means of ingress and egress for all employees who came to the employer's plant by foot, automobile or public conveyance. Guards employed by the employer directed traffic in the parking lot.

Willis v. SAIF, 3 Or App 565 (1970), although not a case involving a parking lot, is nevertheless pertinent because, as I have already mentioned, there are similar considerations underlying the court's decision in that case and the parking lot cases -- in particular, the element of control. The court found claimant's injury compensable for the reasons that the claimant was traveling on a direct route between the employer's parking lot (apparently regarded as part of the "premises" in this case) and his place of work (also "premises"), see 1 Larson, supra, 4-34 et seq., § 15.14, for a discussion of this exception to the premises rule, "across a public area over which his employer exercised partial control" and which somehow exposed him to a hazard greater than that to which the general public was exposed. 3 Or App at 572. My reading of Willis indicates that the evidence of the employer's assumption of "substantial responsibility" for the daily upkeep and cleanup of the public area was a major factor in the finding that the claimant's injury was incurred in the course of his employment.

In Adamson v. The Dalles Cherry Growers, Inc., 54 Or App 52 (1981), the claimant fell on a public street frequently used by employes, situated between two parts of the employer's premises. On the morning of her injury, claimant had been unable to park in the employe parking lot, which was adjacent to one of the employer's plant buildings, due to adverse weather conditions and the fact that her usual parking spot was occupied by another vehicle. Claimant parked on the street just mentioned. The court found that this street was the only avenue of approach to claimant's place of work. She was walking in the street because the sidewalk was covered with snow and ice, and she slipped and fell on the icy street surface. The fall occurred in an area generally used by employes going between buildings on opposite sides of the street. The court noted that, although the employer's buildings surrounded the public street on either side, the employer had no responsibility for maintenance of the street. The court found that there was no evidence that the street had become part of the employer's facility, and no evidence that the employer regularly exercised control over street traffic, the use of the street or its maintenance. Compare Montgomery v. SIAC, 224 Or 380 (1960) with Kringen v. SAIF, 28 Or App 19 (1977). These findings were made despite evidence that, after the claimant slipped on the ice in the street, someone in the employ of the employer spread salt over the slippery area. 54 Or App at 59.

These cases indicate to me that in Oregon a certain quantum of control must be present in order to find that the employer's premises include an extended area not owned, maintained or used exclusively by the employer and its employes. Although Professor Larson may be of the opinion that the fact that a parking lot is open to the public as well as employes is "an obviously immaterial difference", 1 Larson, supra, 4-64, § 15.41 (n. 7), I am not persuaded that the law of this jurisdiction is such that the factor is of absolutely no significance. I am of the opinion that where the inquiry is whether or not a parking lot should be regarded as part of the employer's premises for purposes of workers compensation coverage, the employer's responsibility for

maintenance of and control over the parking lot must exceed the limited right of control evidenced in this record. There must be evidence that the employer regularly exercises control over the area in question and that the employer is directly responsible for maintenance of the premises, particularly where the lot is a common area shared not only with other employers but with members of the public as well. I believe that this proposition is consistent with and in furtherance of the basic purpose of the Workers Compensation Act, and that it is a rational and practical approach to the premises issue in parking lot cases of this nature, one which facilitates consideration of "every pertinent factor. . . as a part of the whole" without categorical application of particular rules or concepts, which may lend the appearance of fixed formulae for decision but are really no more than instruments of "conceptualization and indexing". Cf. Rogers v. SAIF, supra, 289 Or at 643.

I realize that my reasoning on this issue may run slightly afoul of the court's apparent approval of the parking lot rule, as expressed by Professor Larson, in Rohrs v. SAIF, 27 Or App 505, 508-509 (1976). I am simply not convinced, however, that the court's holding in Rohrs goes as far as the majority in this case and Larson in general go in extending employers' premises, particularly in view of the fact that the court in Rohrs cited Larson but then went on to find that the facts of the case did not fit within the parking lot rule or the common area exception to the going and coming rule. 27 Or App at 509, 510.

I have considered cases like Adamson v. The Dalles Cherry Growers, Inc., supra, Willis v. SAIF, supra and Kowcun v. Bybee, supra, as well as others which are factually easily distinguishable from this case, because they involve considerations similar to those in this case and, in one way or another analyze and apply the principles associated with the premises rule as it has developed in this state, including the important relationship between the risks of employment and the definition of the employer's premises.

In conclusion, upon consideration of all of the circumstances, I would find that the activity which resulted in injury to claimant was not an ordinary risk of and incidental to her employment, that claimant was returning from a personal mission when she was injured, and that she was not on her employer's premises at the time of her injury. Based upon these findings, I conclude that claimant's injury is not compensable because it is not sufficiently work-connected. Rogers v. SAIF, supra. I, therefore, respectfully dissent.

DIXIE FITZPATRICK, Claimant
Welch, Bruun et al., Claimant's Attorneys
Cheney & Kelley, Defense Attorneys

WCB 81-06326
December 30, 1982
Order on Review

Reviewed by Board Members Ferris and Lewis.

The claimant requests review of Referee Leahy's order which found: (1) that the employer was not responsible for medical treatment administered by Dr. Setera; and (2) that, therefore, no penalty was due for unreasonable resistance in paying that medical bill.

Claimant contends that Dr. Setera's treatments are related to claimant's industrial injury and claimant is entitled to have them paid. She contends that Dr. Setera's chiropractic treatment was related to compensable conditions of claimant's left arm, right arm, mid spine and cervical spine. Dr. Setera testified to treating claimant's low back, as well, though that portion of the back was not accepted by the insurer. The doctor spent considerable time explaining that in order for the treatment to be effective on claimant's mid and cervical back, he had to work on her low back as well. Dr. Setera testified that claimant's thoracic outlet syndrome surgery caused her trapezius muscle to contract, making her lower back symptomatic due to rotation or tilting in the upper spine to which the trapezius muscle attaches.

Since the hearing in this case, the Board has determined that claimant's thoracic outlet syndrome surgery is not compensable. Dixie Fitzpatrick, 34 Van Natta 974, 976 (1982). Therefore, treatment related to that surgery or its residuals is not compensable.

ORDER

The Referee's order dated March 3,, 1982 is affirmed.

LARRY GALARSA, Claimant
Malagon & Velure, Claimant's Attorneys
Foss, Whitty & Roess, Defense Attorneys

WCB 81-04735
December 30, 1982
Order on Review

Reviewed by Board Members Ferris and Lewis.

The SAIF Corporation requests review of Referee Baker's order which set aside its denial of claimant's aggravation claim. The issue is medical causation: whether claimant's surgery in March, 1981 is related to his September, 1978 industrial injury. Although it is unclear, there appears to be an alternative or additional contention that claimant's work activity subsequent to his industrial injury contributed to the need for surgery.

Claimant was compensably injured on September 21, 1978 when he fell off a ladder, injuring his right wrist. The resulting injury was initially diagnosed by claimant's treating physician, Dr. Bert, as a tear of the triangular fibro cartilage and ulnar collateral ligament. Claimant was off work approximately two weeks in May and June, 1979. Claimant continued to experience swelling and discomfort in his right wrist, for which he was treated with anti-inflammatory medication. He was working during this time. In

September, 1979 Dr. Bert diagnosed rheumatoid arthritis. In a letter report to SAIF, the doctor reported that claimant's industrial accident did not cause his rheumatoid arthritis.

> "I feel that he initially had a tear of his triangular fibro cartilage. The reason that he is still having pain in his wrist is now, however, not directly from the trauma but from the fact that I believe he has rheumatoid arthritis. Rheumatoid arthritis will leave the tissue in the wrist more friable than it would be if it were normal tissue. In this respect this is perhaps why he is still having pain in his wrist following an injury."

In December, 1979 Dr. Bert issued a closing examination report, in which he indicated that since the time of claimant's injury he had experienced continuous pain. The doctor reported his impression:

> "I believe this gentleman has an injury with rheumatoid arthritis superimposed upon that injury but not caused by it. I believe he has a moderate impairment based upon pain and intermittent synovitis and may need some surgical treatment in the future."

A Determination Order issued in January, 1980 awarding claimant compensation for temporary total disability and 7.5° of scheduled permanent disability for a 5% loss of his right forearm.

By February, 1980 Dr. Bert was of the opinion that because of claimant's symptoms in his right wrist and fingers of the right hand, a surgical procedure was indicated. Apparently, in the year between February, 1980 and February or March, 1981, claimant was continuing to experience similar problems in his right upper extremity, and the doctor's chart note of March, 1981 indicates that in addition to recurring problems with claimant's hand, he had a painful rheumatoid nodule in the ulnar aspect of his elbow, which interfered with flexion-extension. In Dr. Bert's opinion, claimant required "a trigger finger release on his long and ring finger, right hand, a tenosynovectomy of the wrist and rheumatoid nodule removal."

On March 12, 1981 Dr. Bert reported that claimant's current problems were not the result of his injury but were the direct result of rheumatoid arthritis, and that it was the rheumatoid arthritis which resulted in the need for surgery. By a March 16, 1981 report, the doctor clarified his earlier report. "While I feel that his main problems are a direct result of rheumatoid arthritis I do feel that his work aggravated this problem but is certainly not the causative factor." On March 17, 1981 surgery was performed.

Dr. Bert's letter report of April 3, 1981 to SAIF reiterated his earlier statement that the rheumatoid arthritis condition necessitated the surgery, but qualified that statement as follows:

> "However, certainly I cannot deny that the work he has done, even though it was intermittent, would aggravate his rheumatoid tendinitis. I cannot honestly separate the two. * * * It would be very difficult to ascribe a percentage aggravation to his work but I would roughly estimate that, of the discomfort he was having and pain, 20 to 30% would be because of aggravation because of the manual labor he was performing."

SAIF's medical consultant, Dr. Norton, apparently reviewed the medical records pertaining to claimant's surgery, concluding that claimant's symptoms subsequent to the injury, as well as the surgical procedures, were typical manifestations of rheumatoid disease. "The surgery that was performed, therefore, is obviously performed for treatment of the rheumatoid arthritic disease." In addition to a general discussion of the nature and possible cause of rheumatoid arthritis, which "is still classified as a disease of unknown cause," Dr. Norton indicated his belief that there is no data supporting the concept that minor trauma significantly alters the clinical course of the disease in general or in any specific joint in particular. Dr. Norton did state, however, that "[a]s indicated by Dr. Bert, the inflamed and diseased tissue may react more quickly and with greater symptomatology than would a normal joint. This, therefore, recognizes the adverse effect of the disease on the level of activity tolerated by the rheumatoid arthritic joint." Dr. Norton's conclusion was that claimant's industrial injury had little or no significance regarding claimant's current condition or need for surgery, and that his work activities in the six to eight months preceding April, 1981 had "no significant influence on the course of his disease or his need for surgical treatment."

On May 6, 1981 SAIF denied claimant's request for claim reopening relative to his right wrist injury of September, 1978.

In setting aside SAIF's denial, the Referee found that claimant had experienced no problems with his right wrist prior to his industrial injury and that from that time on he continued to experience difficulties with his wrist.

> "The work activity need not be the sole cause or even the primary cause for a condition to be compensable. It is unlikely that without the injury, and subsequent work with the symptomatic wrist for the same employer, that the surgery would have been required in 1981."

The Referee found that SAIF was not responsible for removal of the rheumatoid nodule on claimant's right elbow, stating that SAIF need not pay for those medical charges, "to the extent they reasonably may be separated." For the following reasons, we reverse the Referee's order and reinstate SAIF's denial of claimant's aggravation claim.

The question before us involves an issue of medical causation which must be addressed by competent medical evidence. Uris v. Compensation Department, 247 Or 420 (1967); cf. Dimitroff v. SIAC, 209 Or 316, 336 (1957).

After Dr. Bert diagnosed claimant's condition in September, 1979 as rheumatoid arthritis, he opined that, although claimant initially sustained a torn cartilage, the likely reason that he was continuing to experience symptoms was the combination of the rheumatoid arthritis and the injury. His subsequent statement that the rheumatoid arthritis was superimposed upon the injury is confusing in that it is not clear whether claimant had asymptomatic rheumatoid arthritis prior to the September, 1978 injury which became symptomatic with the occurrence of the injury; or whether claimant's injury was the precipitating cause of the rheumatoid arthritis condition. Although a clear answer to this question would not be dispositive of the present aggravation claim, it might assist in determining the range of compensable consequences of claimant's original injury and, thus, whether claimant's current aggravation claim is compensable.

The medical reports generated in support of claimant's aggravation claim, do not discuss the possible connection between claimant's original injury and his surgery. Instead, Dr. Bert discusses the relationship between claimant's work activity and the need for surgery. It is apparently on this basis that the Referee found claimant's aggravation claim compensable.

The medical evidence of claimant's work activity as a contributing cause to claimant's need for surgery in March, 1981 is not sufficient to establish the compensability of claimant's aggravation claim. Claimant's original injury was a torn cartilage and ligament. It is clear that the injury in conjunction with a subsequently diagnosed condition of rheumatoid arthritis prolonged claimant's recovery from his original injury. See Aquillon v. CNA Insurance, 60 Or App 231 (1982). The etiology of claimant's rheumatoid arthritis condition, however, is less clear, and it was the rheumatoid arthritis condition which required claimant's surgery in March, 1981, which forms the basis of claimant's request for claim reopening pursuant to ORS 656.273.

The most that can be said for the medical evidence in support of claimant's aggravation claim is that claimant's work activities contributed to a limited extent to the need for surgery. Dr. Bert's report of April 3, 1981 supports this conclusion; however, it is apparent that claimant's work activities did not constitute the major contributing cause of the need for surgery. SAIF v. Gygi, 55 Or App 570 (1982); see also Douglas S. Chiapuzio, 34 Van Natta 1255 (1982).

Aside from the procedural differences between this case and Aquillon v. CNA Insurance, supra, and in spite of the factual similarities, the significant factual difference is that the medical evidence in support of this claimant's aggravation claim does not establish claimant's original injury, in conjunction with the rheumatoid arthritis, as a material factor contributing to the need for surgery. Instead, the medical evidence refers to claimant's work activity as a contributing cause, which is suggestive of an occupational disease. See ORS 656.802(1)(a). Although inferences can be drawn based upon the apparent fact that claimant continued to experience symptoms in his right wrist and hand up until the time of surgery, the Referee's conclusion, "[i]t is unlikely that without the injury, and subsequent work with the symptomatic wrist for the same employer, that the surgery would have been required in

1981," is based upon speculation and is not supported by the medical evidence in this record. In contrast, the persuasive medical evidence in Aquillon was to the effect that the combination of an industrial trauma and tuberculosis resulted in a diseased synovium. 60 Or App at 235.

We, therefore, hold that claimant has failed to sustain his burden of proving by a preponderance of the evidence that his surgery in March, 1981 is a compensable consequence of either his September, 1978 industrial injury, and/or subsequent work activity. Claimant's aggravation claim was appropriately denied.

ORDER

The Referee's order dated June 10, 1982 is reversed, and SAIF's denial is reinstated and affirmed.

GLENN O. HALL, Claimant
Pozzi, Wilson et al., Claimant's Attorneys
John Snarskis, Defense Attorney

WCB 81-03510
December 30, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

The employer and its insurer request review of Referee Pferdner's order which found the claimant to be permanently and totally disabled. The only issue is the extent of claimant's disability.

The employer/insurer argues that, in finding the claimant to be permanently and totally disabled, the Referee impermissably took into consideration a non-injury related condition of the claimant's which arose subsequent to the compensable industrial injury; specifically, that claimant's cognitive disability was the result not of his head injury, but of his non-related hypothyroidism, first diagnosed by Dr. Danielson on May 5, 1977. The employer/insurer also argues that the Referee erred in finding claimant to be permanently and totally disabled based on the currently depressed Oregon labor market, rather than a hypothetically normal labor market.

We adopt the Referee's findings of fact as our own.

In Emmons v. SAIF, 34 Or App 603, 605 (1978), the court, interpreting ORS 656.206(1)(a), held that "a subsequent non-compensable injury is not relevant in determining the extent of the worker's permanent disability." See also Mitchell A. Rose, 24 Van Natta 173 (1978), aff'd, 36 Or App 511 (1978).

There is no evidence in this record that claimant was suffering any cognitive disabilities prior to his industrial injury of November 29, 1976. Therefore, there can be no contention that this disability could be taken into consideration under ORS 656.206(1)(a) for the purposes of finding permanent total disability. Claimant must thus establish that his cognitive disability was the result of and caused by his compensable industrial injury before it can be considered for the purpose of rating disability.

There is a strong temporal relationship between claimant's mental difficulties and his industrial injury. Claimant struck his head after falling from a ladder. A concussion was diagnosed. He encountered headaches, dizziness and thinking problems subsequent to the injury. However, the court has cautioned that a temporal relationship is generally not sufficient to establish causation. Edwards v. SAIF, 30 Or App 21 (1977). The inference that can be drawn from temporal relationship is about the only evidentiary basis in this record for finding that the 1976 head injury caused all of claimant's current cognitive problems.

Shortly after his industrial injury, claimant began treating with Dr. Danielson, a neurosurgeon. In his May 5, 1977 report, Dr. Danielson stated:

> "Upon observing this gentleman, one has the decided impression, because of eyelid swelling, some coarseness and hoarse deep speech characteristics, thinning of his eyebrows and overall skin characteristics, all make one suspicious of hypothyroidism. The patient is not aware of any thyroid tests being taken of late."

On September 22, 1977 Dr. Danielson reported that claimant's hypothyroidism "is dramatically improved," and he ruled out any operative approach to the problem. On November 3, 1977, Dr. Danielson reported the following:

> "I can clearly state my opinion that his profound hypothyroidism was indeed responsible for any dysfunction from thinking, from his behavioral manifestations, and was certainly an aggravation in his neurological condition which basically stems from his disc problems in the neck. The hypothyroidism was adding to his neuropathy, I am quite certain.
>
> "Additionally, when one is as profoundly hypothyroid as this man was found to be, his judgment would be affected, his memory impaired, his overall personality would certainly be affected by this chemical metabolic physiologic state.
>
> "Additionally, it would be my opinion that his current memory problems are on the basis of the profound degree of hypothyroidism that he had, rather than on an arteriosclerotic degenerative basis. He is still having trouble with dates and things that he should ordinarily remember from day to day. He was reassured in this regard that this may improve. However, if it stays about the same and doesn't worsen, he should be able to live with this problem."

Although Dr. Danielson was fully aware of the circumstances and nature of claimant's industrial injury, he unequivocally concluded that claimant's cognitive difficulties were not the result of the injury, but rather of claimant's unrelated hypothyroidism.

Claimant argues that we should infer from the record that Dr. Danielson treated claimant's hypothyroidism and that this treatment eliminated any cognitive difficulties that claimant suffered as a result thereof, and that we should accept Drs. Wise's and Lezak's opinions that claimant's cognitive difficulties are a result of brain damage suffered in the industrial injury. We agree with claimant in part. We find that Dr. Danielson did treat claimant's hypothyroidism. However, we do not believe that it is logical and reasonable to infer that this treatment eliminated all hypothyroidism-related cognitive difficulties. In fact, Dr. Danielson specifically noted the possibility that claimant's cognitive difficulties would not improve, even with hypothyroidism-related treatment. This is a complex medical question requiring expert evidence. Claimant could have and should have produced this evidence, rather than requesting us to speculate on the matter.

With regard to claimant's reliance on the opinions of Drs. Wise and Lezak (both are psychologists) as support for his proposition, we are not persuaded. Dr. Wise, in his report of July 2, 1981, stated that: "His complaints, regarding his difficulty in learning and his inability to retain information, strongly suggest that he has suffered some organic brain damage." Dr. Lezak noted that claimant had average or even high average intellectual endowment but that he had significant memory deficits, and that: "Mild deterioration of higher mental functions is not uncommon among victims of traumatic brain injury." There is nothing in the reports of either Dr. Wise or Lezak to indicate that they had any knowledge of claimant's hypothyroid condition or were aware that a previous brain scan and electroencephalogram had been completely normal, with no evidence of brain damage. Additionally, we give the opinions of Drs. Wise and Lezak less weight because they are psychologists, not medical doctors, and they are offering opinions somewhat out of their area of expertise. Moreover, it is even questionable whether they are actually attempting to give opinions concerning causation.

We conclude that claimant has not proven that his cognitive problems were caused by his 1976 industrial injury. The remaining question is the extent of disability for the problems that were caused by that injury. We agree with the Referee that: "From an orthopedic and neurological standpoint claimant is physically able to work." Do claimant's physical disability resulting from his injury and the relevant social/vocational factors result in a finding of permanent total disability? We think not. Applying the guidelines for the rating of unscheduled permanent partial disability, OAR 436-65-600 et seq., we find the following. Although claimant has undergone no surgeries, Dr. Danielson has consistently been of the opinion that claimant has suffered a 20% general physical impairment as a result of his injury. Claimant was 51 years old at the time of his injury and was employed as a pellet mill operator. Claimant has successfully completed his GED, and

has been generally successful in several vocational rehabilitation sponsored courses at Portland Community College. He is of at least average intellectual ability and is now restricted to light and sedentary occupations. Considering the record as a whole, including the testimony from vocational experts, we conclude that claimant has suffered a 45% permanent partial disability as a result of his industrial injury.

With regard to the exception taken by the employer/insurer to the fact that the Referee relied on the currently depressed labor market in Oregon in finding the claimant to be permanently and totally disabled, we note that we have previously dealt with this issue in James R. Allison, 34 Van Natta 1178 (1982). We see no point in repeating here what we said in Allison.

ORDER

The Referee's order dated January 20, 1982 and Order on Reconsideration dated February 24, 1982 are reversed.

Claimant is awarded 45% unscheduled permanent partial disability, that being an increase of 30% over and above the Determination Orders of June 8, 1978 and March 30, 1981. Claimant's attorney is allowed an attorney's fee of 25% of that increased permanent disability, not to exceed $2,000. This is in lieu of and not in addition to that allowed by the Referee.

ALBERT W. HUBER, Claimant
Ragen, Roberts et al., Claimant's Attorneys
Schwabe, Williamson et al., Defense Attorneys

WCB 81-07460
December 30, 1982
Order on Review

Reviewed by Board Members Lewis and Ferris.

The employer/insurer requests review of Referee Mulder's order finding that claimant suffers from an occupational disease, ORS 656.802(1)(a), directing it to accept claimant's psychiatric condition as such.

The Referee correctly characterized claimant's condition as an occupational disease, as opposed to a condition resulting from an accidental injury. Clarice Banks, 34 Van Natta 689, 692-696, 697 (1982); James v. SAIF, 290 Or 343, 348 (1981). Claimant has proven by a preponderance of the evidence that his condition is compensable as an occupational disease. SAIF v. Gygi, 55 Or App 570 (1982); McGarrah v. SAIF, 59 Or App 448 (1982).

Our holding that claimant suffers from a compensable occupational disease makes it unnecessary to address the employer/insurer's arguments concerning jurisdiction and timeliness, which are premised on the theory that claimant's condition results from an accidental injury.

ORDER

The Referee's order dated May 14, 1982 is affirmed. Claimant's attorney is awarded $750 as a reasonable attorney's fee on Board review, payable by the employer/insurer.

RIVAL L. HURLBURT, Claimant
W.D. Bates, Jr., Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-04882
December 30, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

Claimant requests and the SAIF Corporation cross-requests review of Referee Foster's order which affirmed in part and reversed in part SAIF's denial of claimant's aggravation claim. Claimant contends that the Referee erred in finding that the medical evidence did not establish a worsening of claimant's injury related condition. SAIF argues that the Referee was mistaken in finding that its May 18, 1981 denial was a denial not only of aggravation, but also of continued medical care and treatment under ORS 656.245, and in setting aside the denial insofar as it was a denial of medical services.

Claimant suffered an industrial injury to his low back on July 8, 1977 while working as a millwright and foreman at Douglas Fir Lumber. Claimant's condition was diagnosed not as a sprain or strain, but as degenerative disc disease associated with osteoarthritis in the lower lumbar spine, which was exacerbated by the lifting incident. A myelogram was performed which revealed a minimal filling defect. Dr. McHolick released claimant to return to his regular work on July 27, 1977 with no permanent impairment. A Determination Order issued on December 27, 1977 allowing claimant benefits for temporary total disability from July 11, to July 26, 1977. There was no appeal from that Determination Order.

Claimant returned to his work in the capacity of foreman only. Claimant's employer closed its mill in 1978 and claimant then worked as a real estate salesman. Claimant is currently not working. Medically, nothing further was heard of the claimant until April 28, 1981 when Dr. Davis submitted a report to SAIF. Dr. Davis recommended reopening of the claim and stated that claimant's primary complaints included back pain with radiation to other parts of the body. Dr. Davis noted that previous x-rays revealed advanced degenerative changes at L3-4, 4-5, and L5-S1, and stated that claimant's condition was slowly worsening (as would normally be expected with a degenerative back condition). Dr. Davis' report does not specifically relate claimant's worsening to the 1977 injury, but rather seems to attribute it more to claimant's degenerative condition. Dr. Davis also did not comment on whether claimant was or was not able to work.

On May 18, 1981 SAIF issued a letter of denial stating that:

> "The medical report submitted in support of your claim for aggravation states your current problems are due to degenerative changes in your back. We can see no relationship between your current condition, which represents a natural progression of an underlying condition and your original industrial injury of July 8, 1977. Therefore, no justification exists for

> re-activiting your claim and without waiving other questions of compensability this formal denial is made."

On September 9, 1981, Dr. Davis stated that:

> ". . . it is my opinion that Mr. Hurlburt has advanced degenerative change in his degenerative disc disease of his low back with signs and symptoms of spinal stenosis or narrowing secondarily.
>
> "There is a clear-cut acute increase in symptoms with progression of symptoms following an injury to his back on the job in 1977 and I feel that his present problem is work related."

On September 25, 1981, Dr. Serbu, who treated claimant following the 1977 injury, reported that there was no question that claimant would have developed progressive disc degenerative disease without the 1977 injury, although he felt it reasonable to state that the injury may have had some slight effect on increasing the discogenic disease.

We agree with the Referee that claimant's current condition represents a progression of his unrelated degenerative disc disease. At the time of claimant's 1977 injury, the medical consensus was that claimant was suffering from a degenerative condition and that the lifting incident caused nothing more than symptoms, with no permanency. It is also apparent that both Drs. Davis and Serbu agree that claimant is currently suffering from the effects of the gradual worsening of his natural degenerative condition. That is certainly the gist of Dr. Davis' April 28, 1981 report, and the doctor fails to explain in his September 9, 1981 report how he relates this natural worsening to claimant's 1977 injury; in any event, Dr. Davis does so only in terms of symptoms. The most that the medical evidence does is suggest that the 1977 injury may have had some slight effect in contributing to claimant's presently symptomatic degenerative disease. However, it is necessary for a claimant to establish the industrial injury as a material cause of the worsened condition. Grable v. Weyerhaeuser, 291 Or 387, 400 (1981). We conclude that claimant's condition is primarily due to natural degenerative changes, and the 1977 injury did not contribute materially to the present level of degeneration.

We agree with SAIF's contention that the Referee erred in finding that the May 18, 1981 denial was a denial of injury related medical benefits under ORS 656.245 and in awarding an attorney fee payable by SAIF. As the Referee correctly noted, SAIF had paid for all medical care and treatment at the time of the aggravation denial. However, subsequent to the denial, claimant sought no further medical care since he believed that injury-related medical treatment had been denied.

Although SAIF's letter of denial may not be a model of clarity, we do not interpret it as denying any injury-related medical

services and/or treatment, but only treatment related to claimant's degenerative disc disease. There is no contention or evidence that SAIF has not paid or is refusing to pay for any injury related medical services. Additionally, in the claimant's request for hearing and in opening statements made before the Referee, the only issue which was raised was the propriety of the aggravation claim denial. There was never any contention by the claimant that medical benefits under ORS 656.245 were an issue. In Dorotha Lorraine Oyler, 34 Van Natta 1128 (1982), and Michael R. Petkovich, 34 Van Natta 98 (1982), we disapproved of volunteering decisions on issues not raised. Since the only issue raised in this case was the May 18, 1981 denial, the Referee should have so confined himself.

ORDER

The Referee's order dated May 14, 1982 is affirmed in part and reversed in part. Those portions of the order which set aside the SAIF Corporation's May 18, 1981 denial in part and ordered SAIF to pay claimant's attorney a fee of $400 are reversed, and SAIF's denial is affirmed in its entirety. The remainder of the Referee's order is affirmed.

HARRY C. JORDAN, Claimant
Allan Coons, Claimant's Attorney
Wolf, Griffith et al., Defense Attorney

WCB 81-1698
December 30, 1982
Order on Review

Reviewed by Board Members Lewis and Ferris.

The employer requests review of Referee McCullough's order which found the claimant permanently and totally disabled due to left arm, shoulder, neck and head conditions related to a compensable injury of October 28, 1975.

The employer contends that the record does not establish that claimant is permanently and totally disabled. It contends that, at most, the medical reports indicate that claimant could not return to employment requiring heavy lifting, and that, even considering the testimony of the claimant and his wife, claimant's current disabilities and activities do not indicate he is permanently and totally disabled. The employer also argues that vocational rehabilitation consultants determined that the claimant could perform unskilled work or work where he could be trained on the job, and that his inability to obtain this type of employment was due to poor economic conditions rather than to the effects of his injury.

We agree that the record does not support a finding that the claimant is permanently and totally disabled, although he does have significant impairment due to left shoulder and arm muscle spasm, weakness and pain combined with disabling headaches related to left shoulder and arm muscle stress. We accept the Referee's findings of facts without repeating them here. We conclude that the evidence shows there are jobs which the claimant could physically handle despite his inability to return to heavy labor such as truck driving and furniture moving. The evidence indicates that the reasons claimant has not been able to become employed are, in part, his physical disabilities, lack of transferable skills, and his age. This inability to obtain employment is also due, in significant part, to the scarcity of unskilled jobs resulting from the economic slump.

The medical reports indicate the claimant has significant weakness, atrophy and pain in his left shoulder and arm, particularly with activity. Also, if the claimant tries to use his left arm to lift, carry, grip or push in any appreciable amount, he will develop headaches due to spasm of the left trapezius and cervical muscles. However, no doctor has said this condition totally incapacitates claimant from at least sedentary or light work, especially if the work does not involve repetitive or stressful use of his left arm.

A report from Crawford Rehabilitation Services, Inc. on October 21, 1980 stated:

> On the basis of currently available medical information, Mr. Jordan appears to be vocationally handicapped. Further, he appears to have no transferable skills but must look for a job at the unskilled level or where skills are taught on the job. Unfortunately, due to the current economic slump, these jobs are not readily available. In fact, they are incredibly scarce.

Similarly, a report from Associated Consultants, Inc. on August 3, 1981 listed several jobs they felt the claimant could try given his physical and vocational limitations: "warehouse management, shipping and receiving, log book inspection, cushman driving with the City of Eugene, miscellaneous jobs at the airport, teaching driving instruction, local and short haul driving and forklift operation." (At hearing the claimant credibly testified that he does not feel he could operate a forklift.) Over thirty contacts were placed on behalf of the claimant for jobs roughly fitting those categories. The claimant got only one interview for outside salesman of a truck rental company. He was turned down as not being aggressive enough for the position. Two positions wanted particular work experience which the claimant did not possess and, in two others, the job was too strenuous. The balance of the job contacts (26) were unsuccessful because there were no openings.

The claimant testified to similar job search experiences in Needles, California where he looked for work the winters of 1980-1981 and 1981-1982. He applied to be a casino floor sweeper, a hardware store clerk, a lumber store clerk and a can weigher at a can company, all with no success because there were no openings.

Based on the above, we do find that claimant has shown good motivation in searching for work despite his disabilities, but we conclude that this poor success is due in large part to few job openings in unskilled jobs not requiring manual labor, rather than to the effects of claimant's compensable injury.

As of September 1, 1976, the claimant had been awarded 128° for 40% unscheduled permanent disability for his left shoulder, and 15% scheduled permanent disability for his left arm. In January, 1980, the claimant underwent left shoulder acromioplasty for impingement syndrome of the left rotator cuff. A Determination Order issued on July 15, 1980 awarded no additional permanent disability compensation. As the Referee noted, the surgery appeared

to give some relief to the claimant for a while, but the relief has not proven to be lasting. Although we do not find the claimant to be totally disabled, we do find his condition has worsened since the previous awards.

The Referee found both the claimant and his wife to be credible witnesses. Based on the increased frequency of claimant's disabling headaches due to left arm strain we find the claimant should be awarded 80°, or 25% unscheduled permanent disability in addition to his prior awards.

ORDER

The Referee's order dated June 7, 1982 is modified. The claimant is awarded 80°, or 25%, unscheduled permanent partial disability in addition to prior awards for a total of 208°, or 65%, unscheduled permanent disability and 15% scheduled left arm disability.

Claimant's attorney is allowed 25% of the increased compensation made payable by this order, not to exceed $2,000, as a reasonable attorney's fee. This fee is in lieu of and not in addition to that allowed by the Referee, and is payable out of claimant's award of compensation.

RONALD W. QUEEN, Claimant
Roll & Westmoreland, Claimant's Attorneys
Schwabe, Williamson et al., Defense Attorneys

WCB 81-05419
December 30, 1982
Order on Review

Reviewed by Board Members Ferris and Lewis.

The employer requests review of Referee St. Martin's order which awarded claimant 35% loss of the right forearm (wrist) due to a compensable injury sustained on September 21, 1979. The award represents a 15% increase over that awarded by the April 28, 1981 Determination Order. The employer contends that claimant's present disability is due to a 1971 wrist injury rather than to the September 21, 1979 wrist injury and that, even if they are responsible for the present wrist disability, the administrative guidelines for rating forearm disability only allow for an award of 11.4% disability of the right wrist.

The claimant compensably fractured his right wrist in 1971 while he worked for this same employer, but while another insurer was on the risk. By Referee's order of April 9, 1981 it was determined that the September 21, 1979 wrist injury was a new injury rather than an aggravation of the 1971 injury, thereby making this (now self-insured) employer responsible for the condition. This determination of responsibility necessarily included a finding that the September 21, 1979 incident materially contributed to and worsened the right wrist carponavicular bone fracture and non-union. Therefore, claimant's entire disability for that condition is now assumed by this employer as a self-insured entity.

We rate the disability as it now exists, taking into consideration his past receipt of money for such disability. ORS 656.222. However, we note that claimant's original injury in 1971 was closed as a non-disabling injury with no award of permanent disability for the right wrist.

In rating the claimant's right wrist disability, we have not included any disability claimant may have from a separate carpal tunnel syndrome. There has never been a determination that the September 21, 1979 injury materially contributed to that condition and the claimant himself distinguishes between that condition and the present claim.

Taking into consideration claimant's loss of dorsiflexion, volar flexion and radial deviation (OAR 436-65-520), and significant loss of grip strength due to pain and atrophy (OAR 436-65-530), we find the Referee's award of 35% loss of the right forearm (wrist) is a reasonable award. Therefore, we affirm and adopt the Referee's order.

ORDER

The Referee's order dated June 11, 1982 is affirmed. Claimant's attorney is allowed $550 for services on Board review.

JULIE RISTICK, Claimant
Pozzi, Wilson et al., Claimant's Attorney
Bruce K. Posey, Defense Attorney

WCB 80-08650
December 30, 1982
Order on Review

Reviewed by the Board en banc.

The self-insured employer requests review of Referee Pferdner's order which set aside its denial of claimant's occupational disease claim for her psychological condition.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated May 14, 1982 is affirmed. Claimant's attorney is awarded $600 as a reasonable attorney's fee on review, payable by the self-insured employer.

Board Member Barnes Dissenting:

We all agree that there were both work and nonwork sources of stress in claimant's life. Since this is an occupational disease claim, the test is whether work sources were the major cause of claimant's psychological disability.

In another mental stress case, we stated that the major cause test "will generally depend . . . on expert medical evidence" and noted "it would be difficult to imagine a psychological condition being found compensable in the absence of a favorable medical opinion." Kay L. Murrens, 33 Van Natta 586, 590-91 (1981). But what was difficult to imagine in Murrens has happened in this case -- claimant's claim was found compensable despite there being no medical opinion that work stress was the major cause of her condition.

Contrary to what the majority may think, but is not willing to articulate, Dr. Ball did not opine that claimant's work was the major cause of her illness. His earlier report only states that work stress was "a definite factor." His later report only states that work stress was "a causative factor."

I agree that stress from claimant's working environment contributed to her psychological disability. But that is not enough to make this claim compensable. The law requires that claimant prove that her work environment was the major cause. She has not done so.

I would reverse the Referee's order and reinstate and affirm the self-insured employer's denial.

DONALD L. ROBERTS, Claimant
Allen & Vick, Claimant's Attorney
Keith D. Skelton, Defense Attorney

WCB 81-05501
December 30, 1982
Order on Review

Reviewed by Board Members Ferris and Lewis.

The employer/insurer requests review of Referee Peterson's order which set aside the insurer's denial of claimant's request for claim reopening and awarded claimant's attorney a reasonable attorney's fee. The issue on review is whether claimant's condition in 1981 was causally related to his 1978 injury.

The employer/insurer has moved the Board to remand the claim to the Referee for further evidence taking, pursuant to ORS 656.295(5). The additional evidence that forms the basis of the employer/insurer's request for remand appears to bear upon the reliability of claimant's testimony. We find that the employer/insurer had adequate opportunity to marshal this evidence prior to the hearing. Furthermore, no request was presented at the time of hearing to leave the record open for the submission of additional evidence. This is clearly a case of the losing party seeking remand to present evidence which, in the exercise of due diligence, reasonably could have been obtained prior to issuance of the Referee's order. Remand is inappropriate in such instances. Robert A. Barnett, 31 Van Natta 172 (1981) affirmed, 59 Or App 133 (1982); Ora M. Conley, WCB Case No. 80-11603, 34 Van Natta 1698 (December 27, 1982).

Addressing the merits of the employer's request for review, we affirm and adopt the Referee's order.

ORDER

The Referee's order dated January 18, 1982 is affirmed. Claimant's attorney is awarded $350 as a reasonable attorney's fee on Board review, payable by the employer/insurer.

DOLORES A. ROSS, Claimant
Myrick, Coulter et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-10886
December 30, 1982
Order on Review

Reviewed by Board Members Lewis and Ferris.

The insurer requests review of Referee Mannix's order which overturned its partial denial of claimant's musculoskeletal conditions and its denial of claimant's psychological condition. The issue is the compensability of claimant's various conditions in light of an automobile accident which occurred several months after the accepted injury which caused similar symptoms.

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

The insurer makes much of the fact that claimant's treating physician related claimant's current musculoskeletal problems to the automobile accident. We believe that a fairer reading of Dr. Sullivan's reports is that he finds both the industrial injury and the automobile accident to be contributing factors, that he cannot sort out the degree of contribution with much precision and that, at most, the automobile accident is the more significant factor. He does not appear to totally exclude the industrial injury as a causative factor. Considering this evidence along with the opinions of the other physicians, particularly those associated with the Southern Oregon Medical Consultants, we believe claimant has met his burden under Grable v. Weyerhaeuser Co., 291 Or 387 (1980), with respect to her orthopedic problems. There is no evidence suggesting that claimant's psychological problems remain other than compensable.

ORDER

The Referee's order dated February 2, 1982 is affirmed. Claimant's attorney is allowed $300 as a reasonable attorney's fee, payable by the SAIF Corporation.

ENZA SHERWOOD, Claimant
Timothy O'Neill, Claimant's Attorney
Rhoten, Rhoten et al., Attorneys
Tooze, Kerr et al., Attorneys
Carl M. Davis, Attorney

WCB 82-00036
December 30, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

Claimant requests review of Referee Quillinan's order which found that claimant is a domestic servant within the meaning of ORS 656.027(1) and thus excluded from coverage under the Workers Compensation Act.

As to the nature of the work actually performed by claimant, this case is indistinguishable from Gunter v. Mersereau, 7 Or App 470 (1971). The only unique fact in this case, not involving the nature of the claimant's work activities, is that claimant was not hired by the homeowner. Instead, claimant was hired by a commercial trust company acting in the capacity of conservator for the homeowner, who is legally incompetent.

We adopt the Referee's findings, which include the following, as our own:

> "Pioneer Trust Company paid claimant directly from Zosel's [the homeowner's] assets with trust fund checks, as well as paying for other services such as maintenance and repair of the house. Pioneer's sole function was to act as a 'bill payer' on behalf of Zosel. Pioneer exercised no control or right to control over the manner in which claimant performed her job while in Zosel's home. At no time did Pioneer pay claimant with any of its own funds."

Claimant contends that she does not fall within the exemption provided by ORS 656.027(1) or the rule of Gunter, because her work was performed for the trust company, a commercial enterprise, and not for the invalid homeowner. Some possible support can be found for that position in the following passage from Gunter:

> "The motivating philosophy behind Workman's Compensation Acts is that the loss arising from accidents in industry should be distributed between the employer and consumer as a cost of production. The domestic servant exception recognizes that the homeowner, who receives no pecuniary profit from maintaining his home, should not be made to bear what would amount to the total burden of compensation protection." 7 Or App at 472.

The court in Gunter also stated, however, that:

> "The bulk of claimant's duties, which were directed toward the care and convenience of the invalid she attended, must be considered domestic in nature. Indeed, they were not unlike those performed by persons commonly associated with domestic service. That defendant may have hired her because of her training as a nurse's aide does not alter her status under the Act. The true test is the nature of the work actually done." (Emphasis supplied.) 7 Or App at 473.

We find that claimant was not a subject worker of the Pioneer Trust Company, the alleged "employer." We find that claimant was a domestic servant within the meaning of ORS 656.027(1), hired as such by the invalid homeowner's conservator for the benefit of the invalid homeowner. Accordingly, claimant is not entitled to receive compensation under the Act.

ORDER

The Referee's order dated May 4, 1982 is affirmed.

DERONDO P. SHOUP, Claimant
Bottini & Bottini, Claimant's Attorneys
Wolf, Griffith et al., Defense Attorneys
Lindsay, Hart et al., Defense Attorneys

WCB 80-05510
December 30, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

The SAIF Corporation requests review of Referee Pferdner's order which set aside its denials of claimant's claim. SAIF contends that claimant was the employe of another entity at the time of the incident, or that claimant was a "borrowed employe" of another entity or that he was a joint employe. In his brief on review, claimant contends that the Referee erred in failing to assess a penalty and attorney fees against SAIF for unreasonably denying the compensability of claimant's claim.

We agree with the Referee's analysis and conclusion on all issues; therefore, we affirm and adopt his order, subject to the following comments concerning claimant's contention on review.

SAIF issued two denials of claimant's claim. The first alleged that, at the time of the accident, claimant was acting in his capacity as a corporate officer of the Qunicy Water District which had not elected workers compensation coverage for its officers. A second denial alleged that, at the time of the injury, claimant was not "a subject employee of the Qunicy Water District."

Claimant contends that the Referee should have penalized SAIF for unreasonably refusing to concede that claimant was a subject worker entitled to compensation under the Act, and that the only issue for resolution was whose employe claimant was when he was injured. See ORS 656.307; OAR 436-54-332. Given the evidence in this case, SAIF's contention that claimant was acting in the capacity of a corporate officer at the time of the accident is a slender reed indeed. Nevertheless, we find that SAIF had a legitimate basis for making such a contention; therefore, SAIF's denial of compensability was not unreasonable.

ORDER

The Referee's order dated June 1, 1982 is affirmed.

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

NICK L. WARD, Claimant
Doblie & Francesconi, Claimant's Attorneys
Schwabe, Williamson et al., Defense Attorney

WCB 81-07174
December 30, 1982
Order on Review

Reviewed by Board Members Barnes and Ferris.

Claimant requests review of that portion of Referee Daron's order which granted an offset of an overpayment of temporary total disability compensation against the award of permanent partial disability. The insurer cross-appeals the Referee's award of 10% permanent partial disability for claimant's low back injury.

Claimant suffered a compensable injury to his low back on July 11, 1980 when he fell while constructing a floor for a mobile home. On October 29, 1980 claimant was released for light duty work by Dr. Fleshman, his treating physician, but there was no light work available for him at that time. Claimant eventually went back to work in May of 1981 when his employer found a light duty job for him. On February 11, 1981 Dr. Fleshman reported that claimant's back was stable. Dr. Fleshman also reported on April 1, 1981 that claimant had residual pain and disability from the injury. Claimant was examined by Orthopaedic Consultants on June 9, 1981. They opined that claimant was medically stationary and that he suffered no permanent impairment as a result of the injury.

Claimant's claim was closed on July 16, 1981 by a Determination Order which awarded temporary total disability from July 12 through September 21, 1980 and temporary partial disability from September 22, 1980 through February 11, 1981. No permanent disability was awarded. The insurer had paid temporary disability compensation to claimant for the period from February 11 to the date he returned to work in May, 1981. The insurer argues that it is entitled to offset this overpayment against the award of permanent disability and that claimant has not suffered any permanent disability.

As to the latter issue, we affirm and adopt the Referee's findings and conclusion that claimant is entitled to an award of 10% permanent partial disability for his low back injury.

The insurer's alleged entitlement to an offset presents a more difficult problem. The general rule is that an insurer is allowed to offset overpayments of temporary disability against future permanent disability awards. Mark L. Side, 34 Van Natta 661 (1982). We have recognized an exception to that general rule in Ruby J. Hampton, 30 Van Natta 708 (1981). Relying on Hampton, claimant argues that the offset should not be allowed in this case because he was not advised that he could return to work during the period in question. The Referee found the present facts sufficiently different to remove this case from the limited Hampton exception. We agree.

The claimant in Hampton was examined by Orthopaedic Consultants at the insurer's request. They found her to be stationary and able to return to work. Their findings, however, were not relayed to the claimant until more than a month after the examination. Claimant did not work or seek work during this period because she had been instructed not to do so by her own treating doctor. Upon learning that her employer considered her able to

return to work, she went back to her job immediately. The insurer asserted that they were entitled to offset the temporary disability paid between the date of the Orthopaedic Consultants' examination and the date claimant returned to work. We held that, although claimant was in fact able to work during the period in question, it would have been "grossly unfair" to deny the claimant income for the period in question due to circumstances completely beyond her control.

In this case, by contrast, it was claimant's own treating doctor who pronounced him to be stationary and able to return to modified work. We think that difference produces a distinction. Independent medical examiners hired by an insurer have no duty to inform a claimant of their findings; we believe they generally do not directly inform a claimant of their findings. A claimant's own treating physician, on the other hand, should have some duty to communicate findings to his or her patient, at least findings as important as a medical release-to-work, and we believe that treating doctors do generally inform patients of their findings.

Claimant testified in this case that his treating doctor did not inform him of his release to work. Even if we were to accept that testimony, we are not willing to extend the Hampton rationale to this kind of situation. A treating physician is selected by a claimant to provide both needed services and advice. A claimant, not an industrial insurer, has control over his or her treating doctor. We were concerned in Hampton with "gross unfairness" and we here conclude it would be unfair to force an industrial insurer to bear a financial burden created by the failure of a claimant's physician to adequately communicate with his patient.

We, therefore, conclude that the insurer is entitled to offset the overpayment of temporary disability compensation against claimant's award of permanent partial disability.

ORDER

The Referee's order dated April 7, 1982 is affirmed.

WHITSELL TRUST, Employer
Carl M. Davis, Attorney

WCB 81-05294
December 30, 1982
Order on Review

Reviewed by Board Members Lewis and Barnes.

The trustee for Whitsell Trust, a family business operated as a business trust, requests review of Referee Seifert's order which upheld the Workers' Compensation Department's order which concluded that Whitsell Trust was a noncomplying employer within the meaning of ORS 656.005(18). The sole issue presented on review is whether the Whitsell Trust was an employer on the dates in question.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated May 7, 1982 is affirmed.

NOBLE E. WILSON, Claimant
Arthur Barrows, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-01096
December 30, 1982
Order on Review

Reviewed by Board Members Lewis and Ferris.

Claimant has requested review of Referee Williams' order which upheld the insurer's denial of compensability of a surgical procedure. The sole issue is the compensability of the surgery, known as a septorhinoplasty. We reverse.

Claimant is a police officer by profession. In 1975 he fractured his nose in a nonindustrial, noncompensable fall from a ladder at his home while engaged in the repair of his house. As a result of that injury the right side of his nose became partially obstructed. The degree of obstruction at that time may have been enhanced by the fact that the tip of claimant's nose, either congenitally or as a result of the aging process, was situated slightly off center from the midline of the nose. Corrective surgery was recommended at that time, but claimant elected to forego surgery.

In 1977 claimant's nose was again fractured in the course of effecting the arrest of persons suspected of criminal activity. The injury was accepted as compensable. The fracture involved both the dorsum (the external juncture of the lateral surfaces of the nose) and the septum (the internal tissue separating the nostrils). As the fracture healed, the dorsum and septum healed off center to the left of midline and a prominent lump developed on the dorsum. Surgery was again recommended, but because of his fear of surgical procedures generally, claimant declined the recommendation at that time.

One of the effects of the manner in which the 1977 fracture healed may have been to further obstruct the right nostril and/or cause obstruction of the left nostril. In the years following the industrial injury, claimant's left nostril began collapsing more, causing obstruction in his breathing. The evidence indicates that the further post-injury collapsing of the left nostril probably is the result of the aging process and not directly related to the injury.

The parties have argued this case and the Referee decided it as if the issues was whether there was a material contribution from the 1977 injury to the obstruction in claimant's breathing which ultimately led him to elect surgical intervention. We regard the relative degree of obstruction from the various occupational and nonoccupational sources as a "red herring" issue. It is undisputed that, as a direct result of the 1977 on the job injury, claimant's nose healed in a deformed fashion. Under ORS 656.245, claimant is entitled to medical treatment to return claimant's nose as nearly as possible to its pre-injury condition. Mary Ann Hall, 31 Van Natta 56 (1981). The fact that the surgery to correct the compensable residuals of his industrial injury incidentally may relieve claimant of nasal obstruction caused primarily by an off the job injury and congenital conditions does not render the surgery noncompensable. Rebecca Hackett, 34 Van Natta 460 (1982), aff'd, 60 Or App 328 (1982)

Likewise, the fact that claimant was willing to live with the residuals of the compensable injury for several years until he overcame his fear of surgery does not negate that one of the primary purposes and effects of the surgery was to correct the residual damage from the industrial injury. Although the need for surgery may have had its roots in the 1975 injury and congenital conditions, the 1977 injury pathologically worsened claimant's nose (literally altering its course), and contributed to the need for surgery. Claimant's treating physician and surgeon testified that the surgery he did following the 1977 injury was more extensive than that which would have been done as a result of the 1975 injury.

Thus, with one exception, we find the surgical procedure to be compensable. We are not persuaded by the evidence before us that the congenital drooping of the tip of claimant's nose was in any manner affected by the 1977 injury, nor does it appear that the surgery to correct the residuals of the 1977 injury necessarily required correction of that condition. It may have been convenient to take care of all defects in the same surgery, but it does not appear that the nose tip correction was required. Therefore, to the extent that the cost of the surgery can be apportioned to exclude that part attributable to correct the nose tip defect, the insurer should not be liable to pay for that part.

ORDER

The Referee's order dated May 7, 1982 is reversed. The insurer's denial dated January 20, 1981 is set aside and the claim remanded for acceptance in accordance with law, except that the insurer shall not be liable for that portion of the surgery to correct the tip of claimant's nose. Claimant's counsel is awarded $1200 as and for a reasonable attorney's fee for his services at hearing and on review, payable by the insurer.

CHARLES L. WRAY, Claimant
Bloom, Marandas & Sly, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-3604
December 30, 1982
Order on Review

Reviewed by Board Members Barnes and Lewis.

The SAIF Corporation requests and claimant cross-requests review of Referee Menashe's order which awarded claimant 75% unscheduled permanent partial low back disability, that being an increase of 50% over and above the April 28, 1980 Determination Order, set aside SAIF's denial of claimant's aggravation claim and ordered SAIF to provide claimant benefits for temporary total disability from December 29, 1980 to March 19, 1981, assessed a 25% penalty against SAIF on the compensation due claimant from March 7, to March 19, 1981, and denied claimant's request for the payment of bills for certain medical reports.

The only issue raised by SAIF for review is the extent of claimant's disability. SAIF contends that the Referee's award was excessive. Claimant cross-appeals contending that he is entitled to permanent and total disability, that he is entitled to time loss

benefits from December 29, 1980 to April 19, 1981, rather than from December 29, 1980 to March 19, 1981 as ordered by the Referee, and that the Referee erred in not ordering SAIF to reimburse him for the cost of four medical reports.

We adopt the Referee's findings of fact as our own.

I

The Referee found that the preponderance of the medical evidence did not indicate that claimant was totally incapacitated on a medical basis alone. We agree with that conclusion. The medical consensus is that claimant is still capable of employment in light or sedentary work and claimant demonstrated such a capacity by his work for a real estate sales company for approximately a seven month period in 1980, although he eventually had to quit as a result of back pain.

With regard to nonmedical factors, the Referee concluded that although claimant was 62 years old, his past work experience in a variety of areas and various skills such as ability as a counselor (claimant is a doctor of divinity) and apparent ability to speak, read and write German and Japanese fluently and French passably, made his employment outlook very realistic, despite the fact that he is now precluded from heavy work. The Referee additionally concluded that claimant had not demonstrated reasonable efforts to obtain employment compatible with his disability and that, in view of many inconsistencies and discrepancies, he viewed claimant's testimony with caution. We agree.

Claimant additionally argues that the Referee erred in his refusal to take into consideration claimant's "pre-existing" heart condition and headaches in making his award. Although that point is debatable, we find that even considering these conditions, claimant is not permanently and totally disabled. Claimant's heart condition and headaches never caused him any particularly substantial problems, even while he was engaged in an occupation requiring strenuous physical labor.

In summary, we agree with the Referee that claimant has not demonstrated that he is permanently and totally disabled. Although SAIF argues that the permanent partial disability award was excessive, we do not find sufficient reason to disagree with the Referee's finding.

II

We disagree with claimant's contention that he is entitled to an additional month of time loss benefits. Claimant's argument appears to be based primarily on Dr. Reynolds' report of May 5, 1981, which states: "Also enclosed is a prior letter written to Ms. Sherry Wiltse indicating disability from 12-29-80 to return to work on 4-19-81." (Emphasis added.) Dr. Reynolds' earlier letter of March 19, 1981 indicates that time loss was authorized for the claimant from December 29, 1980 until the date of the letter. It would thus appear that the reference to April 19, 1981 in Dr. Reynolds' letter of May 5, 1981 was a typgraphical error, and that he actually meant to state March 19, 1981. The Referee apparently so interpreted it, and we agree.

III

The final issue involves claimant's request for SAIF to reimburse him for the cost of four medical reports. The Referee found that the reports were generated for litigation purposes. We agree. In fact, claimant's attorney indicated at the hearing that he initially requested those reports for purposes of a social security claim for which he was representing the claimant.

It is the long-standing rule in workers compensation cases that litigation reports are not a recoverable medical expense under ORS 656.245. John A. Mayer, 7 Van Natta 278 (1971); Richard Stinson, 29 Van Natta 469 (1980); Clara Peoples, 31 Van Natta 134 (1981); Daniel Ball, 34 Van Natta 100 (1982). ORS 656.245 refers to the costs of providing "medical services for conditions resulting from the injury for such period as the nature of the injury or the process of the recovery requires," including "medical, surgical, hospital, nursing, ambulances and other related services, and drugs, medicine, crutches and prosthetic applicances, braces and supports and where necessary, physical restorative services." Conspicuous by its absence is any reference to litigation expenses associated with securing the right to compensation.

Claimant argues that the rule in workers compensation cases to the effect that litigation reports are not a recoverable expense under ORS 656.245 is inconsistent with the rule in personal injury cases, citing Chopp v. Miller, 264 Or 138 (1972). It does appear that Chopp supports the proposition that the cost of medical reports prepared for litigation purposes are a recoverable item of damages, although there are no subsequent cases that amplify on Chopp. However, there are also situations in which such matters would be part of a post-litigation cost bill. See ORCP 68. By contrast, there is no provision for the prevailing party recovering costs in proceedings before this agency. We adhere to the position that medical reports obtained for litigation purposes are not reimburseable under ORS 656.245.

ORDER

The Referee's order dated January 27, 1982 is affirmed.

Claimant's attorney is awarded an attorney's fee of $450 for services before the Board, payable by SAIF.

WORKERS' COMPENSATION CASES

September-December 1982

Decided in the Oregon Court of Appeals:

Decided in the Oregon Supreme Court:

IN THE COURT OF APPEALS OF THE STATE OF OREGON

ASSOCIATED REFORESTATION CONTRACTORS, INC.,
Respondent - Cross-Appellant,
v.
STATE WORKERS' COMPENSATION BOARD et al,
Defendants,
HOEDADS, INC.,
Appellant - Cross-Respondent.

(No. 104293, CA A20491)

Appeal from Circuit Court, Marion County.

Wallace P. Carson, Judge.

Argued and submitted March 10, 1982.

Michael B. Goldstein, Eugene, argued the cause for appellant - cross-respondent. With him on the briefs was Goldstein, Drescher & Spring, Eugene.

Emil R. Berg, Portland, argued the cause for respondent - cross-appellant. With him on the brief were John R. Barker, and Wolf, Griffith, Bittner, Abott & Roberts, Portland.

Before Richardson, Presiding Judge, and Thornton and Van Hoomissen, Judges.

VAN HOOMISSEN, J.

Affirmed.

VAN HOOMISSEN, J.

Plaintiff, a trade association representing the interests of reforestation companies, brought this action for a declaratory judgment that defendant Hoedads,[1] a cooperative engaged in the tree-planting business, is subject to the workers' compensation law, ORS ch 656.

The parties entered into a lengthy stipulation that described the structure and operation of Hoedads. The trial court entered a declaratory judgment. Hoedads appeal, claiming that: (1) its purchase of workers' compensation insurance on the eve of trial made the controversy moot; (2) plaintiff lacks standing to bring the action; and (3) the trial court was incorrect on the merits. Plaintiff cross-appeals, claiming that, in addition to the declaratory judgment, the

trial court should have issued an injunction directing the workers' compensation agencies to require Hoedads to obtain workers' compensation coverage.

Hoedads first maintains that the entire controversy is moot, because it voluntarily purchased workers' compensation insurance on the eve of trial. Hoedads may have purchased the insurance, but it refused to agree that it was legally required to do so. Hoedads can cancel the coverage at any time, subjecting it to a penalty of ten percent of the estimated annual premium, or can let the policy expire after the end of one year without paying a penalty. Hoedads voted to obtain coverage once before but later changed its decision.

We do not agree that the issue is moot. Voluntary cessation of allegedly illegal conduct will not moot a case unless it is clear that the allegedly wrongful behavior could not reasonably be expected to recur. *Gates v. McClure,* 284 Or 685, 588 P2d 32 (1978). Here, Hoedads has refused to agree it is required to maintain coverage or to promise that it will voluntarily maintain it for any period of time.[2] The penalty it would incur for cancellation is substantial, but

[1] Another defendant cooperative does not appeal. The State of Oregon, the Workers' Compensation Board and its members and the Workers' Compensation Department and its director were also named as defendants.

[2] At the beginning of trial, plaintiff offered to enter into a consent judgment with Hoedads to the effect that Hoedads is a subject employer. Hoedads refused.

not prohibitive when considered in the light of Hoedads' total revenues. The essential controversy in this declaratory judgment action remains: plaintiff contends and defendant denies that defendant is legally required to maintain coverage for its workers.

Plaintiff bases its standing to bring this action on the direct economic harm it has suffered as a result of Hoedads' allegedly illegal conduct. Hoedads argues that economic harm alone is legally insufficient to confer standing without a showing that the statute allegedly transgressed was designed to protect against that type of harm, citing *Hardin v. Kentucky Utilities Co.,* 390 US 1, 88 S Ct 651, 19 L Ed 2d 787 (1968). Both parties ignore the standing requirement of the Declaratory Judgments Act:

> "Any person * * * whose rights, status or other legal relations are affected by a * * * statute * * * may have determined any question of construction or validity arising under any such * * * statute * * * and obtain a declaration of rights, status or other legal relations thereunder." ORS 28.020.

Plaintiff asks for a construction of the workers' compensation statutes; that is, whether they apply to cooperatives. Plaintiff's "rights, status or other legal relations" are certainly affected by such statutes in that plaintiff is required to purchase workers' compensation insurance for its employees.

We conclude that plaintiff alleged and proved enough personal stake in the outcome of this case to have standing here. Several of plaintiff's member companies offered evidence that Hoedads had underbid them and obtained reforestation contracts, with the cost of workers' compensation insurance to the member company more than equalling the amount by which Hoedads' bid was lower.[3] In an action for a declaratory judgment, such concrete and identifiable harm as this, directly caused by the allegedly illegal conduct of defendant, is sufficient to confer standing without regard to the class of persons protected by the statute defendant is alleged to have violated. The economic

[3] The record indicates that the cost of workers' compensation insurance in the reforestation industry varies between 11 and 16 percent of the gross amount of bids.

harm suffered by plaintiffs' members, and the substantial advantage defendant enjoys because of the absence of compensation insurance expense, is sufficient to insure that the questions will be framed with the necessary specificity, that the issues will be contested with the necessary adverseness and that the litigation will be pursued with the necessary vigor. *See Budget Rent-A-Car v. Multnomah Co.*, 287 Or 93, 597 P2d 1232 (1979).

The substantive issue in this case is whether defendant is a subject employer under the workers' compensation statutes. "Employer" is defined as

> " * * * any person * * * who contracts to pay a remuneration for and secures the right to direct and control the services of any person." ORS 656.005(14).

A subject employer, required by ORS 656.017 to provide workers' compensation coverage for all subject workers, is defined as an employer who employs one or more subject workers. ORS 656.023. Subject workers are defined as "all workers," with certain exceptions to be discussed. A worker is defined as "any person * * * who engages to furnish services for a remuneration, subject to the direction and control of an employer * * *." ORS 656.005(28).

Hoedads makes two separate arguments that it is not a subject employer: (1) when its members perform labor and receive in return a percentage of the profits of the cooperative, they are not furnishing services "for remuneration" under ORS 656.005(28); and (2) because its workers participate in the business as partners, they are exempt from coverage under ORS 656.027(7).

Hoedads is a cooperative incorporated under ORS chapter 62. Membership in the cooperative has varied over the past few years between 150 and 400 workers, with membership of 200 at the time of trial. The cooperative is organized on the basis of crews, ranging in size from 12 to 30 members. In order to join the cooperative, a prospective member must join and maintain membership in a crew. Each crew has the right to decide its own membership. A

crew has the power to terminate a member; if it does, the terminated person has thirty days in which to gain membership on another crew or lose membership in the cooperative. Each crew member has one vote in the crew and in

general cooperative meetings and receives a share of gross profits, after a deduction for administrative expenses, in proportion to the amount of work performed. *See* ORS 62.415(1). Each member must pay a $2,000 membership fee, usually paid through a deduction from earnings. This fee is refunded to the worker on termination from the cooperative.

There is an annual turnover rate in membership of approximately 25 to 30 percent. Neither the Articles of Incorporation nor the Bylaws provide a method by which the cooperative itself, as opposed to a crew, can terminate a member; however, the cooperative can remove an entire crew, without cause, by a two-thirds vote of the governing council, ratified by a majority vote of the membership at large. A crew's right of termination has been exercised in the past. A crew member may voluntarily leave the cooperative without cause and without notice, without incurring liability.

The council is the governing body of the cooperative. Each crew elects one member to the council, which sets policy for the cooperative, creates a budget for its administration, sets compensation for officers and members performing administrative duties, bids on contracts and assigns contract work to the crews, who have the right to refuse work on a given job. When on the job, each crew supplies a "non-planting foreperson" (NPF). This job is usually rotated on a daily basis. The NPF serves as liaison between the crew members actually doing the tree planting and the government inspector. The planting must be done according to exacting specifications.

Hoedads first argues that its members, who perform labor in return for a share of profits in proportion to the amount of work performed, should not be considered as working for "remuneration" under ORS 656.005(28) and (14). It points out that, in the absence of profits, members may not receive any compensation for their services. It urges that patronage dividends should be treated, not as remuneration, but as incidents of an ownership interest in the cooperative.

The actualities of the relationship that member workers bear to the cooperative belie Hoedads' argument

Members may be fired from their crews without cause, or an entire crew may be dropped. The turnover rate of workers is large, and members are free to leave the cooperative at will. The legislature chose the broad word "remuneration" to define a subject employer; we see no reason that the recompense that a worker receives for his labor should not be considered remuneration just because the amount varies with the profits of the organization.

We also see no merit in Hoedads' contention that it is exempt from coverage as a partnership. ORS 656.027(7). Even accepting the proposition that cooperatives might be distinct entities for some purposes, but not for others,[4] we disagree that Hoedads is essentially a partnership. A partner may not be excluded from the partnership at the will of the other partners. Again, the fact that pay is contingent on profits does not transform an employer into a partnership. Members retain only limited control through elected representatives on the governing council. They may be thought of as having a proprietary interest in the cooperative, for the period in which they are members, but this is not inconsistent with what remains in essence an employer-employe relationship.

In its cross-appeal, plaintiff argues that in addition to the judgment's declaration of Hoedads' being a subject employer, the judgment should have included an order directing the defendant state agencies to discharge their duties under ORS 656.052. That statute provides in relevant part:

> "(1) No person shall engage as a subject employer unless and until he has provided coverage pursuant to ORS 656.017 for subject workers he employs.
>
> "(2) Whenever the director has reason to believe that any person has violated subsection (1) of this section, the director shall serve upon him a proposed order declaring him to be a noncomplying employer and containing the

[4] "* * * Cooperative associations are neither partnerships nor ordinary business corporations, and the Legislative Assembly has recognized their distinct character by enacting a special chapter of the Code to deal with them. ORS ch 62." *Kuhns et ux v. State Tax Com.*, 223 Or 547, 554, 355 P2d 249 (1960).

> amount, if any, of civil penalty to be assessed pursuant to ORS 656.735(1)."

It appears from the briefs that Hoedads is currently maintaining workers' compensation insurance and so is not in violation of the statute. We decline to modify the judgment.

Affirmed.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Guy Fincham, Claimant.

FINCHAM,
Petitioner,
v.
WENDT,
Respondent.

(No. 81-04246, CA A24269)

Judicial Review from Workers' Compensation Board.

Argued and submitted August 25, 1982.

Steven R. Huff, Salem, argued the cause for petitioner. With him on the brief was Karol Wyatt Kersh & Associates, P.C., Salem.

Dennis Graves, Salem, argued the cause and filed the brief for respondent.

Before Buttler, Presiding Judge, Joseph Chief Judge, and Warren, Judge.

JOSEPH, C. J.

Reversed and remanded with instructions that the claim be accepted as compensable.

JOSEPH, C. J.

The sole issue in this case is whether a worker engaged in remodeling a cold storage room in a building located on a "hobby farm" is subject to workers' compensation coverage. Claimant seeks judicial review of a determination by the Workers' Compensation Board that he is a nonsubject worker under the householder exemption. ORS 656.027 provides in relevant part:

> "All workers are subject to ORS 656.001 to 656.794 except those nonsubject workers described in the following subsections:
>
> "* * * * *
>
> "(2) A worker employed to do gardening, maintenance, repair, remodeling or similar work in or about the private home of the person employing the worker."

Employer lives on a 25-acre farm, where he grows peaches, pears, apples, cherries, grapes and berries. He occasionally has hired teenagers to help pick the fruit. Some of the crop is sold to commercial outlets; the rest is sold from a self-service fruit stand. Gross sales in 1980 were about $8,000. Although it has shown a profit at times in the past, the farm is not generally a profitable activity. Employer has regular full-time employment elsewhere; he regards the farming as a hobby that enhances the family's enjoyment of the property as their home.

In September, 1980, employer hired claimant, a 17-year old high school student, to pick fruit for two days. On October 18, 1980, employer hired claimant again, this time to expand a cold storage room in a building located 65 feet from employer's residence. The building houses farm machinery, tractors, tools and a mechnical repair shop, as well as other cold rooms for storing peaches and apples intended for sale. Claimant worked on the project after school for about two weeks. On November 2, 1980, he injured his head in a fall from a ladder while he was engaged in the work.

The referee found that claimant was not an independent contractor; the employer does not contend otherwise. The only issue before us is the applicability of the quoted householder exemption; thus, if the exemption is inapplicable, claimant is a subject worker under ORS

656.027. The Board, in reaching its conclusion that the exemption was applicable, reasoned:

> "As noted, we have found that the employer was not really engaged in farming as a business, but as a hobby, and that the claimant was not hired as a general farm laborer. That being the case, we find that the employer is not a subject non-complying employer, as did the Referee, due to the exception contained in ORS 656.027(2)."

Employer contends that this case is disposed of by a mechanical reading of the statutory language "in or about the private home." By his reading, the construction work was "about" the home for no other reason than that the building was in the vicinity of the home. We agree that the statutory language can be construed to include outbuildings. Remodelling done not "in" but "about" a private home might well include renovation of an outbuilding, such as an attached or detached garage housing the family car. Under the interpretation urged by employer, however, remodelling of a commercial machine shop that happened to be located adjacent to the private home of the machine shop owner could be considered to be in the vicinity of and, hence, "about" the private home, and the employment would thus fall within the exemption. That result is clearly wrong. A mechanical reading of the statute must therefore fail.

The dispositive concept in this statutory provision is the term "private," which must be distinguished from the concept of business or commercial premises. The basis of the householder exemption is the character of the home as a private place, not as business premises. Outbuildings are included in the exemption only because they are extensions of the home and, as such, share the same character as the home. In order for work done on outbuildings to fall within the exemption, the outbuildings must be of a private character rather than business or commercial.

The record shows that the building in question here was used to store tractors, tools, farm equipment and fruit intended for sale. It was evidently not used to house personal automobiles of the employer.[1] Certainly, the cold

[1] The employer's testimony suggests that the vehicles in the "garage" were farm tractors:

storage room that claimant was building was directly related to the fruit sales. We conclude that the construction claimant was engaged in was not work on an extension of the private home but rather on the premises of a farm operation.

The Board and employer have taken the position that the fruit selling operation was not "really" a business, because it was not the primary source of income of the employer. We rejected a similar contention in *Carlile v. Greeninger,* 35 Or App 52, 580 P2d 588, *rev den* 283 Or 235 (1978), where the issue was whether the employe was an independent contractor or servant. There, the primary business of the employer was rock crushing, but he was also trying to start a cordwood business. We said:

> "Defendant argues that cordwood cutting is not a regular part of his business, which was rock crushing, and that

"Q. * * * What building was it that the remodeling work was to be done in?

"A. It was the garage — existing garage — that's been there since 1943.

"Q. And what did you use that building for?

"A. Well, it's a shop and garage and cars.

"Q. Did you park your vehicles in it?

"A. Tractors.

"Q. And when you say shop —

"A. One part of it.

"Q. Did you have mechanical parts — excuse me — mechanical tools and things like that in the building?

"A. Yes.

"* * * * *

"Q. Do you keep all of your farm equipment and tractors in this garage?

"A. Yes.

"Q. Do you also do your work on them in there?

"A. Some of them, yes.

"Q. Do you keep the tools that you work for picking the fruit in this building?

"A. Yes.

"Q. Do you keep or store the fruit in any other location, besides the cold storage rooms in this building?

"A. No."

> the claimant's job was merely temporary with no prospect for continued employment. Defendant is essentially arguing that under the 'relative nature of the work' test put forth in *Woody v. Waibel,* 276 Or 189, 554 P2d 492 (1976), claimant does not qualify as an employe. [Footnote omitted.]
>
> "While it may be that woodcutting was not defendant's primary business, it was a business of his, and the falling and bucking of trees was an essential part of that enterprise. Further, there was a prospect of continued employment although it was contingent upon defendant's ability to acquire more timber." 35 Or App at 54-55.

While selling fruit grown on his small farm may not have been the employer's primary business, we conclude, as in *Carlile,* that it was nonetheless a business or commercial activity.

Similarly, we reject the argument that a business effort must show a profit in order to constitute a business. As stated by Larson:

> "On one point a fair degree of unanimity seems to have emerged. In the absence of a 'pecuniary-gain' requirement, the concept of trade or business does not necessary [sic] embrace the element of profit-seeking. It is true that the word 'profit' turns up here and there in general definitions of 'business' as distinguished from nonbusiness activities, but when the showdown comes, the court may explain that this was not really an essential part of the definition. For example, although Washington had held that the Red Cross was not covered because it was not in business for profit, it managed to hold later that a cafeteria run on a nonprofit basis by a corporative Naval Supply Depot was indeed a business.
>
> "This is a sound result. The test is not whether the employer is in business for profit, but whether he is in business at all. If he supplies a product or service, it is immaterial what he does with his profits, or whether he expects or gets any profits at all." I Larson, Workers' Compensation Law, § 50.44(9) (1980). (Footnotes omitted.)

We concur with this view. The record here indicates that the employer's fruit selling business was sometimes profitable, sometimes not. Workers' compensation coverage does not depend on the profit and loss statements of the employer.

The Supreme Court has held that statutes governing workers' compensation are to be interpreted to effectuate the purposes of the law. *Woody v. Waibel,* 276 Or 189, 197, 554 P2d 492 (1976). In *Woody,* the two chief purposes of workers' compensation law were recognized to be to further a social bargain (giving up the right to litigation for that of limited compensation) and as social insurance (allocation of financial risk to the ultimate consumer). The court quoted from a law review article explaining the social insurance purpose:

" 'The second principal social policy purpose was the social insurance form through which workmen's compensation was to operate. [Note omitted.] This would be its risk distribution aspect. The fact that modern industrial life will inevitably generate work-related injuries and possibly death is one of the major premises underlying workmen's compensation. * * * Therefore, the cost of these injuries and fatalities is to be distributed throughout society and viewed as a cost of doing business.' Note, *Employeer or Independent Contractor: The Need For a Reassessment of the Standard Used Under California's Workmen's Compensation,* 10 U San Fran L Rev 133, 136-37 (1975)." 276 Or at 194 n 6.

Larson directly relates the purpose of the householder exemption to the social insurance purpose of workers' compensation law:

"It has always been assumed, rightly or wrongly, that the cost of compensation protection did not become a burden upon the employer directly, since he was expected to pass the cost along to the consumer in the price of the product. There are those who argue that this does not go to the essence of the compensation idea, and perhaps does not really work out at all; but the fact remains that for decades the compensation principle has been made acceptable to employers (and, to some extent, also to skeptical courts) on the argument that the cost could be passed along through the medium of insurance whose premiums are reflected in the cost accounts on which the price is based. Whether or not Lloyd George ever really said that 'the cost of the product should bear the blood of the working man,' it was in the setting provided by this idea that the principle became established of the business employer's unilateral noncontributory liability without fault toward anyone who might retroactively be determined by a court to have a claim upon him for compensation.

"When a similar liability is imposed upon the householder, however, who produces and sells no goods or services that can bear the cost of compensation insurance, the law has gone one step further and said that any employer, solely because he stands in the employment relation to an employee, is liable without fault for the latter's injuries and must assume and absorb the entire ultimate cost himself.

"* * * * *

"* * * [S]imply to impose workmen's compensation liability on householders, whether by judicial decision or by statutory extension, would mean, first, that the employer would bear all the cost of protection in this category of wage-loss, and, second, that he could never be quite sure in advance whether he needed compensation insurance and what his potential future liability might be. No closer questions can be found in the entire shadowy realm of employee status than the very questions that would face the householder many times every year: the status of directly hired window washers, repairmen, snow shovelers, grass mowers, baby-sitters, and all the army of artisans whose visits are a normal and frequent incident in the life of a house owner. No one would dare to let a handyman

climb to his precarious perch on a stepladder and remove a storm window without first taking out compensation insurance for the day." I Larson, Workers' Compensation Law, § 50.25 (1980).

In this case, we draw the line between subject and nonsubject worker status, not on the basis of the physical proximity of the worker's employment to the private home of the employer, but rather in light of the fundamental purposes of workers' compensation law. In the context of this case, the employer was a producer, rather than a consumer like the ordinary householder. The fruit selling operation is within the stream of commerce, whether or not employer was always able to make the business a financial success. Claimant was not engaged in construction on an extension of the private home, but rather on the premises of and in connection with a business. Hence, the remodelling was not "about the private home" within the meaning of ORS 656.027(2), and claimant was a subject worker.[2]

[2] In *Anfilofieff v. SAIF*, 52 Or App 127, 132, 627 P2d 1274 (1981), we interpreted the phrase "employed to do * * * work" in the householder exemption, ORS 656.027(2), to signify the overall nature of the employe's duties rather than the specific task. We held that repair of a bath house on the premises of the employer's private residence was work incidental to the overall nature of the claimant's employment as a carpenter on a housing project and, hence, that the claimant was not *employed* to repair or remodel the bath house. That case is inapplicable to this one, for claimant here had no other regular employment relationship with the employer.

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 Ray Futrell, Claimant.

FUTRELL,
Petitioner,
v.
UNITED AIRLINES et al,
Respondents.

(WCB Nos. 80-02723, and 80-02724, CA A23442)

Judicial Review from Workers' Compensation Board.

Argued and submitted June 10, 1982.

Robert K. Udziela, Portland, argued the cause for appellant. With him on the brief was Pozzi, Wilson, Atchison, O'Leary & Conboy, Portland.

James Emerson, Portland, argued the cause for respondents. With him on the brief was Tooze, Kerr, Marshall & Shenker, Portland.

Before Richardson, Presiding Judge, and Thornton and Van Hoomissen, Judges.

THORNTON, J.

Reversed; referee's order reinstated.

THORNTON, J.

This is an appeal by claimant from an order of the Workers' Compensation Board that modified the order of the referee by reducing claimant's award for unscheduled permanent partial disability from 60 percent to 30 percent.

Claimant assigns as error the Board's action in reducing the referee's award. He argues, *inter alia*, that (1) regulations used by the Board (OAR 436-65-600, *et seq*) came into effect on April 1, 1980, as Workers' Compensation Department Administrative Order 4-1980 and are not applicable to claimant's injury of September 19, 1976; and (2) even if the court finds that the Board was entitled to consider the regulations in evaluating claimant's disability, it is impossible to determine if the regulations were correctly applied to claimant. The challenged regulations are apparently referred to generally as the "green book" rules. *See Fraijo v. Fred N. Bay News Co.*, 59 Or App 260, ___ P2d ___ (1982).

Unscheduled permanent partial disability is assessed on the basis of loss of earning capacity. *Surratt v. Gunderson Bros.*, 259 Or 65, 485 P2d 410 (1971). As to claimant's first point, we conclude that ORS 656.202(2)[1] does not preclude the Board from applying the 1980

guidelines to evaluate a 1976 injury. Although ORS 656.202(2) fixes the date of the injury as the time when the right to compensation is determined, we see no legal obstacle to using 1980 guidelines in evaluating an earlier injury. Use of the guidelines contained in OAR 436-65-600 *et seq* does not "impair existing rights, create new obligations or impose additional duties with respect to past transactions." *Dorenco v. Benj. Franklin Fed. Sav. and Loan,* 281 Or 533, 539 n 7, 577 P2d 477, *cert den* 429 US 1051 (1978).

As to claimant's second point, we conclude that there is merit in his objection to the Board's order. On *de novo* review we conclude that the Board's use of a figure of

[1] 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."

"minus 25" for "available work" is contrary to the evidence. OAR 436-65-600(3)(e) assigns that value in cases where there is an "immediate and continuing demand for the worker's services." It reduces the extent of a claimant's permanent partial disability.

From a realistic view, claimant could hardly be classed as a worker who is faced with "continuing demand" for his services. He can no longer perform services as an airplane mechanic. His former employer has refused to rehire him even for light duty. He has tried and has been unable to find employment elsewhere. His temporary operation of a small bookstore does not demonstrate, contrary to the Board's finding, an ability to work in the management or sales departments of the airline industry. There was no evidence presented that would indicate that claimant either had training for or adaptability to that work. On the record it does not appear that the labor market finding should have been a minus 25. OAR 436-65-608(3)(a). We need not determine the correct finding.

As we indicated in *Fraijo v. Fred N. Bay News Co., supra,* 59 Or App at 260 (slip opinion at 10), we will make use of the "green book" rules "only when the record discloses the manner in which the Board used them, and then only to the extent their intrinsic persuasiveness assists us in the performance of our independent assessment function." Given the Board's erroneous labor market finding, we will not use the value here.[2] On *de novo* review we conclude that the referee's award should be reinstated, namely, that claimant's award for unscheduled permanent partial disability should be increased from 30 percent to 60 percent.

Reversed; referee's order reinstated.

[2] *Fraijo,* is not to be taken as suggesting that the rules, even if properly applied by their terms, are binding on our *de novo* review.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Clara M. Peoples, Claimant.

STATE ACCIDENT INSURANCE FUND CORPORATION,
Appellant,
v.
PEOPLES,
Respondent.

(No. A8106-03862, CA A21965)

Appeal from Circuit Court, Multnomah County.

Charles S. Crookham, Judge.

Argued and submitted December 18, 1981.

Darrell E. Bewley, Appellate Counsel, State Accident Insurance Fund Corporation, Salem, argued the cause and filed the brief for appellant.

Dwight Ronald Gerber, Florence, argued the cause and filed the brief for respondent.

Before Buttler, Presiding Judge, and Warden and Warren, Judges.

BUTTLER, P. J.

Award of $200 attorney fees for submitting the dispute to the circuit court reversed; in all other respects order is affirmed.

BUTTLER, P. J.

The State Accident Insurance Fund Corporation (SAIF) appeals an order of the circuit court determining the amount of claimant's attorney fees, to be paid by SAIF, arising out of a dispute over the compensability and extent of her disability. The Workers' Compensation Board referee awarded $1,436.18 in attorney fees. On review, the Board reduced the fee for the hearing before the referee to $1,000 and awarded $500 for the appeal to the Board. Claimant's attorney was dissatisfied with those awards and, pursuant to ORS 656.388(2), *infra,* submitted the matter to the circuit court for its determination of the amount of such fees. The court awarded claimant's attorney $1,351.17 for the hearing before the referee, $750 for the Board proceeding and $200 as attorney fees for the proceeding before the circuit court.

Although neither party raises the question, we conclude that this court has jurisdiction on appeal, because the order is final, affects a substantial right and was entered in a special statutory proceeding with respect to which the authorizing law does not expressly prohibit an appeal. *Semble,* ORS 19.010(2)(e) and (4); ORCP 67B.

SAIF contends that the court erred in modifying the Board's awards without finding that the Board "abused its discretion" in fixing the amounts to be awarded and that the court was without statutory authority to award any amount of attorney fees incurred in submitting the fee dispute to the circuit court. We affirm the court's modification of the award as to the hearing before the referee and the Board proceeding, and reverse the award for the circuit court proceeding.

SAIF relies on *Bentley v. SAIF,* 38 Or App 473, 590 P2d 746 (1979), for the proposition that the circuit court may modify the Board's attorney fee award only if the Board "abused its discretion." In *Bentley,* we discussed our own scope of review of an attorney fee award made by the Board and decided that we would modify the Board's award only in the case of a "manifest abuse of discretion." 38 Or App at 481. *Bentley* did not involve the circuit court's authority when an attorney fee dispute is submitted to it under ORS 656.388(2), which provides:

> "(2) If an attorney and the referee or board cannot agree upon the amount of the fee, each forthwith shall submit a written statement of the services rendered to the presiding judge of the circuit court in the county in which the claimant resides. The judge shall, in a summary manner, without the payment of filing, trial or court fees, determine the amount of such fee. This controversy shall be given precedence over other proceedings."

Under the statute, the court does not sit as a reviewing court, but as an arbiter required to make an independent determination of the proper fee amount. The Board's award is no more binding on the circuit court than is the amount suggested by claimant's attorney or by the insurer. The circuit court is not limited to a review for abuse of discretion.

We have jurisdiction, but we conclude that the legislature intended that the circuit court's determination of the amount of fees, if supported by any evidence in the record, be final. Here, claimant's attorney submitted a statement of time expended that supports the circuit court's order determining the fees with respect to both the hearing before the referee and the Board review. We affirm that part of the court's order.

However, we find no authority for the circuit court's award of an attorney fee incurred in submitting the dispute to the circuit court. Attorney fees may only be awarded in workers' compensation cases if they are au-

thorized by statute. *Brown v. EBI Companies,* 289 Or 905, 618 P3d 959 (1980); *Korter v. EBI Companies, Inc.,* 46 Or App 43, 610 P2d 312 (1980), 51 Or App 206, 625 P2d 667 (1981). ORS 356.382 and 656.386 are the only statutes authorizing such awards. ORS 365.382 authorizes, under certain conditions,[1] an award of attorney fees at the hearing before the referee, on review by the Board and on "court appeal." ORS 656.386 authorizes attorney fees at all three stages if the claimant prevails on appeal to the Court of Appeals. No statute authorizes an award of attorney fees incurred in submitting a fee dispute to the circuit court.

[1] SAIF does not dispute the Board's conclusion that the statutory conditions were met for an attorney fee award at the hearing and Board review stages of this proceeding.

Even the provisions authorizing fees at the "court" stage provide for an award only on "appeal" to the court. As we observed earlier, submission of the fee dispute to the circuit court is not an "appeal" of the referee's or the Board's award. It is a summary proceeding in which the court "determines" the amount of the fee; the court does not sit as a reviewing court. Because no statute authorizes an attorney fee award for a fee dispute submitted to circuit court under ORS 356.388(2), the award of $200 was error.

The part of the order awarding $200 attorney fees for submitting the dispute to the circuit court is reversed; in all other respects it is affirmed.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Jerry J. Reust, Claimant,

REUST,
Petitioner,
v.
SAIF CORPORATION,
Respondent.

(WCB No. 80-00038, CA A24193)

Judicial Review from Workers' Compensation Board.

Argued and submitted July 16, 1982.

Dave Kryger, Albany, argued the cause for petitioner. With him on the brief were Robert W. Muir, and Emmons, Kyle, Kropp & Kryger, P.C., Albany.

Darrell E. Bewley, Appellate Counsel, State Accident Insurance Fund Corporation, Salem, argued the cause and filed the brief for respondent.

Before Richardson, Presiding Judge, and Thornton and Van Hoomissen, Judges.

THORNTON, J.

Reversed; referee's order reinstated.

THORNTON, J.

This is a case where the order of the Workers' Compensation Board reversing the referee is defective in that it does not appear that the Board, in arriving at claimant's unscheduled permanent partial disability, gave sufficient consideration to claimant's loss of earning capacity. The Board reduced the hearings referee's permanent partial disability award from 65 percent to 35 percent for a back injury.

The preponderance of medical opinion, as well as claimant's own testimony, was that claimant is unable to return to any of his previous employments. He is no longer physically capable of doing custodian's work, carpentry work, painting, farm labor, cannery work or mill work, all of which he did before his industrial accident. The evidence shows that his rehabilitation training as a locksmith fell short of preparing him for employment in that occupation.

On *de novo* review we conclude that the referee's award should be reinstated.

Reversed; referee's order reinstated.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of William Townsend, Claimant.

TOWNSEND,
Petitioner - Cross-Respondent,
v.
ARGONAUT INSURANCE COMPANY et al,
Respondents - Cross-Petitioners.

(No. 79-00826, CA A23849)

Judicial Review from Workers' Compensation Board.

Argued and submitted July 8, 1982.

Michael Wasserman, Salem, argued the cause for petitioner - cross-respondent. With him on the briefs were Rolf Olson, and Olson, Hittle & Gardner, Salem.

Katherine H. O'Neil, Portland, argued the cause for respondents - Cross-petitioners. With her on the briefs was Schwabe, Williamson, Wyatt, Moore & Roberts, Portland.

Before Richardson, Presiding Judge, and Thornton and Van Hoomissen, Judges.

RICHARDSON, P. J.

Affirmed.

RICHARDSON, P. J.

Claimant appeals an order of the Workers' Compensation Board approving denial of responsibility for claimant's ankylosing spondylitis. Employer and its compensation carrier, Argonaut Insurance Company (Argonaut), cross-appeal, seeking reversal of an increase in the award by determination order for unscheduled permanent partial disability resulting from a 1972 compensable back injury. We affirm.

Claimant sustained a compensable injury to his back in March, 1972, when he was struck on his lower back by a pole. He was diagnosed as suffering a contusion of the sacrum and lumbar area, chronic lumbosacral strain and a compression fracture of a vertebra. He had had no problems with his back before the injury. In July, 1977, after his claim was reopened, he was examined by Dr. Edward Rosenbaum, a rheumatologist, who diagnosed ankylosing spondylitis, a form of rheumatoid arthritis of the spine. The relation of the spondylitis to the 1972 injury is at issue in this case.

Citing Dr. Rosenbaum's diagnosis, Argonaut denied responsibility for "further medical or compensation benefits * * * in connection with this claim." The denial was interpreted as a total denial and held unreasonable by a referee in December, 1977. The issue of the relationship between claimant's original injury and the ankylosing spondylitis was explicitly held open.

In September, 1977, claimant was hospitalized for severe back pain. A few weeks after the hospitalization, another rheumatologist, Dr. Moore reported to claimant's attorney:

> "* * * I would have to favor trauma occurring during that accident as the major cause of the patient's back pain. I am sure that the ankylosing spondylitis has been a contributing factor and I am sure it accounts for some of the patient's stiffness and for some of the chronicity of his pain syndrome. On the other hand, I suspect strongly that the patient would never have had incapacitating back pain had he not had the trauma in 1972. * * *"

He also noted that it is not uncommon for ankylosing spondylitis to be asymptomatic before a back trauma. The following month he wrote a "clarification," stating that claimant's ankylosing spondylitis "flared as a direct result of the trauma he incurred in 1972" and that he "would therefore attribute whatever pain he has at the present time resulting from the spondylitis to be a consequence of that trauma."

By stipulation and order dated September 18, 1978, claimant's claim was reopened as of September, 1977. In December, 1979, the parties entered into a stipulation that ordered Argonaut to comply with the previous stipulation and "continue to pay compensation until closure is authorized," as well as medical expenses.

In July, 1979, claimant was examined by Orthopaedic Consultants, who diagnosed ankylosing spondylitis and chronic low back strain and indicated that the spondylitis was unrelated to the 1972 injury. In July, 1980, Argonaut requested another opinion from Dr. Rosenbaum. On the basis of his July, 1977, examination and a review of subsequent medical reports, Dr. Rosenbaum said that claimant was suffering from ankylosing spondylitis that was unrelated to his injury. Argonaut issued a partial denial with respect to benefits for disability resulting from the spondylitis. A hearing was held, after which the referee approved the partial denial and made a permanent partial disability award of 75% unscheduled low back disability. The Board affirmed and adopted the referee's opinion and order. Claimant appeals the partial denial, and Argonaut cross-appeals with respect to the extent of disability.

Claimant contests Argonaut's right to issue a denial, as well as the denial's merits. Claimant argues that Argonaut waived its right to deny the compensability of his ankylosing spondylitis by failing to issue a denial within the statutory time period specified in ORS 656.262(6). That section provides:

> "Written notice of acceptance or denial of the claim shall be furnished to the claimant by the insurer * * * within 60 days after the employer has notice or knowledge of the claim. * * *"

However, the penalty for a late denial is not a waiver of the right to deny; the penalty is specified in ORS 656.262(9).[1] The Oregon Supreme Court, in *Norton v. Compensation Department,* 252 Or 75, 79, 448 P2d 382 (1968), stated:

> "* * * [I]n the absence of express legislative direction to ignore notice of denial made more than 60 days, we would not apply that sanction * * *."

Claimant also maintains that Argonaut has waived its right to deny compensability of his ankylosing spondylitis by paying benefits after the disease was diagnosed. The Oregon Supreme Court has recently stated that, under what is currently ORS 656.262(8),[2] an employer is not estopped to deny liability after paying compensation if the denial is based on a defense other than lack of notice. *Frasure v. Agripac,* 290 Or 99, 619 P2d 274 (1980). Claimant urges us to distinguish *Frasure* on the ground that the denial in that case was the result of a complete change in medical opinion as to whether the injury was new or an aggravation of an old one. However, we have applied *Frasure* without interpreting its holding to be so limited. *Saxton v. Lamb-Weston,* 49 Or App 887, 621 P2d 619 (1980), *rev den* 290 Or 727 (1981); *Babb v. SAIF,* 49 Or App 707, 619 P2d 1362 (1980). It does not make a difference whether we consider this case in terms of waiver or estoppel; the effect of applying either doctrine would be to subvert the purpose of the workers' compensation system by encouraging the withholding of benefits.

Relying on *Clinkenbeard v. SAIF,* 44 Or App 583, 605 P2d 1390 (1980), claimant also contends that Argonaut is foreclosed from denying the compensability of his ankylosing spondylitis because of the stipulations entered into in 1978 and 1979 after Argonaut knew the disease had

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[1] ORS 656.262(9) provides:

> "If the insurer * * * unreasonably delays acceptance or denial of a claim, the insurer * * * 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."

[2] ORS 656.262(8) provides:

> "Merely paying or providing compensation shall not be considered acceptance of a claim or an admission of liability, nor shall mere acceptance of such compensation be considered a waiver of the right to question the amount thereof."

been diagnosed. However, unlike the stipulations in this case, the stipulation at issue in *Clinkenbeard* explicitly mentioned compensation for specific subsequently diagnosed diseases. Neither of the stipulations here specifically refers to the condition of ankylosing spondylitis, but each refers only to payment of all compensation due until closure is authorized. We will not interpret the stipulations as admitting what they do not clearly state.

We turn to the issue of the compensability of claimant's ankylosing spondylitis. Claimant's disease was not *caused* by his injury. In order to establish its compensability, the burden is on claimant to prove by a preponderance of the evidence that: "(1) his work activity and conditions (2) caused a worsening of his underlying disease (3) resulting in an increase in his pain (4) to the extent that it produces disability or requires medical services." *Weller v. Union Carbide,* 288 Or 27, 35, 602 P2d 259 (1979). Claimant has not met his burden as to the second element of the *Weller* test, *i.e.,* that his 1972 back injury caused a worsening of his ankylosing spondylitis.

The primary support for claimant's position is in the reports and testimony of Dr. Moore, the rheumatologist to whom claimant was referred shortly after the initial diagnosis of ankylosing spondylitis. He treated claimant from September, 1977, until mid-1978. He saw claimant again in September, 1980. Dr. Moore testified:

> "* * * I don't believe he would be in the situation he is now had that accident not occurred. * * * [A]s I look back over the course of this illness, it is the major incident that I see that has caused him to have an ongoing disease activity at a much higher level than what he had before."

The record does not demonstrate an adequate basis for the doctor's conclusion. Examination of his reports and testimony reveals it to be based essentially on the following: (1) that claimant was asymptomatic before the injury and symptoms consistent with ankylosing spondylitis followed the injury; and (2) inflammatory arthritis as a general rule tends to "flare in the face of trauma." Neither basis is sufficient to persuade us that his conclusion is more likely correct than not.

Dr. Moore testified that, in his opinion, the trauma had aggravated the inflamation from ankylosing spondylitis, "producing the symptoms that have carried through to the present time." Indications of the ankylosing spondylitis were apparent in an x-ray report of August, 1973, in which "sclerosis of the iliac aspect of the left sacroiliac joint" was noted. A 1975 x-ray report noted progression since the 1973 x-ray, indicating the possibility of ankylosing spondylitis. However, Dr. Moore testified that sclerosis suggests that

ankylosing spondylitis would have been present for a year or more but "whether it had been for three, four years, whether it had been for a year is unclear." He provided no specific explanation other than temporal coincidence why inflammation due to ankylosing spondylitis was aggravated by the 1972 injury. Although he stressed the continuity of symptoms since the injury as a factor in his conclusion, he also stated:

> "* * * I would not be willing to make some kind of statement as to what extent he had ankylosing spondylitis to account for his symptoms and to what extent he had something else. * * *"

Dr. Moore was the only physician who concluded that claimant's 1972 injury had aggravated his disease. Other physicians who examined him, including Dr. Rosenbaum, who first diagnosed ankylosing spondylitis, and Dr. Poulson, who treated claimant from July, 1975, until sometime in the fall of 1977, were unable to make such a connection. Claimant has failed to meet his burden under *Weller* to establish a causal connection between the injury and worsening of the disease of ankylosing spondylitis.

On cross-appeal Argonaut contends that there is no basis for the referee's increase in the permanent partial disability award by the original determination order, because claimant's disability had not changed since the time of that determination. We disagree. The record shows that the referee adequately considered claimant's physical limitations, work experience and training in making his finding, and we concur in those findings.

Affirmed.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
Zelda M. Bahler, Claimant.

BAHLER,
Petitioner,
v.
MAIL-WELL ENVELOPE CO.,
Respondent.

(WCB 79-06095, CA A22838)

Judicial Review from Workers' Compensation Board.

Argued and submitted April 21, 1982.

Alan M. Scott, Portland, argued the cause for petitioner. With him on the brief were Gary M. Galton, and Galton, Popick & Scott, Portland.

David O. Horne, Beaverton, argued the cause and filed the brief for respondent.

Robert K. Udziela, and Pozzi, Wilson, Atchison, O'Leary & Conboy, Portland, filed a brief amicus curiae for Oregon Trial Lawyers Association.

Before Richardson, Presiding Judge, and Thornton and Van Hoomissen, Judges.

VAN HOOMISSEN, J.

Reversed and remanded to award reasonable attorney fees.

VAN HOOMISSEN, J.

Claimant appeals a portion of an order on reconsideration of the Workers' Compensation Board that failed to award attorney fees after she had prevailed on the issue of compensation in a carrier-initiated appeal.[1] The issue is whether claimant is entitled to an award of a carrier-paid attorney fee when, after a carrier-initiated review, the Board finds that compensation should not be reduced but that penalties awarded by the referee should be reduced.

Claimant worked for Mail-Well for 13 years. In February, 1979, she left its employment. On May 2, 1979, she filed a claim for occupational disease. Employers Insurance of Wausau paid the first installment of interim compensation on June 4, 1979, retroactive to May 3. It continued to pay benefits until July 11, 1979, when it denied compensability. Claimant requested a hearing. The referee ordered the claim accepted, awarded an $800 attorney fee pursuant to ORS 656.382(1),[2] and, pursuant to ORS 656.262(9),[3] assessed a 25 percent penalty for late payment of interim time loss benefits and for late denial of the claim.

Wausau requested review of the referee's order. The Board affirmed the referee on the issue of compensation; however, it eliminated the penalty award, finding

[1] Amicus contends that the Board exceeded its authority in this case in extending statutory time limits for the payment of compensation or denial of a claim and that, even if the Board has authority to extend those time limits by rule, it acted unlawfully, because it did not promulgate rules pursuant to ORS 656.726 and ORS 183.335. Petitioner did not seek judicial review on the basis of those contentions, and we conclude that their resolution is not necessary to a decision here. We therefore decline to address them.

[2] ORS 656.382(1) provides:

"If an insurer or self-insured employer refuses to pay compensation due under an order of a referee, board or court, or otherwise unreasonably resists the payment of compensation, the employer or insurer shall pay to the claimant or the attorney of the claimant a reasonable attorney's fee as provided in subsection (2) of this section. To the extent an employer has caused the insurer to be charged such fees, such employer may be charged with those fees."

[3] ORS 656.262(9) provides:

"If the insurer or self-insured employer unreasonably delays or unreasonably refuses to pay compensation, or unreasonably delays acceptance or denial of a claim, the insurer or self-insured 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."

that Wausau's conduct was not so unreasonable as to warrant a penalty. The Board did not award claimant an attorney fee for prevailing on the issue of compensation. Claimant moved for reconsideration, specifically requesting an attorney fee for prevailing before the Board on the issue of compensation.

In its order on reconsideration, the Board held:

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

ORS 656.382(2) provides:

> "If a request for hearing, request for review or court appeal is initiated by an employer or insurer, and the referee, board or court finds that the compensation awarded to a claimant should not be disallowed or reduced, the employer or insurer shall be required to pay to the claimant or the attorney of the claimant a reasonable attorney's fee in an amount set by the referee, board or the court for legal representation by an attorney for the claimant at the hearing, review or appeal."

The term "compensation," as used in ORS 656.382(4), excludes penalties. *Reed v. Del Chemical,* 26 Or App 733, 554 P2d 586, *rev den* 276 Or 387 (1976), *cert den* 429 US 1110 (1977). ORS 656.382(2) is triggered when, as here, the compensability of a claim is at issue. Where compensation is at issue and the reviewing body determines that the compensation awarded should not be disallowed or reduced, a carrier-paid reasonable attorney fee must be awarded

regardless of any decision by the reviewing body on other issues raised on review. *Mobley v. SAIF,* 58 Or App 394, 648 P2d 1357 (1982).

Reversed and remanded to award reasonable attorney fees.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
Ralph Castro, Claimant.

STATE ACCIDENT INSURANCE FUND
CORPORATION,
Petitioner,
v.
CASTRO,
Respondent.

(WCB No. 80-02536, CA A23020)

Judicial Review from Workers' Compensation Board.

Argued and submitted June 10, 1982.

Darrell E. Bewley, Appellate Counsel, State Accident Insurance Fund Corporation, Salem, argued the cause and filed the brief for petitioner.

Peter O. Hansen, Portland, argued the cause for respondent. On the brief was Rick W. Roll, Portland.

Before Richardson, Presiding Judge, and Thornton and Van Hoomissen, Judges.

VAN HOOMISSEN, J.

Reversed.

VAN HOOMISSEN, J.

The State Accident Insurance Fund (SAIF) appeals a decision of the Workers' Compensation Board that affirmed a referee's decision ordering SAIF to commence payment of compensation awarded by this court before our mandate issued.

A recitation of the procedural history of the claim is appropriate. SAIF denied the claim, contending that claimant had not suffered a compensable injury. Claimant requested a hearing. A referee agreed that the claim was not compensable. The Board affirmed. Claimant appealed to this court. We issued our opinion reversing the Board. 44 Or App 296, 605 P2d 1389 (1980). SAIF petitioned for Supreme Court review. We advised the parties that we would not issue our mandate until the Supreme Court completed its review. The Supreme Court accepted the case for review and thereafter remanded it to this court. 290 Or 353, 624 P2d 564 (1981). We then remanded the case to the Board with instructions to reconsider its order in light of the Supreme Court's opinion. 51 Or App 2, 624 P2d 642 (1981). On that remand, the Board held that claimant had not suffered a compensable occupational disease.

Following our original opinion, and while the Supreme Court had the case under review, claimant requested a hearing, contending that as a result of our original opinion SAIF was obliged to begin paying compensation. SAIF objected to any hearing, contending that the referee lacked jurisdiction until our mandate issued. The referee overruled SAIF's objection and ordered SAIF to begin paying compensation. The Board affirmed. SAIF has appealed.

The first question is: When does our decision on judicial review become effective so that a decision holding that claimant is entitled to compensation must be complied with by the carrier? No Oregon decision has considered this issue. The general rule is that the date of the *mandate*, not the date of issuance of the decision, is the effective date of an appellate court's decision, that the *mandate* is the order and that the court's opinion merely gives the reason supporting the order. *See Wolfe Investments v. Shroyer,* 249 Or 23, 436 P2d 554 (1968).

In *In Re Brown,* 6 Wash 2d 215, 235-37, 101 P2d 1003, 107 P2d 1104 (1940), the court said:

> "'* * * The opinion, on the other hand, is the property of the judges, and subject to their revision, correction and modification in any particular deemed advisable until, with the approbation of the writer, it is transcribed in the records, after which it ceases to be the subject of change. It then becomes like a judgment record, and is beyond the interference of the judges, except through regular proceedings before the court by petition.'
>
> "* * * The filing of an opinion of this court is merely one step in the orderly process of the court leading up to the court's judgment. The opinion or decision may or may not result in a judgment of this court in accordance therewith. The cause is still pending at large before this court until the entry of a judgment, and a judgment other than that provided for in the Departmental opinion as filed may well be, and often has been, entered."

In *C. & O. R. Co. v. Kelly's Admx.,* 161 Ky 660, 662, 171 SW 182 (1914), the court said:

> "* * * [A]nd the judgments of this court never become final until the mandate is issued. The mandate from this court is the order that gives authoritative notice to the parties and the trial court that the judgment appealed from has been reversed or affirmed, as the case may be. In other words, the mandate is the judgment of this court, the opinion being merely an expression of the views of the court that are made effective by the mandate."

See also Begley v. Vogler, 612 SW2d 339, 341 (Ky 1981); *Dalton v. Johnson,* 341 SW2d 596, 597 (Mo 1960).

Claimant contends that refusal to give effect to our decision as of the date of the opinion violates ORS 656.313, which provides in pertinent part:

"(1) Filing by an employer or the insurer of a request for review or court appeal shall not stay payment of compensation to a claimant."

He argues that the statute applies directly to a petition for Supreme Court review of a Court of Appeals decision that reverses the Board's decision and awards a claimant greater compensation. We find no authority for this conclusion in the Workers' Compensation Act. Although specific provisions exist for appeals to the Board and to this court, *see*

ORS 656.295 and 656.298, the Act does not expressly provide for review by the Supreme Court. We conclude that the "request for [Board] review or court appeal" referred to in ORS 656.313 applies to the Board and Court of Appeals review expressly authorized in the act. Further militating against claimant's argument is the fact that no mandate issues from the Court of Appeals on a case pending for review by the Supreme Court until the Supreme Court finally has acted on the case and the time for petition for rehearing in that court has expired. If no mandate has issued, no enforceable order to pay compensation exists.[1]

A claimant may not enforce the result reached in an opinion until a mandate has issued. Lower tribunals have no power to act on a decision of an appellate court until the mandate is received, or at least until it is issued; action taken by a lower court before the receipt or issuance of a mandate is void.

Because no mandate had been issued by this court when claimant brought this case to hearing, the referee had no power to order SAIF to pay compensation. SAIF's motion to dismiss should have been allowed.

Reversed.

[1] This analysis is limited to the fact situation here — where we reverse the Board and decide that claimant is entitled to compensation or to increased compensation. If the Board had ordered new or increased compensation, appeal to the Supreme Court from our decision affirming the Board would not stay payment because the Board's order, although not final, is effective and enforceable upon filing. ORS 656.313.

When this case arose a mandate was used to make an appellate decision effective. The present practice is provided in ORS 19.190, as amended in 1981, and ORAP 11.03.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Ralph L. Baer, Claimant.

STATE ACCIDENT INSURANCE FUND CORPORATION,
Petitioner,
v.
BAER et al,
Respondents.

(No. 80-2528, CA A23546)

Judicial Review from Workers' Compensation Board.

Argued and submitted July 28, 1982.

Darrell E. Bewley, State Accident Insurance Fund Corporation, Salem, argued the cause and filed the brief for petitioner.

James P. O'Neil, Myrtle Creek, argued the cause and filed the brief for respondent Ralph L. Baer.

Michael G. Bostwick, Portland, argued the cause for respondent EBI Companies. On the brief was Lindsay, Hart, Neil & Weigler, Portland.

Before Gillette, Presiding Judge, and Warden and Young, Judges.

YOUNG, J.

Affirmed.

YOUNG, J.

This is a workers' compensation claim under the occupational disease law. ORS 656.802 to 656.824. The issue is the allocation of responsibility between two successive carriers of the same employer. The referee and the Workers' Compensation Board found SAIF, the initial carrier, liable. We review *de novo,* ORS 656.298(6), and affirm.

Claimant contracted a compensable occupational disease, allergic contact dermatitis, from his exposure to a chemical (potassium dichromate) used in his work as a printer, his occupation for 26 years. Claimant developed the allergy between October, 1976, and January, 1977. In January, 1977, he began treatment with Dr. Weiss, a dermatologist. His condition improved by January 28, 1977. When the allergy developed, the employer's carrier was SAIF. In February, 1977, SAIF accepted the claim as a nondisabling compensable occupational disease, and medical benefits were paid.

Claimant continued to work from January, 1977, to July, 1979, without changes in his duties or workload. He continued to have manifestations of the disease, specif-

ically hand eczema, even though he had followed Dr. Weiss' advice, wore surgical gloves for a time and used the prescribed medication. The condition gradually worsened until July 9, 1979, when claimant suffered significant eruptions of dermatitis. Acting on Dr. Weiss' advice, he did not work for three weeks. Until then, he had not lost any time from work because of the condition. Claimant returned to work on July 30, 1979, and immediately developed new areas of skin eruptions on his hands and fingers, which resulted in tenderness and irritation. He then stopped working and has not worked as a printer since that time.

Between January, 1977, and July, 1979, the employer terminated its workers' compensation coverage with SAIF and obtained coverage from EBI Companies (EBI).[1] In July, 1979, claimant filed a new claim for the occupational disease, and his employer sent the claim to EBI. EBI

[1] When claimant developed the allergy (between October, 1976 and January, 1977), SAIF was on the risk, and in July, 1979, EBI was the insurer.

accepted the claim and paid benefits until March, 1980, when it issued a notice of denial.[2] The referee upheld the denial and found SAIF liable.

SAIF, in defense, argues that the last injurious exposure rule applies, citing *Bracke v. Baza'r,* 293 or 239, 646 P2d 1330 (1982), and contends that "the date of disability controls which injurious exposure is liable for the disability."[3] SAIF argues that claimant became disabled and suffered injurious exposure while EBI was on the risk.[4] In *Bracke,* the court stated:

> "Liability for the disability caused by the underlying disease is fixed when the disability arises. A recurrence of symptoms which does not affect the * * * underlying disease does not shift liability for the disabling disease to a subsequent employer." 293 Or at 250.

See also Inkley v. Forest Fiber Products Co., 288 Or 337, 605 P2d 1175 (1980); *Mathis v. SAIF,* 10 Or App 139, 144-45, 499 P2d 1331 (1972). On the other hand, EBI maintains that the last injurious exposure rule is inapplicable, because the July, 1979, occupational disease claim was based on the recurrence of symptoms caused by claimant's unchanged compensable allergy and was not the result of a new injurious exposure to chemicals.

The medical evidence consists of Dr. Weiss' report and his deposition. He testified that contact dermatitis, once acquired, is a condition that remains constant and unchanged, although its symptoms (skin eruptions) may come and go depending upon the extent of the exposure to the offending substance.[5] In sum, once allergic — always

[2] On the basis of an arrangement with claimant, EBI continued to pay benefits after the notice of denial.

[3] The last injurious exposure rule has been applied in occupational disease cases. *See, e.g., Inkley v. Forest Fiber Products Co.,* 288 Or 337, 605 P2d 1175 (1980) (hearing loss), and *Mathis v. SAIF,* 10 Or App 139, 499 P2d 1331 (1972) (asbestosis).

[4] *Inkley v. Forest Fiber Products Co., supra,* held that the last injurious exposure rule applied to successive insurers of the same employer.

[5] Dr. Weiss explained that there must be exposure to an offending substance over a period of time before the allergy will develop. He made a comparison with poison oak, a type of dermatitis:

"Certain individuals can work in the woods and be exposed to poison oak for years and years and never have any problems, and then all of a sudden, for

allergic.[6] In *Bracke v. Baza'r, supra,* the claimant developed "meat wrappers' asthma." It was established that she became sensitized to fumes while employed by Baza'r between May, 1974, and September, 1975. She sought hospital emergency room treatment in January, 1977, but her condition of sensitization to the fumes was not recognized. In May, 1977, while employed by Thriftway, her symptoms became more severe and she ceased work. The court 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 employment environment with airborne lung irritants." 293 Or at 243.

The court found Baza'r to be liable and stated:

> "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." 293 Or at 243-44.

We are unable to distinguish *Bracke* from the present case. There is no uncertainty as to the date of onset of the compensable disease. SAIF recognized as much when it accepted claimant's original claim. Nor is there any evidence of an exacerbation of the disease while EBI was on the risk. The evidence is that exposure to the chemicals caused a recurrence of the symptoms. As in *Bracke,* claimant proved that he contacted the allergy and suffered

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reasons not clear to us, they become allergic and develop an allergy to it. Subsequent exposures, though, they always break out * * *."

Compare Dr. Weiss' description of claimant's allergy with the claimant's "sensitization" to fumes in *Bracke v. Baza'r, supra,* 293 Or at 242.

[6] To explain further the doctor's testimony, we borrow from the opinion of the referee.

> "Dr. Weiss characterized the eruption, also described as hand eczema, in its various stages as symptoms of the allergic contact dermatitis. Although SAIF attempted to establish * * * that the hand eczema * * * and other manifestations of the dermatitis, and the decree thereof, were secondary disease processes also constituting a compensable condition, Dr. Weiss' testimony does not support that position. Dr. Weiss * * * testifies, that those manifestations are *symptoms.* There is no other medical evidence."

"disability" when he became allergic to the chemical. The defense of the last injurious exposure rule does not apply. Claimant's employment while EBI was on the risk did not contribute to the course of, or aggravate or worsen the underlying allergy.

Affirmed.[7]

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[7] Claimant assigns error to the Board's reduction of the attorney fees awarded by the referee. We are unable to address this issue, because there is no cross-

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Gordon Turley, Claimant.

TURLEY,
Petitioner,
v.
SAIF CORPORATION,
Respondent.

(No. 80-11183, CA A24358)

Judicial Review from Workers' Compensation Board.

Argued and submitted September 22, 1982.

Brian L. Welch, Portland, argued the cause for petitioner. On the brief were Samuel J. Imperati, and Welch, Bruun and Green, Portland.

Darrell E. Bewley, Appellate Counsel, SAIF Corporation, Salem, argued the cause and filed the brief for respondent.

Before Buttler, Presiding Judge, and Warren and Rossman, Judges.

PER CURIAM.

Reversed; referee's order reinstated.

PER CURIAM.

The compensability of claimant's foot problems was established in *SAIF v. Turley,* 52 Or App 839, 632 P2d 808 (1981). The Board awarded no permanent disability because it found no compensable impairment. On *de novo* review, we find that claimant has suffered a serious loss of function in his feet in that he is permanently precluded from any activity involving prolonged standing or walking. The referee's award of 50 percent scheduled disability for each foot is reinstated.

Reversed; referee's order reinstated.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Felipe Aquillon, Claimant.

AQUILLON,
Petitioner,
v.
CNA INSURANCE et al,
Respondents.

(No. 80-06118, CA A24050)

Judicial Review from Workers' Compensation Board.

Argued and submitted September 22, 1982.

John D. Ryan, Portland, argued the cause for petitioner. With him on the brief was Richard G. Helzer, Portland.

Emil R. Berg, Portland, argued the cause for respondents. With him on the brief was Wolf, Griffith, Bittner, Abbott & Roberts, Portland.

Before Buttler, Presiding Judge, and Warren and Rossman, Judges.

BUTTLER, P. J.

Reversed.

BUTTLER, P. J.

Claimant appeals from a determination by the Workers' Compensation Board (Board) affirming the referee's order and upholding the carrier's denial of compensability for a portion of an on-the-job knee injury that the carrier claims was solely the result of tuberculosis.

Claimant sustained the knee injury in December, 1978, when a metal door fell against his right knee, causing a tear of the medial meniscus. He underwent an arthroscopic meniscectomy in May, 1979, performed by Dr. Manley, who noted that the synovial fluid in the knee joint was cloudy. After the surgery, claimant continued to have problems with his knee. In October, 1979, Dr. Manley consulted a specialist in infectious diseases, who suggested the possibility of tuberculosis. In December, 1979, the presence of tuberculosis in the knee joint was confirmed by Dr. Manley. Another arthroscopy revealed "gross problems and changes within the knee * * * secondary to tuberculosis which [was felt to be] the reason for [claimant's] slow postoperative progress following the meniscectomy."

Dr. Hutchinson examined claimant in November, 1979. His initial opinion that the *surgery* had caused the tuberculosis to appear was revised at the hearing when he

learned that the synovial fluid was cloudy at the time of the surgery. He then concluded that the *injury* had "a high probability of aggravating or activating" tubercular infection. He stated that claimant most likely had contracted tuberculosis in Mexico before working for his present employer and that it was an "indolent" (slowly growing) infection until the time of the injury. He stated that he knew of no medical studies documenting that tuberculosis itself can be accelerated or aggravated by the injury.

Dr. Gilbert, who had been consulted earlier, saw claimant in January, 1980. His first report stated that it is well documented that trauma can reactivate an indolent tubercular infection, and noted that, absent the injury, the tuberculosis here might not have been detected for a considerable time. In response to a subsequent inquiry from the insurer, he stated by letter in March, 1980, that the industrial injury in this case had not accelerated the tubercular infection and that it was "highly likely" that the right

knee tuberculosis would have manifested itself even if the injury had never occurred.

In May, 1980, the carrier issued the denial letter that is the subject of this appeal. In relevant part, the denial states:

> "You submitted a claim to us for a work injury to your right knee that occurred on 12/18/78. That claim was accepted and benefits were paid to you as a result of this injury and subsequent surgery that was carried out.
>
> "Thereafter, it was discovered that you were suffering from tuberculosis arthritis in the right knee. We have investigated this condition and found that the tuberculosis condition in no way relates to your occupational injury of 12/18/78. Furthermore, in all medical probability, the condition as it relates to the original injury would most likely have stabilized three months after the first surgical procedure as a result of the industrial injury.
>
> "Therefore, we must advise you that we are denying any responsibility to you under Workers' Compensation as a result of the tuberculosis arthritis of your right knee and any tuberculosis condition from which you are now suffering or may suffer at any time in the future. This denial includes, but is not limited to, all medical treatment and any subsequent disability that results from any tuberculosis condition.
>
> "This denial does not affect your original work injury and any benefits that you might be entitled to as a result of that original injury. *Furthermore, it is our position that, since in all medical probability your condition would have stabilized three months after your first surgery, you are not due any further benefits under Workers' Compensation as a result of your work injury of 12/18/78 and that all ongoing medical treatment, and disability, be it temporary or permanent in nature, is a result of your tuberculosis condition and in no way relates to your occupational injury of 12/18/78.* This denial is not to be construed as a waiver of other possible defenses." (Emphasis supplied.)

The denial was upheld by the referee based on the testimony of Dr. Gilbert at the hearing, when he explained his view that the tuberculosis itself was not affected by the injury. But Dr. Gilbert also explained that the synovium (membrane lining the knee joint), which was already

weakened by the tuberculosis, was further traumatized by the injury. He testified:

> "* * * [Tuberculosis is] a disease process already in the synovium tissue, and then we get the trauma on top of it, and hemorrhage. We get a lot of blood or lot of white cells or debris in the joint space, and that aggravates the already existing tuberculus infection, and I think I can support strongly that the TB was already there.
>
> "It's not that we are aggravating the TB, but simply taking tissue already damaged with TB and put[ting] another process on top of it, which in this case happened to be trauma. The two, together, are aggravation. * * *
>
> "* * * * *
>
> "I know of no medical literature itself that shows the TB itself is made to progress faster, is more severe, or is aggravated in any way, but the synovitis is aggravated. In other words, you've got the cells already diseased by TB, and then they are traumatized, and you have additional injury, but it's not the TB that's progressing. Now, you have two disease processes going on in the synovium.
>
> "* * * * *
>
> "The synovium is diseased, and now injured, not only by the TB, but by the trauma * * *. The process is more aggressive. The process is a combination of the two things — the TB and the trauma.
>
> "* * * * *
>
> "The two injuries, combined, aggravated the disease in the synovium. * * *"

In this case, claimant challenges what purports to be a partial denial of his claim insofar as it relates to the tuberculosis, viewed as a separate condition, as well as a denial of further responsibility for benefits as a result of the accepted industrial injury claim. In the abstract, that kind of denial might not be unreasonable where there is a noncompensable, separate condition and where the claimant has fully recovered from his compensable injury. Here, the preponderance of the medical evidence is that the tuberculosis itself was not worsened by the industrial injury and hence is not itself compensable. The problem is that it is difficult, if not impossible, on this record to separate the effects of the tuberculosis from those of the traumatic injury. Perhaps for that reason, the denial went

farther than simply denying responsibility for the condition of tuberculosis. The denial letter stated that all compensable effects of the injury had ceased after three months, and thus implied that claimant's continuing disability was the result of the tuberculosis. The denial terminated all benefits for claimant's current condition, including payment for medical services.

There is, however, no medical evidence in the record supporting the position that all effects of the industrial injury had ceased. No doctor states that claimant's current condition stems solely from the tuberculosis. To the contrary, the undisputed medical evidence is that the two conditions are inextricably intertwined, in that the traumatic injury was superimposed on the tubercular infection, and the presence of the tubercular infection prolonged the effects of the traumatic injury to the synovium.

It is well established that an accidental injury need not be the sole, or even the principal, cause of a disabling condition if it contributed to the disability, despite other preexisting conditions, for the employer takes the worker as he finds him. *Patitucci v. Boise Cascade Corp.*, 8 Or App 503, 507, 495 P2d 36 (1972). Here, the evidence shows that the knee injury contributed to claimant's current problem of a diseased synovium. To sustain the carrier's denial, it would be necessary to find that the claimant's current knee problem is solely attributable to the tuberculosis. Because no evidence supports that position, the employer's denial was improper.

Reversed.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Claude Lyon, Claimant.

LYON,
Petitioner,
v.
SAIF CORPORATION,
Respondent.

(No. 80-03328, CA A23806)

Judicial Review from Workers' Compensation Board.

Argued and submitted September 10, 1982.

Peter W. McSwain, Eugene, argued the cause for petitioner. On the brief were Evohl F. Malagon, and Malagon & Velure, Eugene.

Darrell Bewley, Appellate Counsel, Salem, argued the cause and filed the brief for respondent.

Before Gillette, Presiding Judge, and Warden and Young, Judges.

GILLETTE, P. J.

Order modified to award 50 percent permanent partial disability.

GILLETTE, P. J.

The issue in this workers' compensation case is the extent of claimant's disability under ORS 656.214(5). The referee found claimant to be 60 percent permanently partially disabled. The Workers' Compensation Board (Board), relying in part on the fact that claimant was about to enter or had just entered a rehabilitation program, reduced the award to 25 percent. Claimant appeals, maintaining *inter alia* that the Board should not have reduced his award through speculation on the outcome of his rehabilitation efforts. We modify the award.

Claimant is in his early 30's. He has a 10th grade formal education and a GED. On October 4, 1974, he was working as a journeyman carpenter when he fell from a ladder and injured his left elbow. A series of determination orders[1] finally resulted in an undisputed award for the scheduled elbow disability.

Claimant also contended that the 1974 injury resulted in a compensable unscheduled psychological dis-

[1] Early orders were set aside, because medical developments revealed that claimant's elbow injury was worse than his doctors originally had thought.

ability. By order dated October 19, 1979, the referee concluded that claimant's psychological problems were compensably related to his 1974 industrial injury. SAIF did not appeal that order. The opinion and order did not determine the *extent* of claimant's psychological disability. On April 23, 1980, a determination order awarded claimant "80 degrees for 25 percent unscheduled disability resulting from psychological impairment." Claimant sought administrative review. The referee concluded that, taking into consideration claimant's condition, together with his age, education, training and experience, claimant was entitled to 60 percent permanent partial disability.

SAIF appealed. On review the Board reinstated the 25 percent determination order award, but noted:

> "It is difficult if not impossible to assess the effect of claimant's psychological condition on his wage earning capacity because he is now engaged in a retraining program, the purpose of which is to enhance his earning capacity. * * *"

Claimant now seeks reinstatment of the 60 percent award.

As we view the case, the first issue is the propriety of the inference, drawn by the referee and accepted by the Board, that claimant actually enrolled in and attended a retraining program at Rogue Community College.

In the summer of 1980, after several years of apparent apathy and despair about his employment future, claimant began to show an interest in a two-year motorcycle repair program offered at Rogue Community College. At the urging of claimant's psychiatrist, Dr. Luther, Comprehensive Rehabilitation Services, Inc. (CRS) evaluated claimant[2] and concluded that he was "motivated to receive training in order to work in the area of * * * motorcycle maintenance." By a letter dated October 3, 1980, the Division notified claimant that it had approved a rehabilitation program that was to have begun on September 29, 1980, and end on June 13, 1982.

The hearing on the extent of claimant's psychological disability was held on September 30, 1980, several days before the date of the letter. At that hearing, claimant testified that he was "trying to get into an educational program" but that his past experiences had made him pessimistic about vocational rehabilitation. SAIF submitted the Division's approval notice after the hearing; the referee admitted it without objection from claimant's counsel. In the opinion and order dated November 28, 1980, the referee, presumably relying on the exhibit and claimant's testimony, stated:

> "The inference to be drawn from the record, which I draw, is that claimant is presently attending the authorized program of rehabilitation. * * * Claimant is presently enrolled in Rogue Community College * * *."

[2] An earlier CRS evaluation had concluded that claimant was not physically and emotionally ready for rehabilitation.

As noted above, the Board relied heavily on this inference to justify its rejection of the 60 percent disability award and its reinstatement of the 25 percent award.

The exhibit is the only thing in the record to indicate that claimant may have enrolled in and attended the Rogue Community College program. Claimant argues

that, because there is nothing else in the record to show his participation in the program, the Board improperly speculated about its effect on his earning capacity. We think the fairest inference from the record is that claimant probably enrolled as he was authorized to do. However, a finding that claimant *enrolled* is a far cry from assuming claimant *successfully completed* the program.

This brings us to the second question in this case: Was it proper for the Board to base its rejection of the 60 percent award on claimant's participation in an uncompleted rehabilitation program? This court and the Oregon Supreme Court have both held that the Board cannot base decisions regarding permanent total disability

> "* * * upon a speculative future change in employment status. * * * [W]hether [a] claimant is permanently totally disabled must be decided upon conditions existing *at the time of decision,* and his award of compensation * * * can be reduced only upon a specific finding that the claimant *presently* is able to perform a gainful and suitable occupation." *Gettman v. SAIF,* 289 Or 609, 614, 616 P2d 473 (1980). (Emphasis supplied.)

See also Lohr v. SAIF, 48 Or App 979, 618 P2d 468 (1980); *Leedy v. Knox,* 34 Or App 911, 580 P2d 530 (1978).

The three cases cited above are permanent *total* disability cases, but we believe their reasoning applies equally to permanent *partial* disability cases. In *Gettman,* the court based its holding on the language of the ORS 656.206 definition of "permanent total disability." Because that definition is phrased in the present tense ("a suitable occupation *is* one which * * * the worker *is* able to perform after rehabilitation" [emphasis supplied]), the court concluded that the Board could not properly speculate about future changes in employment status that *might* result from vocational rehabilitation. The statute governing determination of unscheduled permanent partial disability is also in the present tense:

> "* * * the criteria for rating of disability shall be the permanent loss of earning capacity due to the compensable injury. Earning capacity is the ability to obtain and hold gainful employment in the broad field of general occupations, taking into consideration such factors as age, education, training, skills and work experience. * * *" ORS 656.214(5).

In other words, disability rests on how employable the claimant is at the time of the disability determination, rather than on how employable the claimant will be after

all feasible retraining has been completed.[3] It was improper, at least on this record, for the Board to reduce claimant's disability award on the basis of his enrollment in a program that the record does not show he had completed.

We turn now to the question of the extent of claimant's disability. He concedes that he had "some" psychological problems before the 1974 accident. SAIF contends that "a substantial part of [claimant's] problems preexisted his injury." Neither party explains what claimant's pre-injury problems were, and the record contains very little additional information.

Dr. Luther, claimant's treating psychiatrist, described a childhood unstable enough to produce early psychological problems, but he never discussed such problems directly. He did, however, imply pre-injury problems in a June, 1979, letter in which he stated that claimant's psychiatric problem "has definitely *worsened* as a result of his injury of October, 1974." (Emphasis supplied.) A second examiner, Dr. Duvall, stated:

> "Mr. Lyon does in my considered opinion, have psychological problems which predate this industrial injury. An individual does not usually develop these kinds of problems solely as the result of an injury and subsequent disability. * * * Probably the clearest way to view Mr. Lyon's kind of adaptation is to see it as the result of preexisting psychopathology interacting with subsequent stress following his injury and disability.
>
> "* * * [M]y judgment [is] that his response to the injury was to a significant degree determined by his preexisting psychopathology."

Finally, Dr. Gardner, who interviewed and tested claimant once, said:

> "I believe [claimant's] personality disorders preceded the industrial injury. * * * He seems to feel somebody should take care of him or * * * solve his problems for him. This adaptation to life preceded his injuries. Thus, it is my professional opinion that his present personality disorder had nothing to do with his industrial injury."

No one explains the types of disorders or problems that supposedly preceded the injury. Some explanation of them would have helped in our evaluation of the various experts' strikingly different explanations of the cause or causes of claimant's present condition.

On the other hand, the record contains a number of indications that, before claimant's injury, his marriage was good, he enjoyed his work, he excelled in athletics and he engaged in a number of outdoor activities. The pre-injury picture that emerges is one of a healthy, active, satisfactorily employed and happily married man. We therefore agree with the referee's statement in his October 19, 1979, order:

[3] Of course, in both permanent total and permanent partial disability cases the Board may reconsider and adjust its award if vocational rehabilitation has lessened the claimant's disability. ORS 656.268(5); ORS 656.278.

"No doubt claimant had underlying psychological problems, but there is nothing in this record to suggest that those problems were active prior to the injury. * * *"

Thus, the psychological problems noted *after* the injury signify a decline from claimant's pre-injury condition.

Claimant was not treated for psychological problems until October, 1978, four years after his accident. Before that, the only reference in the record to claimant's state of mind was the observation of his treating physician, Dr. Lynch, that claimant was "well motivated and would make a good candidate for retraining." Psychological problems must have appeared by the fall of 1978, however, because claimant's attorney then referred him to Dr. Luther for psychiatric evaluation. Thereafter, a variety of psychiatrists, psychologists and other physicians had occasion to observe and comment on claimant's psychological problems.

The most notable thing about the psychiatric evaluations is that each person who examined claimant between October, 1978, and the time of the hearing in September, 1980, concluded that, at the very least, he was "depressed." Frequently the language was stronger. Dr. Luther stated at different times that claimant was "psychiatrically disabled" or "essentially totally disabled" and that

his depression was "significant and chronic." Consulting physician Dr. Yospe said that he was "severely depressed" and "overwhelmed by his somatic and emotional problems." Other examiners noted "overwhelming psychological problems," "a moderate to severe range of depression," a "downward spiral of depression of helplessness," an "overwhelming pathology" and a "depression [that] would interfere with his involvement in rehabilitation."

In addition to the doctors' conclusions about claimant's disability, CRS had found in 1979 that claimant was "not capable of holding a job, given his present psychiatric condition," and could not "benefit from rehabilitation services" until his "medical and psychiatric difficulties have stabilized."

Such unanimity of opinion indicates that claimant, at the time of the 1980 hearing, was indeed in poor psychological shape and that his problems placed significant limitations on his earning capacity.[4] Even though the last CRS

[4] A number of the reports attribute claimant's depression, in part, to his marital problems and to his use of depressants and alcohol. Some of these observations relate to the *causal relationship* between claimant's injury and depression, a question that was settled by the October 19, 1979, order; they do not relate to the *extent* of his depression. Several examiners and CRS also noted claimant's lack of motivation, and one or two opined that he was receiving "considerable secondary gain." We do not believe that these observations speak to the extent of claimant's disability, because his lack of motivation seemed to be a sub-part of his overall depression.

evaluation, made in September, 1980, concluded that claimant was "motivated to secure retraining," the record supports the referee's conclusion that claimant's "depressed neurosis * * * adversely affects his ability to return to the employment market. * * *"

In summary, claimant is a man in his early 30's with a 10th grade education and a GED. At the time of his injury, he had spent seven years as a carpenter. As a result of that injury, he can no longer work as a carpenter. He has "few transferrable skills," and he has psychological problems that flow from the 1974 injury. In our opinion, these factors significantly handicap claimant's "ability to obtain and hold gainful employment in the broad field of general occupations." He is more disabled than the Board's award suggests.

On the other hand, claimant is still fairly strong and healthy despite his accident.[5] He is of average intelligence and young. Both CRS and Dr. Luther believed at the time of the hearing that he was motivated to proceed with retraining—the motivation itself being an improvement in his condition. These factors indicate to us that the referee's 60 percent award is too high.

On *de novo* review, we modify the Board's award to 50 percent permanent partial disability.

[5] Doctors' reports consistently described claimant as "well-muscled." Apart from his left arm and shoulder disability, the reports indicate that claimant is physically sound.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation
of Peter J. Russ, Claimant.

PHIL A. LIVESLEY CO. et al,
Petitioners,
v.
RUSS,
Respondent.

(WCB No. 80-03289, CA A22795)

Judicial Review from Workers' Compensation Board.

Argued and submitted May 17, 1982.

Dennis R. VavRosky, Portland, argued the cause for petitioner. On the brief were Ronald W. Atwood, and Rankin, McMurry, VavRosky & Doherty, Portland.

Michael J. Hansen, Salem, argued the cause for respondent. With him on the brief was Thorbeck & Hansen, Salem.

Before Gillette, Presiding Judge, and Warden and Young, Judges.

WARDEN, J.

Affirmed.

WARDEN, J.

The issue in this workers' compensation case is compensability. The employer seeks reversal of the Workers' Compensation Board's order affirming the referee's finding that the claimant's hip injury from an "unexplained fall" was compensable. We affirm.

Claimant, an 82-year-old laborer, was employed at a food-processing plant. On February 5, 1980, the date of the injury, claimant had worked a full eight-hour shift sorting onions on a production line. He finished his duties at 5 p.m. and proceeded from his work area to the time clock to "punch out" for the day. In traveling along his usual route to the time clock, claimant fell and broke his right hip. Surgery was performed, and claimant was released to return to regular work on September 11, 1980.

There is no dispute concerning the cause of the fall. Testimony revealed that the area where the injury occurred was free from debris and other substances that would account for the fall. Claimant testified that he did not feel dizzy, experience vertigo or lose consciousness before falling. His doctor reported that there was no evi-

dence of a previously existing disease or weakness that would account for the fall. In short, there was no idiopathic[1] reason for the claimant's fall; it was simply unexplained.

Employer argues that claimant did not meet his burden to prove by a preponderance of the evidence that the injury was compensable. It is employer's contention that the Board impermissibly shifted the burden of proof from the claimant to the employer when it found that the unexplained fall on the employer's premises was sufficiently work-connected to be compensable. We do not agree.

According to Professor Larson, risks causing injury to a claimant can be placed in three categories: risks distinctly associated with the employment, risks personal to the claimant, and "neutral" risks that have no particular

employment or personal connection.[2] 1 Larson, Workmen's Compensation Law § 7.00 (1978). Harms resulting from the first group are universally compensable, while injuries sustained from the second are not. It is in the third category that the dispute lies. A growing majority of jurisdictions place on the employer the burden of neutral risks in the course of employment that result in harm.[3] When the accident would not have occurred and the injury would not have been received but for the employment and when the risk is not a personal one, there is a sufficient work connection to establish compensability. 1 Larson, Workmen's Compensation, § 10.31 (1978); *see also Hubble v. SAIF,* 56 Or App 154, 641 P2d 593, *rev den* 293 Or 521 (1982); *Otto v. Moak Chevrolet,* 36 Or App 149, 583 P2d 554, *rev den* 285 Or 319 (1978). Under this analysis, an idiopathic fall is not compensable; nor is a fall compensable if it is equally possible that its cause was idiopathic or work-related. However, a completely unexplained fall that occurs on the employer's premises, during working hours, while the employe is working is compensable. We are persuaded that this analysis is consistent with the unitary work connection approach articulated in *Rogers v. SAIF,* 289 Or 633, 616 P2d 485 (1980).

Oregon has been grouped with the minority of states that deem an injury from an unexplained fall not compensable. This is primarily the result of confusion between cases involving unexplained causation and idiopathic causation. While often treated the same analytically, the two types of falls are fundamentally different. As Larson explains:

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[1] We use the term "idiopathic," as it is used by Larson, to mean "peculiar to the individual" and not as "arising from an unknown cause."

[2] Neutral risks include those whose nature is known but which are not associated with employment or the employe personally, *e.g.,* a stray bullet, a mad dog, a lunatic killer, a bolt of lightning, debris from a distant explosion or a flying insect. Another type of neutral-risk case is that in which the cause itself, or the character of the cause, is simply unknown.

[3] Many jurisdictions have reached this result with the aid of statutory presumptions.

> "* * * [U]nexplained fall cases begin with a completely neutral origin of the mishap, while idiopathic fall cases begin with an origin which is admittedly personal and which therefore requires some affirmative employment contribution to offset the prima facia showing of personal origin." 1 Larson, Workmen's Compensation § 12.11 (1978).

This confusion is reflected in *Puckett v. Wagner,* 6 Or App 269, 487 P2d 897 (1971), a fall case, and *Raines v. Hines Lbr. Co.,* 36 Or App 715, 585 P2d 721 (1978) a death case. Although *Puckett* has been cited as an "unexplained fall" case, there was evidence of idiopathic causation. The claimant had been sent home early from work because he had been drinking. While leaving the employer's premises, he fell and was injured. The personal contribution of voluntary intoxication removes that case from the neutral risk category and puts it squarely in the area of personal risk. The employe may have been in the course of his employment, but he failed to carry his burden or proving that the injury arose out of his employment. Similarly, *Raines* involved the death of an employe from a heart attack. There were two equally plausible explanations of the death: one idiopathic, one work-related. Because the evidence was capable of supporting both theories equally, we held that the claimant, employe's widow, had not met her burden to prove work connection.

In the instant case, the Board found, and we agree, that the medical reports and lay testimony persuasively eliminated all idiopathic factors of causation. This is a true unexplained fall case. Accordingly, we hold that claimant, having proved that the injury occurred on the employer's premises during work hours and having shown that the cause of the injury is unknown and not personal, has carried his burden of proof. In so concluding, we have not shifted the burden of proof or used an implied presumption. Rather, a sufficient work connection between the injury and the employment has been shown by the fact that the injury occurred in the course of employment, that the employment caused the employe to be at the place where he was injured at the time when he was injured, and that there is no evidence of personal contribution to the injury. *Rogers v. SAIF, supra.*

Affirmed.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Stanley P. Van DerZanden, Claimant.

VAN DERZANDEN,
Petitioner,
v.
STATE ACCIDENT INSURANCE FUND CORPORATION,
Respondent.

(WCB No. 80-06147, CA A23478)

Judicial Review from Workers' Compensation Board.

Argued and submitted June 10, 1982.

Gary M. Galton, Portland, argued the cause for petitioner. With him on the brief were Catherine Riffe, and Galton, Popick & Scott, Portland.

Darrell E. Bewley, Appellate Counsel, State Accident Insurance Fund, Salem, argued the cause and filed the brief for respondent.

Before Richardson, Presiding Judge, and Thornton and Van Hoomissen, Judges.

VAN HOOMISSEN, J.

Order modified to award 15 percent permanent partial disability; affirmed as modified.

VAN HOOMISSEN, J.

Claimant appeals from an order of the Workers' Compensation Board reversing the referee's award of 30 percent for permanent partial disability and reinstating the determination order award of 5 percent. He also seeks award of attorney fees at the Board level for increasing two penalty awards and an attorney fee award at the hearing level. We modify the award.

On January 9, 1980, claimant, 49, was injured on the job when he slipped and fell on an icy slope, hitting his head and back. At the time of the injury, he was plant superintendent for the City of Gresham water-treatment facility and had been employed by the city for approximately 13 years. He was initially treated by Dr. Ordonez, a neurosurgeon, who diagnosed a C-7 compression fracture of the neck and a cervical spine sprain. An x-ray examination of claimant's spine by Dr. Friedman revealed 30 percent loss of vertical height in the anterior aspect of the C-7 vertebral body. Dr. Ordonez prescribed pain medication and a cervical collar, which claimant wore for four months. On February 5, 1980, Dr. Ordonez released claimant for light-duty work on a part-time basis.

Before claimant's injury, the city had entered into negotiations to transfer the operation of its water-treatment facility to a private company, Envirotech Operating Services, which was accomplished in February, 1980. Thus, when claimant returned to work in February, he was working for a new employer, Envirotech, and was given a new assignment as Plant Training Coordinator at his previous rate of pay. The new position required him to conduct lectures, order training materials and organize seminars. He testified that he had had no training in those areas and experienced considerable difficulty in performing his new duties. He worked part-time for two or three weeks and then, at the request of his supervisor, discontinued working.[1] He stated that problems with his neck, shoulders, head and back interfered with his work.

On May 6, claimant was released by Dr. Ordonez for his "usual desk work." On May 14 he sought another medical opinion from Dr. Puziss, an orthopedic surgeon, who diagnosed a healed C-7 fracture and prescribed physical therapy for neck and low back discomfort. He released claimant for part-time desk work and concluded that he was entitled only to temporary partial disability. Dr. Puziss determined that claimant was medically stationary on June 23 and that he could return to his former sedentary work but advised against his returning to his position as training coordinator because of the stress that job caused, which the doctor believed could aggravate his cervical pain syndrome. Claimant returned to work for a short time in June and July and was ultimately terminated on August 29, 1980.[2]

At SAIF's request, claimant was examined on May 27 by Dr. Snodgrass, a neurologist. He noted claimant's complaint of pain in his neck, headaches, low back discomfort, lethargy and poor appetite. He stated that his examination was impeded by claimant's "functional overlay which is principally voluntary guarding and by lack of effort when testing strength." He concluded that claimant was capable of returning to work in a supervisory capacity and that he appeared to be depressed and fearful of losing his job.[3] After a later re-examination, Dr. Snodgrass recommended a psychiatric evaluation.

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[1] Dr. Ordonez stated that he received a call from claimant's supervisor requesting that he be told to stay off work because of dangerous conditions in the area that might cause him to fall.

[2] Envirotech wrote claimant:

> "Your actions, public statements and lack of cooperation have given us no choice but to 'lay you off for lack of work' as of Friday, August 29, 1980."

Apparently claimant had been quoted in a newspaper article concerning the take-over by Envirotech as saying that he was not properly suited for a position of "classroom instructor or book writer."

[3] Claimant publicly opposed the take-over by Envirotech. He informed Dr. Snodgrass that because of his opposition, his job was in jeopardy for "political reasons."

At SAIF's request, claimant was also examined by Dr. Shannon, a psychiatrist. She concluded that claimant was suffering from a mild to moderate psychophysiological disorder, which, although not directly related to his injury, provided him with a focus for his symptoms. She recommended further psychological testing to determine if he was suffering from pre-senile dementia. Dr. Reiter, a

psychologist, examined claimant on September 16. He diagnosed a mild to moderate deficit in verbal memory, which could result from early dementia but which was unlikely from a physical injury.

A determination order was issued on July 21, 1980, which awarded claimant temporary total disability from January 10, 1980, through June 23, 1980, less time worked, and 5 percent permanent partial disability for his neck injury. Claimant requested a hearing. The referee ordered SAIF to pay 30 percent permanent partial disability, a 15 percent penalty based on the temporary total disability award for late payment of interim compensation from May 5, 1980, through June 23, 1980, a 10 percent penalty for refusal to pay a medical bill and attorney fees of $150.

SAIF and claimant each requested review. The Board modified the referee's order, reinstating the 5 percent permanent partial disability, increasing the penalties to 25 percent for late payment of interim compensation and for refusal to pay the medical bill and awarding an additional $200 in attorney fees for services rendered at the hearings level.

The parties agree that claimant's permanent disability rating, under the relevant administrative rules, is greater than 5 percent. On *de novo* review, we conclude that claimant is entitled to 15 percent permanent partial disability.

Claimant requests attorney fees at the Board level, contending that he was the prevailing party because the Board increased the penalties and attorney fees awarded by the referee. In workers' compensation cases attorney fees may be awarded only when expressly authorized by statute. *Atwood/Christensen v. SAIF,* 30 Or App 1009, 1011, 569 P2d 52, *rev den* 280 Or 521 (1977). Claimant relies on ORS 656.382(2):

> "(2) If a request for hearing, request for review or court appeal is initiated by an employer or insurer, and the referee, board or court finds that the compensation awarded to a claimant should not be disallowed or reduced, the employer or insurer shall be required to pay to the claimant or the attorney of the claimant a reasonable attorney's fee in an amount set by the referee, board or the

court for legal representation by an attorney for the claimant at the hearing, review or appeal."

Here, SAIF initiated a request for review of the referee's order. The Board reduced the disability award to 5 percent. Thus, claimant did not prevail on the compensation issue. *Bailey v. Morrison-Knudsen,* 5 Or App 592, 598, 485 P2d 1254 (1971). The Board did increase penalties and attorney fees. Nonetheless, as we noted in *Korter v. EBI Companies, Inc.,* 46 Or App 43, 54, 610 P2d 312 (1980), *remanded* 290 Or 301, *remanded* 51 Or App 206, 625 P2d 667 (1981), "'prevailing' in technical issues while losing on the claim itself should not allow an award [of attorney fees]."

Order modified to award 15 percent permanent partial disability; affirmed as modified.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Shirley Gordon (now Lindsey), Claimant.

LINDSEY,
Petitioner,
v.
STATE ACCIDENT INSURANCE FUND CORPORATION,
Respondent.

(No. 79-10162, CA A23576)

Judicial Review from Workers' Compensation Board.

On petitioner's petition for reconsideration filed August 26, 1982. Former opinion filed July 28, 1982, 58 Or App 389, 650 P2d 1097.

Kenneth H. Colley and Colley & Colley, Corvallis, for petition.

Before Gillette, Presiding Judge, and Warden and Young, Judges.

GILLETTE, P. J.

Petition for reconsideration granted; former opinion modified to reverse and remand for reimbursement of the cost of claimant's water bed; former opinion adhered to in all other respects.

GILLETTE, P. J.

In this workers' compensation case, claimant, a retail employe who injured her back in a fall at her employer's pet store, originally appealed from a Workers' Compensation Board order and alleged three errors: (1) premature closure of her claim, (2) inadequate award of permanent partial disability and (3) failure to order that she be reimbursed for the cost of a water bed that her doctor had specifically prescribed for her. We affirmed without opinion. *Lindsey v. SAIF,* 58 Or App 389, 650 P2d 1097 (1982). She now seeks review by the Supreme Court. Treating her petition as one for reconsideration, ORAP 10.10, we grant reconsideration on the question of the water bed and order that claimant be reimbursed for it.

A general review of the facts would benefit neither bench nor bar. Suffice it to say that we are persuaded, on *de novo* review, that claimant's claim was not prematurely closed and that claimant has received an adequate permanent partial disability award for her injury. Our former opinion on those two aspects of the case is affirmed.

The water bed was prescribed by claimant's original treating doctor, Dr. McBride, who began treating claimant after her April 14, 1979, injury. He found that the injury was to the soft tissues and ruled out a fracture. SAIF accepted the claim. On July 15, 1979, during her course of treatment, McBride prescribed a water bed. She purchased the bed and reported the expense to SAIF; SAIF refused to pay.

McBride's prescription for the water bed said, simply,

> "Water bed for correction of low back condition."

Reimbursement for prescribed items such as the water bed is required by ORS 656.245(1), which provides:

> "(1) For every compensable injury, the insurer or the self-insured employer shall cause to be provided medical services for conditions resulting from the injury for such period as the nature of the injury or the process of the recovery requires, including such medical services as may be required after a determination of permanent disability. Such medical services shall include medical, surgical,

> hospital, nursing, ambulances and other related services, and drugs, medicine, crutches and prosthetic applicances, braces and supports and where necessary, physical restorative services. The duty to provide such medical services continues for the life of the worker."

The referee found that McBride's prescription was sufficient and ordered SAIF to reimburse claimant for its cost. The Board reversed on this issue, stating:

> "We find Dr. McBride's 'prescription' is insufficient under OAR 436-69-335 which requires a *medical report* which *clearly justifies the need* for articles of household furniture such as a bed * * *." (Emphasis in original.)

Assuming without deciding that the Board's interpretation of the rule's requirements is correct, the Board's ruling is nonetheless incorrect, because the rule in question was not promulgated until February 1, 1980, which was subsequent to the date of the prescription. We will not apply the rule retroactively. *See SAIF v. Mathews,* 55 Or App 608, 612, 639 P2d 668 (1982).

Having established that the *rule* does not defeat claimant's claim, we need note further only that we find the prescription to have been justified and hold, as did the referee, that SAIF must reimburse claimant for the cost of the water bed.

Petition for reconsideration granted; former opinion modified to reverse and remand for reimbursement of the cost of claimant's water bed; former opinion adhered to in all other respects.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation
of Berlie O. Bold, Claimant.

BOLD,
Petitioner,
v.
STATE ACCIDENT INSURANCE FUND
CORPORATION,
Respondent.

(WCB Case No. 79-07213, CA A24446)

Judicial Review from Workers' Compensation Board.

Argued and submitted September 22, 1982.

David W. Hittle, Salem, argued the cause and filed the brief for petitioner. With him on the brief was Olson, Hittle & Gardner, Salem.

Darrell E. Bewley, Appellate Counsel, State Accident Insurance Fund Corporation, Salem, argued the cause for respondent.

Before Buttler, Presiding Judge, and Warren and Rossman, Judges.

ROSSMAN, J.

Affirmed.

ROSSMAN, J.

Claimant seeks judicial review of an order of the Workers' Compensation Board upholding the carrier's denial of temporary total disability payments.

Claimant is a full-time shop teacher at Canby High School. On November 10, 1977, a winch handle struck his right hand, causing an impacted comminuted fracture of the second metacarpal head. Claimant received conservative treatment and returned to work in four days. He continued to work throughout the spring as a shop instructor. Claimant's salary was ordinarily payable in twelve equal installments, but at the end of the school year, he opted to collect his summer installments in a lump sum.

Claimant had also been a journeyman welder for 20 years. During the summer months, between the school years, he usually worked as a welder. He would have done so in the summer of 1978, but, in his estimation, the hand injury prevented him from doing so. Although he was physically able to work as a shop teacher during the summer, that work was not available to him. In the summers of

1979 and 1980, instead of welding, claimant took course work relating to his teaching certification. The record is not entirely clear, but he may also have done so in the summer of 1978. In any event, claimant worked at no occupation during the summer of 1978.

The *only* issue raised is claimant's entitlement to temporary total disability benefits for the period from June 2 to August 25, 1978. Citing *Jackson v. SAIF,* 7 Or App 109, 490 P2d 507 (1971), the referee ruled that his entitlement to temporary total disability depended on whether claimant was unable to perform his "regular work" during the summer, and he concluded that claimant was not so entitled because his "regular work" was as a teacher:

> "[Claimant's] work as a welder was not his regular employment during the summer months, but merely substitute employment during those summer periods when school was in recess and he had no other professional obligations as a teacher to satisfy."

In the alternative, the referee reasoned that "regular work" was the type of work performed at the time of injury, which

in this case was teaching. In *Jackson v. SAIF, supra,* the court stated:

> "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.

Seeing a "more fundamental issue" than whether welding was or was not claimant's regular employment during the summer, the Board upheld the denial on the ground that claimant's entitlement to time loss payments ceased when he returned to his teaching work, there being no indication that claimant had been released for work on a trial basis. The Board stated:

> "If claimant returned to work as a shop teacher prior to the end of the school year, his entitlement to time loss payments ceased."

Claimant was not totally disabled during the relevant period, as evidenced by his prompt return to work as a shop teacher and by his testimony that he was physically *able* to continue to do that work during the summer. Temporary total disability is not directly defined in the statutes. In relevant part, ORS 656.210(1) states:

> "When the total disability is only temporary, the worker shall receive during the period of that total disability compensation equal to 66-2/3 percent of wages, but not more than 100 percent of the average weekly wage nor less than the amount of 90 percent of wages a week or the amount of $50 a week, whichever amount is lesser. * * *"

The statute governs the rate of payment of temporary total disability by predisability earnings. It sequentially follows ORS 656.206 to 656.209, which pertain to permanent total disability. The initial phrase of ORS 656.210(1) ("When the total disability is only temporary") indicates that "total

disability" would be as defined in ORS 656.206(1)(a).[1] That

is, total disability is the incapacitation of a worker "from regularly performing work at a gainful and suitable occupation."

Here, claimant was *able* regularly to perform work at a "gainful and suitable occupation," namely, that of shop teacher. Thus, he was not totally disabled within the meaning of the statutory scheme. It follows that he was not entitled to temporary total disability benefits for the period requested.

Affirmed.

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[1] ORS 656.206(1)(a) provides:

"Permanent total disability" means the loss, including preexisting disability, of use or function of any scheduled or unscheduled portion of the body which permanently incapacitates the worker from regularly performing work at a gainful and suitable occupation. As used in this section, a suitable occupation is one which the worker has the ability and the training or experience to perform, or an occupation which the worker is able to perform after rehabilitation."

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
Allen H. Sparks, Claimant.

SPARKS,
Petitioner,
v.
STATE ACCIDENT INSURANCE FUND
CORPORATION,
Respondent.

(WCB Case No. 81-00286, CA A24583)

Judicial Review from Workers' Compensation Board.
Argued and submitted October 11, 1982.

Don G. Swink, Portland, argued the cause for petitioner. On the brief was J. Randolph Pickett, Portland.

Donna Parton, Salem, argued the cause for respondent. On the brief was Darrell E. Bewley, Appellate Counsel, State Accident Insurance Fund Corporation, Salem.

Before Buttler, Presiding Judge, and Warren and Rossman, Judges.

ROSSMAN, J.

Affirmed in part; reversed in part; and remanded with instructions that the left hip claim be accepted.

ROSSMAN, J.

Claimant appeals from an order of the Workers' Compensation Board finding that an injury to his right ankle and a left hip problem were not compensable.

On March 19, 1976, claimant, a 50-year-old plumber, fell from a ladder, landing on his right foot and right wrist. The carrier accepted the wrist claim, and it is not in issue here. The controversy in this proceeding involves claimant's contentions that (1) he injured his *right ankle* in the March accident and (2) he suffers pain in his *left hip* as a consequence of the removal of a small piece of bone from his pelvis for use in bone fusion surgery to repair the compensable wrist fracture.

On *de novo* review, we agree with the Board that claimant failed to show that the right ankle condition was causally related to the industrial injury, but we disagree with the Board's conclusion that the left hip problem is not compensable. Claimant required four separate bone graft operations for his wrist injury. A preponderance of the medical evidence establishes that the second graft surgery caused persistent weakness and discomfort at the site of the origin of the abductor muscles in the left iliac crest area, the donor bone site. The causative link is that surgery to correct the compensable wrist condition caused the problem in the left hip. The Board, in concluding that the hip condition was not compensable, suggested that its decision was based on the lack of evidence of any impairment at the donor site. We do not understand the Board's use of the term "impairment." The question of impairment is an extent-of-disability inquiry and is *not* involved in this case. This is a compensability case.

Affirmed in part; reversed in part; and remanded with instructions that the left hip claim be accepted.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
John R. Blackman, Claimant.

BLACKMAN,
Petitioner,
v.
STATE ACCIDENT INSURANCE FUND
CORPORATION et al
Respondents.

(No. D270142, CA A23494)

Judicial Review from Workers' Compensation Board.

Argued and submitted October 15, 1982.

Robert K. Udziela, Portland, argued the cause for petitioner. With him on the brief was Pozzi, Wilson, Atchison, O'Leary & Conboy, Portland.

Darrell E. Bewley, Appellate Counsel, State Accident Insurance Fund Corporation, Salem, argued the cause and filed the brief for respondent State Accident Insurance Fund Corporation.

William R. Gary, Solicitor General, Salem, argued the cause for respondent Workers' Compensation Board. With him on the brief was Dave Frohnmayer, Attorney General, Salem.

Before Richardson, Presiding Judge, and Thornton and Van Hoomissen, Judges.

RICHARDSON, P. J.

Reversed and remanded.

RICHARDSON, P. J.

Claimant appeals from the Workers' Compensation Board's "order of disbursement of third party funds." ORS 656.593. The order required distribution to SAIF of certain amounts claimant recovered in an action against a third party for an injury for which SAIF had paid benefits under the Workers' Compensation Law.

The board and SAIF argue that we lack jurisdiction over the appeal and move that we dismiss it. For the reasons stated in *Schlect v. SAIF,* 60 Or App 449 ___ P2d ___ (1982), we conclude that we have jurisdiction. We turn to the merits.

The record in this case consists only of SAIF's letter requesting a "hearing regarding the distribution of [the third party action] funds," other correspondence and the board's order. Claimant argues, correctly, that there is no evidence to support the contested part of the board's award to SAIF. Claimant accordingly argues that we should reverse that part of the award on the ground that there was a failure of proof. We do not agree that that is the appropriate disposition of the appeal. The problem with the proceedings below was not that SAIF's evidentiary showing was inadequate; SAIF and, for that matter, claimant had no opportunity to make an evidentiary showing through the procedures the board and the parties followed. We held in *Schlect v. SAIF, supra,* that third-party distribution orders of the board under ORS 656.593 are reviewable by this court pursuant to ORS 656.298 as matters concerning a claim. *See* ORS 656.704. It follows that the proceedings that culminate in a third-party distribution order must produce a record adequate for our review under ORS 656.298. It also follows that when, as here, appropriate proceedings were not conducted and the absence of a record makes it impossible for us to consider factual issues raised by the parties on appeal, a remand for further proceedings is necessary. *See Patton v. St. Bd. Higher Ed.,* 59 Or App 477, 651 P2d 169 (1982).[1]

Reversed and remanded.

[1] In addition to the reasons stated in the text, we consider an outright reversal to be inappropriate here because the board and the parties did not have the benefit of our opinion in *Schlect v. SAIF, supra,* at the time this matter was considered by the board, and the procedural requirements for proceedings under ORS 656.593 are not articulated in *that* statute. We note also that claimant's counsel failed to comply with the two requests by the chairman of the board for a response to SAIF's letter requesting a hearing.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Leroy R. Schlecht, Claimant.

SCHLECHT,
Petitioner,
v.
STATE ACCIDENT INSURANCE FUND CORPORATION et al,
Respondents.

(No. D 306743, CA A23093)

Judicial Review from Workers' Compensation Board.

Argued and submitted October 15, 1982.

Robert K. Udziela, Portland, argued the cause for petitioner. With him on the brief was Pozzi, Wilson, Atchison, O'Leary & Conboy, Portland.

Darrell E. Bewley, Appellate Counsel, State Accident Insurance Fund Corporation, Salem, argued the cause and filed the brief for respondent State Accident Insurance Fund Corporation.

William R. Gary, Solicitor General, Salem, argued the cause for respondent Workers' Compensation Board. With him on the brief was Dave Frohnmayer, Attorney General, Salem.

Before Richardson, Presiding Judge, and Thornton and Van Hoomissen, Judges.

RICHARDSON, P. J.

Order distributing $1,000 attorney fee to State Accident Insurance Fund Corporation reversed; otherwise affirmed.

RICHARDSON, P. J.

Claimant appeals from a "third party distribution order" of the Workers' Compensation Board, requiring claimant to pay to SAIF part of the settlement proceeds that he received from the tortfeasor for an injury for which SAIF has paid him workers' compensation benefits. The board and SAIF contend that this court lacks jurisdiction over the appeal.[1] We conclude that we have jurisdiction, and we affirm in part and reverse in part.

[1] Before the briefs were filed, the board moved to dismiss the appeal. We denied the motion with leave to renew. The board has renewed the motion in its brief and has appeared only to address the jurisdictional issue. SAIF also argues that the appeal should be dismissed, but it addresses no other issue in its brief.

In his response to the board's original motion to dismiss, claimant argued: "The Board is not a 'party' to this proceeding pursuant to ORS 656.005(23), and has no standing to contest jurisdiction of this Court." The board replied that, if the court lacks jurisdiction, it must dismiss the appeal "whether the jurisdictional issue is raised by a party or a passing sparrow." We are required to determine whether we have jurisdiction, whether or not the question is raised. For that reason, and because SAIF is a party and *does* raise the question, it is immaterial whether the board has standing to appear.

In July, 1978, claimant was injured in a highway collision while in the course of his employment as a truck driver. He filed a workers' compensation claim with SAIF and also brought a tort action against the driver of the other vehicle. *See* ORS 656.576 *et seq.* The claim was partially denied by SAIF, and claimant requested a hearing. In late 1979, claimant settled the action against the tortfeasor for $57,500, and on December 31, 1979, he tendered $16,582.89 to SAIF pursuant to ORS 656.593.[2] The

parties appear to agree that that amount was equal to SAIF's recoverable costs under the statute as of the date of tender. *But see* n 5, *infra.* In January, 1980, SAIF approved the settlement and demanded that an additional amount from the settlement be forwarded to it "to be placed in the Advance Refund Account until the pending Hearing [on the claim] is concluded and all costs are known and paid." In April, 1980, the referee found generally in claimant's favor

[2] ORS 656.593 provides:

"(1) If the worker or the beneficiaries of the worker elect to recover damages from the employer or third person, notice of such election shall be given the paying agency by personal service or by registered or certified mail. The paying agency likewise shall be given notice of the name of the court in which such action is brought, and a return showing service of such notice on the paying agency shall be filed with the clerk of the court but shall not be a part of the record except to give notice to the defendant of the lien of the paying agency, as provided in this section. The proceeds of any damages recovered from an employer or third person by the worker or beneficiaries shall be subject to a lien of the paying agency for its share of the proceeds as set forth in this section and the total proceeds shall be distributed as follows:

"(a) Costs and attorney fees incurred shall be paid, such attorney fees in no event to exceed the advisory schedule of fees established by the board for such actions.

"(b) The worker or the beneficiaries of the worker shall receive at least 33-1/3 percent of the balance of such recovery.

"(c) The paying agency shall be paid and retain the balance of the recovery, but only to the extent that it is compensated for its expenditures for compensation, first aid or other medical, surgical or hospital service, and for the present value of its reasonably to be expected future expenditures for compensation and other costs of the worker's claim under ORS 656.001 to 656.794. Such other costs include assessments for reserves in the Administrative Fund and any reimbursements made pursuant to ORS 656.728(3), but do not include any compensation which may become payable under ORS 656.273 or 656.278

"(d) The balance of the recovery shall be paid to the worker or the beneficiaries of the worker forthwith. Any conflict as to the amount of the balance which may be retained by the paying agency shall be resolved by the board.

"(2) The amount retained by the worker or the beneficiaries of the worker shall be in addition to the compensation or other benefits to which such worker or beneficiaries are entitled under ORS 656.001 to 656.794.

"(3) A claimant may settle any third party case with the approval of the paying agency, in which event the paying agency is authorized to accept such a share of the proceeds as may be just and proper and the worker or the beneficiaries of the worker shall receive the amount to which the worker would be entitled for a recovery under subsections (1) and (2) of this section. Any conflict as to what may be a just and proper distribution shall be resolved by the board."

The statute is quoted in this note in its present form, as amended by Or Laws 1981, ch 540, § 1. At the times relevant here, the statute as it read before that amendment was applicable; however, the differences between the two versions are not material to the issues in this appeal.

on his appeal from the partial denial of his claim. The incremental benefits to claimant from the referee's disposition, together with medical expenses SAIF paid after the tort action was settled, equalled $4,849.55. The referee also awarded claimant an attorney fee of $1,000, to be paid by SAIF, for prevailing in the hearing on SAIF's partial denial of the claim. The referee's order was affirmed by the board and was not appealed farther.

The parties did not reach agreement on the allocation of the tort action settlement, and on March 18, 1981, SAIF requested that the board resolve the dispute. SAIF contended that it was entitled to a distribution to offset (1) the $4,849.55 it had expended or incurred for compensation or benefits since receiving claimant's payment; (2) the $1,000 attorney fee awarded claimant by the referee; and (3) $5,000 "as an estimate of future anticipated costs." The board ordered claimant to distribute $5,849.55 to SAIF but it concluded that SAIF had not proved its claim for $5,000 for anticipated future costs. Claimant contends on appeal that the board erred by ordering the distribution of $5,849.55 to SAIF.

The board argues that this court has no jurisdiction to consider the appeal because, under ORS 656.704,[3] orders of the board "other than those concerning a claim" are subject to the review provisions in the Administrative Procedures Act (ORS 183.310 to 183.500) rather than those in the Workers' Compensation Law. According to the board, third party distribution proceedings are not matters "concerning a claim" because they are not "matters in which a

worker's right to receive compensation, or the amount thereof, are directly in issue." ORS 656.704(3). The board

[3] ORS 656.704 provides:

"(1) Actions and orders of the director, and administrative and judicial review thereof, regarding matters concerning a claim under ORS 656.001 to 656.794 are subject to the procedural provisions of ORS 656.001 to 656.794 and such procedural rules as the board may prescribe.

"(2) Actions and orders of the director and the conduct of hearings and other proceedings pursuant to ORS 656.001 to 656.794, and judicial review thereof, regarding all matters other than those concerning a claim under ORS 656.001 to 656.794, are subject only to ORS 183.310 to 183.550 and such procedural rules as the director may prescribe. The director may make arrangements with the board pursuant to ORS 656.726(7) to obtain the services of referees to conduct such proceedings or may make other arrangements pursuant to ORS 656.722 to obtain personnel to conduct such proceedings. The director by rule shall prescribe the classes of orders issued by referees and other personnel that are final, appealable orders and those orders that are preliminary orders subject to revision by the director.

"(3) For the purpose of determining the respective authority of the director and the board to conduct hearings, investigations and other proceedings under ORS 656.001 to 656.794, and for determining the procedure for the conduct and review thereof, matters concerning a claim under ORS 656.001 to 656.794 are those matters in which a worker's right to receive compensation, or the amount thereof, are directly in issue. However, such matters do not include any proceeding under ORS 656.248 or any proceeding resulting therefrom."

contends further that third party distribution proceedings are not subject to the contested case provisions of the Administrative Procedures Act and, accordingly, that they are initially reviewable by the circuit court rather than this court. *See* ORS 183.480 to 183.484. Claimant argues that judicial review of *all* board orders under ORS chapter 656 is controlled by ORS 656.298(1), which provides in part:

> "Any party affected by an order of the board may within the time limit specified in ORS 656.295, request judicial review of the order with the Court of Appeals."

It is not certain, in our view, that ORS 656.704 has any relevance to judicial review of *board* orders; the principal subject of the statute appears to be the conduct and review of proceedings of the Director of the Workers' Compensation Department.[4] The only relevance the statute seems to have to board proceedings is its allocation of authority to conduct hearings, investigations and other proceedings between the board and the director, with claim-related matters as the basic dividing line. However, we need not decide here whether ORS 656.704 has any application to judicial review of board orders, because we conclude that the board's authority under ORS 656.593(1)(d) to resolve "[a]ny conflict as to the amount of

the balance [of a third-party recovery] which may be retained by the paying agency" pertains to a matter "concerning a claim" and is therefore reviewable under ORS 656.298. *See also* ORS 656.593(3) and n 5, *infra.*

We do not agree with the board's narrow reading of the phrases "concerning a claim" and "matters in which a worker's right to receive compensation, or the amount thereof, are directly in issue" used in ORS 656.704. The paying agency's right to distribution of third party recoveries under ORS 656.593 arises out of its responsibility for compensation, and the amount distributed is ascertained in part by the amount of compensation. Proceedings under ORS 656.593 are somewhat analogous to proceedings under ORS 656.307, where the sole issue *can* be which of two employers or insurers is responsible for coverage of a

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[4] In *SAIF v. Broadway Cab Co.*, 52 Or App 689, 629 P2d 829, *rev den* 291 Or 662 (1981), we stated:

> "It *is* clear that the only *specific* subject matter for a referee's activities on February 12, 1980, in connection with Workers' Compensation under the quoted statutes was in 'cases, disputes and controversies regarding matters concerning a claim * * *'; similarly, the Board's subject matter jurisdiction on July 23, 1980, was to review 'appealed orders of referees in controversies concerning a claim * * *.' * * *" 52 Or App at 692-93. (Emphasis in original.)

We noted in *Broadway Cab* that the jurisdiction of the referees and the board could include matters not involving claims where there is an express statutory source of jurisdiction; however, we also noted:

> "* * * [W]e have been able to discern only two instances of what seems to have been intended as the source: ORS 656.740(3), which provides for a referee's hearing on a proposed order declaring a person to be a noncomplying employer, and ORS 656.745(3), which relates to penalties and assessments. * * *" 52 Or App at 693.

It is unnecessary to decide in this case what effect, if any, 1981 legislation has on our conclusion in *Broadway Cab. See, e.g.,* Or Laws 1981, ch 874, § 11, amending ORS 656.704.

claim acknowledged to be compensable. The parties to an ORS 656.307 proceeding, including the claimant, have appeal rights under ORS 656.298. *See SAIF v. Broadway Cab Co.,* 52 Or App 689, 693 n 2, 629 P2d 829, *rev den* 291 Or 662 (1981). For present purposes, the principal difference between ORS 656.307 and 656.593 is that under the former there is an adjudication of the claim itself, while distribution under the latter is—or can be—decided independently of the claim. It nevertheless seems clear that third-party distribution orders directly affect the amount of compensation payable to a claimant by the entity responsible for payment under the Workers' Compensation Law. We do not think the legislature intended to create as fine a distinction as the board finds in ORS 656.704, or to create the kind of jurisdictional confusion which would result from the board's interpretation. We hold that we have jurisdiction, and we turn to the merits.

Claimant argues that SAIF is not entitled to distribution of the compensation or medical expenses incurred after the settlement of the third-party action. He contends that SAIF was required to make a claim *at the time of the settlement* "for the present value of its reasonably to be expected future expenditures for compensation," ORS 656.593(1)(c),[5] and, having failed to do so, could not recover

the compensation and benefits that actually accrued or were paid between the time of the settlement and the time of distribution. Claimant also states:

> "* * * ORS 656.593 sets forth the statutory procedure by which distribution of proceeds of third party actions occurs. The statute contemplates calculation of SAIF's interest at the time recovery comes about, be it by settlement or judgment. Otherwise, particularly in that [sic] case of settlements, the entire policy of orderly and fair distribution is defeated. Counsel representing an injured worker must, as any lawyer representing a client in a civil action, exercise judgment, and balance the value of the case, and the chances for success upon trial, against the certainties of a settlement. If SAIF is permitted to come back—after a settlement is effected—and claim more money than previously claimed, the 'certainty' factor involved in settlement of claims becomes mythical. Counsel is unable to intelligently inform his or her client of the *actual,* rather than potential in-pocket gain from the settlement. The policy of this state has long been to favor settlement, and it must be presumed the legislature intended, by the passage of ORS 656.593, to enhance that policy, not hinder it. Thus, SAIF's statutory entitlement in this case must be looked upon as arising at the time the settlement was approved by SAIF." (Emphasis claimant's.)

[5] Claimant's argument posits that ORS 656.593(1)(c) and (1)(d) are the relevant provisions for determining whether the contested amounts were correctly awarded to SAIF. He does not rely on ORS 656.593(3), which appears to be specifically applicable to allocations between claimants and paying agencies of third-party *settlements,* while subsection (1) relates to the distribution of *damages.*

Claimant misperceives the purpose of ORS 656.593. It has nothing to do with the policy of encouraging settlements. Indeed the Workers' Compensation Law's provisions governing distribution of third-party recoveries prohibit compromise or settlement of actions by the claimant unless the paying agency consents. ORS 656.587, 656.593(3). The statutes are also not aimed at maximizing recovery by claimants in third party actions. Their objective is to allocate *whatever* the claimant recovers between him and the paying agency and to provide reimbursement to those responsible for statutory compensation of injured workers when damages or settlements are obtained against the persons whose acts caused the injuries. We therefore find the policy reasons claimant offers in support of his argument unpersuasive.

We are also unconvinced by his interpretation of the statutory language. We do not believe the paying agency must make a claim "for the present value of its reasonably to be expected future expenditures for compensation" at the time of the third party recovery. We construe that language of ORS 656.593(1)(c) to refer to compensation and expenditures anticipated at the time the third-party recovery is distributed by agreement of the parties or ordered distributed by the board. Given the objectives of the statute, we discern no reason why compensation or other benefits *actually* paid or incurred between the time of judgment or settlement and the time of distribution should be treated as "expected *future* expenditures." (Emphasis supplied.)

The board did not err in ordering distribution to SAIF of the compensation awarded claimant and the medical expenses paid on his behalf by SAIF after the settlement of the third party action. However, we agree with claimant that SAIF is not entitled to a distribution to offset the fee it was required to pay claimant's attorney. In reaching the opposite conclusion, the board stated:

> "The first part of [ORS 656.593(1)(c)], down to the term 'hospital service,' says that SAIF is entitled to reimbursement for 'its expenditures for compensation.' Were this all there was to the statute, the question would be whether carrier-paid attorney fees are a form of compensation. See ORS 656.005(9). However, the balance of the statute refers to a present reserve for 'future expenditures for compensation *and other costs* of the worker's claim under ORS 656.001 to 656.794.' (Emphasis added.) Carrier-paid attorney fees are obviously an 'other cost' of the worker's claim under ORS Chapter 656. We cannot imagine the legislature intending that a carrier in this situation could maintain a reserve for *future* carrier-paid attorney fees but not qualify for reimbursement for *previously*-paid attorney fees. We, therefore, conclude that SAIF is entitled to reimbursement for the $1,000 in attorney fees it paid to claimant's attorney." (Emphasis in original.)

Although the question is close, we conclude that attorney fees a claimant recovers against an insurer after prevailing in a hearing on the insurer's denial of a claim are not recoverable by the insurer as an "other cost" of the claim under ORS 656.593(1)(c). We do not believe the legislature intended that the coincidence of a third-party

recovery should relieve the insurer from paying attorney fees awarded to the claimant for prevailing in a hearing on a denied claim.

The portion of the order directing distribution to SAIF of the $1,000 attorney fee awarded claimant in the claim proceeding is reversed; the order is affirmed in all other respects.[6]

[6] Neither party contends that the proceedings before the board did not meet applicable *procedural* requirements. SAIF observes that, under ORS 656.593, "[n]o hearing is required or other procedure set forth." Later in its brief, SAIF states that "[i]n this case no hearing was had. There is no evidence or fact finding. There is nothing to be reviewed by the Court of Appeals." If we were required to rely on the record before the board, we might agree. *See Blackman v. SAIF,* 60 Or App ____, ____ P2d ____ (decided this date). However, the parties in this case do not ask that we determine any questions that can be correctly characterized as factual, and the legal issues they raise can be decided in light of the facts discernible from the record and those set forth in claimant's summary of facts, which SAIF accepts.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Daniel Leary, Claimant.

LEARY,
Petitioner,
v.
PACIFIC NORTHWEST BELL,
Respondent.

(WCB No. 80-01939, CA A23101)

Judicial Review from Workers' Compensation Board.

Argued and submitted June 10, 1982.

Robert K. Udziela, Portland, argued the cause for petitioner. With him on the brief was Pozzi, Wilson, Atchison, O'Leary & Conboy, Portland.

Katherine O'Neil, Portland, argued the cause for respondent. With her on the brief were William H. Replogle, and Schwabe, Williamson, Wyatt, Moore & Roberts, Portland.

Before Richardson, Presiding Judge, and Thornton and Van Hoomissen, Judges.

VAN HOOMISSEN, J.

Reversed; referee's order reinstated.

VAN HOOMISSEN, J.

Claimant appeals an order of the Workers' Compensation Board that reversed a referee's order holding his occupational disease claim compensable. The dispositive issue is whether claimant's physical disabilities arose out of and in the scope of his employment. ORS 656.802(1)(a).[1] We review *de novo,* ORS 656.298(6), and reverse.

Claimant, age 54 at the time of the hearing, had been employed by Pacific Northwest Bell (PNB) for 33 years installing and repairing telephones. In December, 1977, he began experiencing headaches, upset stomach and diarrhea. At the hearing he testified that he was under considerable stress at work because of the constant turnover of supervisors, many of whom were younger than he and had less experience; that his supervisors gave conflicting instructions and instituted varying work methods; that they supervised his work too closely, which he considered

[1] ORS 656.802(1)(a) defines "occupational disease" 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."

unnecessary given his experience; that they harassed him about his production, which he believed to be about the same as other employes; and that they criticized him for refusing to work overtime, which he did not believe was mandatory. Several of claimant's supervisors testified at the hearing or by affidavit that he produced less than other employes, was easily agitated, disliked authority, had difficulty adjusting to changing policies and felt persecuted by them.

In December, 1977, claimant told Dr. Howell that he was experiencing stress at work and was particularly concerned about the company's hiring of young, inexperienced women and placing them in supervisory roles ahead of older, more experienced men. The doctor tentatively diagnosed a duodenal ulcer. When treatment failed to remedy claimant's intestinal condition, he was hospitalized in February, 1978, for a gastroscopy which revealed duodenitis, peptic ulcer and peptic esophagitis. On Dr. Howell's advice, he took a three-month leave of absence. Dr. Howell informed PNB that claimant's condition

"is directly aggravated by his work situation and a leave of absence is considered imperative." Claimant's condition improved, and he returned to work in May, 1978.

Claimant's intestinal problems recurred. In December, 1979, he contacted Dr. Parent, an internist, and related that he was dissatisifed with his job and was undergoing great tension at work. Dr. Parent diagnosed hypertension, diarrhea with possible ulcerative colitis, duodenitis and reflux esophagitis with persistent ulceration. He concluded that "[a]ll [claimant's] problems appear to be tension or stress related." Although he did not believe claimant's work directly caused his problems, he concluded that "his work situation and attitude towards it are directly aggravating these problems."

Claimant filed a claim for occupational disease. PNB denied that claim. Dr. Parent wrote PNB:

> "It is my opinion that a dominant factor in this patient's life is his job stress. I feel his hypertension is probably on an essential basis, however, as you are aware stress does affect this adversely as it does irritable bowel or colitis. It is also a factor in increasing acid which is a factor in the etiology of dueodenitis and esophagitis. * * *"

At PNB's request, claimant was examined by Dr. Colbach, a psychiatrist, who reported:

> "What I think we have here is a man who is really not smart enough and does not have the personality flexibility to cope well with change. For many years, he apparently did all right. Now, at a time when he is aging and slowing down in many ways, he is confronted at the same time with an increasingly complex and changing society and work situation. He feels unappreciated, alienated, and angry. He develops psychosomatic symptoms. He is too limited to really understand what is going on, so he projects most of the blame on certain individuals in his work environment.

"It doesn't appear that his work has forced him into any particularly stressful situations. But his selective perceptions of what is going on at work do cause him distress and do, in turn, contribute to his psychosomatic problems. These selective perceptions, of course, are unconscious results of his intellectual and personality limitations.

"I have described a complex situation. Whether this is properly compensable under workers' compensation law is

impossible for me to say. It is more of an administrative law decision than a medical one.

"I don't think any particular psychiatric intervention is indicated here.

" * * * * *

"If I had to give claimant a particular diagnostic label, I would say that he has elements of what has been termed 'the paranoid personality,' although he isn't quite so bad as to deserve the full implications of this label."

The referee concluded that claimant "truly believed he was being harassed" at work and that his "reactions to his perceived experiences at work did cause him stress and anxiety which directly resulted in his need for treatment and care of his resulting physical problems." The Board concluded that claimant was subjected to normal and reasonable supervision and that his "adverse psychological and physical reaction" to that supervision did not arise within the scope of his employment. The Board observed that his stress factors, young supervisors and women supervisors, were "really factors which any person claimant's age encounters everywhere."

An occupational disease need not "be caused or aggravated solely by the work conditions." It is sufficient "[i]f the at-work conditions, when compared to the nonemployment exposure, are the major contributing cause of the disability." *SAIF v. Gygi,* 55 Or App 570, 574, 639 P2d 655, *rev den* 292 Or 825 (1982). The question is whether claimant's stress, which appears to result primarily from his perception of the way he is treated by his supervisors, can be said to arise in the scope of his employment.

Where an employe is deviating from expected job performance standards, supervision directed at improving the desired performance falls within the scope of employment because it is inevitable in the employment relationship. If that kind of supervision is the nexus linking the psychiatric condition to the job, the claim arises out of and in the course of employment within the meaning of ORS 656.802(1)(a). An adverse psychological reaction to supervision directed at improving job performance is within the scope of employment, and an adverse reaction to it is a risk of employment. It is unnecessary that claimant prove that

his stress resulted from harassment or other illegitimate supervision, because that would inject the element of fault into the proceeding. Neither is the claim precluded because the incidents contributing to claimant's stress might not have adversely affected an average worker. *McGarrah v. SAIF,* 59 Or App 448, 651 P2d 153 (1982); *Maddox v. SAIF,* 59 Or App 508, 651 P2d 180 (1982).

In *SAIF v. Gygi, supra,* 55 Or App at 578, we held that a self-employed attorney who began to drink alcohol excessively and abuse over-the-counter drugs because of the pressures of his work had a compensable occupational disease. We stated that, "[a]lthough claimant, being self-employed, may have been the author of his own downfall, his condition arose because of his response to the demands of his law practice."

Here, claimant's stress is similarly the result of his response to his job. In addition to the stress factors noted by the Board, claimant also identified stress resulting from conflicting orders as a consequence of the turnover of supervisors, as well as what he perceived to be harassment over his production and refusal to work overtime. It is not dispositive whether claimant was in fact harassed. What is decisive is whether he believed that he was being harassed and whether that belief was the major contributing cause of his stress and resulting disability.

Dr. Colbach noted that claimant's "selective perceptions, of course, are unconscious results of his intellectual and personality limitations." The Supreme Court has stated that for purposes of determining compensability under the Workers' Compensation Act, the employer takes the workers as he finds them with all their inherent defects. *Weller v. Union Carbide,* 288 Or 27, n 5, 602 P2d 259 (1979). It is not important that the stress affecting claimant was not unusual or excessive. It exacerbated his disabling intestinal disorders. The medical evidence supports a conclusion that claimant suffers a greater and different degree of stress when he is at work. *See James v. SAIF,* 290 Or 343, 350, 624 P2d 565 (1981). His medical records establish that his condition improved significantly during his leave of absence from PNB. There is no evidence that he suffered from any unusual stress from nonemployment

sources. We find it significant that claimant was employed by PNB for more than 33 years and that it has been only in the last few years that he has been unable to cope with his problems at work.[2] Thus, notwithstanding that his work-related stress appears largely to be his own reaction to his working conditions, *see SAIF v. Gygi, supra,* 55 Or App at 578, we conclude that it is the major contributing cause of his disability and that it is therefore compensable.

Reversed; referee's order reinstated.

[2] Before this time claimant had suffered a back injury that intermittently causes him discomfort that is unrelated to his present claim.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
Robert O. Barrett, Claimant.

BARRETT,
Petitioner,
v.
UNION OIL DISTRIBUTORS,
Respondent.

(WCB No. 79-09096, CA A24711)

Judicial Review from Workers' Compensation Board.

Argued and submitted September 20, 1982.

Richard T. Kropp, Albany, argued the cause for petitioner. With him on the brief was Emmons, Kyle, Kropp & Kryger, P.C., Albany.

Brian L. Pocock, Eugene, argued the cause for respondent. With him on the brief was Cowling, Heysell & Pocock, Eugene.

Before Richardson, Presiding Judge, Joseph, Chief Judge, and Van Hoomissen, Judge.

VAN HOOMISSEN, J.

Reversed; referee's order reinstated.

VAN HOOMISSEN, J.

Claimant appeals an order of the Workers' Compensation Board that reversed the referee's order that the employer's insurer accept his claim for aggravation of an earlier compensable injury. Without reaching the merits, the board concluded that claimant's aggravation claim was not timely filed. We disagree and reverse.

Claimant was injured in 1973. His claim was closed, and after a hearing and board review in 1974, he was granted 25 percent unscheduled disability. In the following years he complained of increased pain and disability. In December, 1978, he sent a letter to the employer's insurer, stating that he was experiencing "further problems" with his industrial injury and requesting that his claim be reopened.

At the time of his injury, former ORS 656.271(1) provided:

> "* * * The claim for aggravation must be supported by a written opinion from a physician that there are reasonable grounds for the claim * * *."

The requirement for a doctor's opinion accompanying an aggravation claim was eliminated in 1975. ORS 656.273 provides in pertinent part:

"(7) A request for hearing on any issue involving a claim for aggravation must be made to the department in accordance with ORS 656.283. Adequacy of the physician's report is not jurisdictional. If the evidence as a whole shows a worsening of the claimant's condition the claim shall be allowed."

In interpreting ORS 656.273, we have said:

"As we interpret this statute, a claimant may make a 'claim for aggravation' under subsection (2) *or alternatively,* a physician may submit a report, which is a 'claim for aggravation' under subsection (3) * * *." *Stevens v. Champion International,* 44 Or App 587, 589, 606 P2d 674 (1980).

The referee concluded that claimant's aggravation claim had been filed properly under the new statute and that the substantial medical evidence in claimant's favor merited overturning the insurer's denial and ordering payment of benefits. The employer appealed only on the merits

of the aggravation claim, not the procedural aspects of the claim filing. The board, however, chose to apply the earlier procedural statute. It reasoned that claimant's letter to the insurer, unaccompanied by a physician's report, was an invalid aggravation claim. It therefore reversed the referee.

The initial question on review is whether the board applied the correct statute. Fundamental fairness dictates that the board should not decide a claim on the basis of evidence not in the record or on issues not briefed before it. *Neely v. SAIF,* 43 Or App 319, 323, 602 P2d 1101 (1979), *rev den* 288 Or 493 (1980). This issue presents only a question of law, however. The facts contained in the record on this point are not in dispute. No need exists to remand the case when all the evidence on that issue is in the record. The board's *de novo* review is on the record submitted before it, as is ours. *Neely v. SAIF, supra.*

We have not yet ruled on the retroactive effect, if any, of ORS 656.273. Generally, statutes or regulations that say nothing about retroactive application are not applied retroactively if such a construction will impair existing rights, create new obligations or impose additional duties with respect to past transactions. *Derenco v. Benj. Franklin Fed. Sav. and Loan,* 281 Or 533, 539 n 1, 577 P2d 477, *cert den* 439 US 1051 (1978); *Joseph v. Lowery,* 261 Or 545, 547, 495 P2d 273 (1972). ORS 656.202(2) provides special legislative guidance in the field of workers' compensation:

"Except as otherwise provided by law, payment of benefits for injuries or death 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."

ORS 656.202(2) is not, however, an absolute proscription against retroactive application of workers' com-

pensation statutes. It is generally applied to deny retroactive application of legislation that alters the amounts and availability of benefits under the act. *See, e.g., SAIF v. Mathews,* 55 Or App 608, 639 P2d 668, *rev den* 292 Or 825 (1982); *Bradley v. SAIF,* 38 Or App 559, 590 P2d 784, *rev den* 287 Or 123 (1979); *Holmes v. SAIF,* 38 Or App 145, 589 P2d 1151 (1979).

In determining whether statutes should have retroactive effect, we have distinguished between statutes relating "to eligibility for coverage" and those relating to "whether and when a claim can be made in situations where coverage exists," the latter but not the former being applied retroactively. *Miner v. City of Vernonia,* 47 Or App 393, 398, 614 P2d 1206, *rev den* 290 Or 149 (1980). In *State ex rel Huntington v. Sulmonetti,* 276 Or 967, 557 P2d 641 (1976), the Supreme Court gave the benefit of a procedural change in a workers' compensation statute governing timely filing of a request for hearing to a claimant whose first claim for the same injury had already been decided adversely to him as untimely under the previous version of the statute. In *Holden v. Willamette Industries,* 28 Or App 613, 560 P2d 298 (1977), we held that an amendment to ORS 656.807(1), which increased the period for filing occupational disease claims from three to five years from the date of last exposure and which became effective after claimant's first claim on his exposure had been held untimely, could be applied retroactively to allow claimant to file another claim:

> "The most fundamental reason to extend the limitation, however, is that the most apt application of the policy of the law that the Workmen's Compensation Act is to be liberally construed for the benefit of the worker, is to the construction of a statute which is silent or ambiguous as to its retroactive effect upon workers' claims. Therefore, we construe the amended version of ORS 656.807(1) to allow consideration of claims filed within five years of last exposure which existed on October 5, 1968, or thereafter." *Holden v. Willamette Industries, supra,* 28 Or App at 618. (Footnote omitted.)

Support for applying the 1975 statute is found in the fact that a claim for aggravation, unlike a request for continuing medical services, is generally treated as a new claim. ORS 656.273(6). A claimant's request for aggravation benefits is not granted automatically. The claimant must prove a worsened condition, a direct and compensable correlation to the previous compensable injury, and the absence of any intervening injuries or contributive exposures. Like a claim for new injury, a claimant has a strict time limit in which to file an aggravation claim and specific statutory requirements that the substance of the claim

must meet before it is deemed properly filed. If a compensable worsening is found, the claim will ordinarily be processed as an initial claim and a new determination order issued when the claimant has become medically stationary.

We conclude that this claim for aggravation of a previous compensable injury should be processed under the statutory procedure in effect at the time the claim was made. *Cf. Thornsberry v. SAIF,* 57 Or App 413, 644 P2d 661 (1982). Claimant's letter to his employer's insurer suffices as a timely claim for aggravation rights. ORS 656.273.

On the merits, without reiterating the evidence that supports claimant's claim, we conclude that the medical evidence establishes that claimant's condition has worsened since his last arrangement of compensation. We also find no merit to the employer's contention that intervening activities materially contributed to claimant's worsened condition.

The referee's order to employer's insurer to accept the claim and to pay compensation as authorized by law until closure is reinstated. ORS 656.268.

Reversed; referee's order reinstated.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Donald A. Godell, Claimant.

GODELL,
Petitioner,
v.
SAIF CORPORATION,
Respondent.

(No. 80-05378, CA A23841)

Judicial Review from Workers' Compensation Board.

Argued and submitted November 15, 1982.

David A. Force, Eugene, argued the cause for petitioner. On the brief were Evohl F. Malagon and Malagon & Velure, Eugene.

Darrell E. Bewley, Appellate Counsel, State Accident Insurance Fund, Salem, argued the cause and filed the brief for respondent.

Before Gileltte, Presiding Judge, and Warden and Young, Judges.

PER CURIAM.

Order modified to award claimant 64 degrees for 20 percent unscheduled permanent partial disability.

PER CURIAM

Claimant appeals an order of the Workers' Compensation Board (Board) assessing the extent of his permanent partial disability for atopic eczema at five percent. He seeks reinstatement of the referee's assessment of 40 percent. On *de novo* review, we assess the extent of claimant's disability at 20 percent. *See Hoag v. Duraflake,* 37 Or App 103, 585 P2d 1149, *rev den* 284 Or 521 (1978).

The order of the Workers' Compensation Board is modified to award claimant 64 degrees for 20 percent unscheduled permanent partial disability.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of
Charles Maddox, Claimant.

State Accident Insurance Fund Corporation,

Petitioner,

v.

WCB No. 79-09937
CA A23313

Charles Maddox,

Respondent.

****

Judicial Review from Workers' Compensation Board.

Argued and submitted May 10, 1982.

Darrell E. Bewley, Appellate Counsel, State Accident Insurance Fund Corporation, Salem, argued the cause and filed the briefs for petitioner.

Michael E. Wasserman, Salem, argued the cause for respondent. On the brief was Linda C. Love, Salem.

Before Buttler, Presiding Judge, and Warren and Rossman, Judges.

BUTTLER, P. J.

Order affirmed on jurisdictional issue; remanded for review of extent of disability.

FILED 12/8/82.

BUTTLER, P. J.

This workers' compensation case has been through this court twice on its way from the Workers' Compensation Board to the Supreme Court and back again on remand.[1] The Board had determined the claim to be compensable, but did not determine the extent of disability. While the compensability issue was on appeal through the courts, the referee proceeded to determine the extent of claimant's disability and awarded permanent total

disability. Before the Board, SAIF contended that the referee lacked jurisdiction to rate the extent of disability while the issue of compensability was on appeal. The Board reversed the referee's award of permanent total disability on the ground that the claim was not compensable. SAIF appeals from the Board's order pertaining to extent of claimant's disability, re-asserting its contention that the referee and Board lacked jurisdiction to rate the extent of claimant's disability pending appeal of the issue of compensability.[2]

In its order denying SAIF's motion to reconsider, the Board explained its position on the jurisdictional issue:

> "THE SAIF Corporation's motion for reconsideration complains that the Board's Order on Review dated December 7, 1981 failed to address its jurisdictional argument. Its jurisdictional argument is: When in litigation a claim has been found compensable, but that decision has been appealed and is not yet finally resolved, the Board and its Referees lack jurisdiction to enter orders rating extent of disability.
>
> "SAIF's argument that extent hearings be deferred until compensability is finally determined is attractive, and it may well be that the Board should consider adopting a rule that so provides. Unless and until the Board adopts such a rule, however, we address SAIF's jurisdictional argument by stating we are not persuaded. ORS 656.313(1)."

At the time of claimant's injury, ORS 656.313(1) provided:

> "(1) Filing by an employer or the State Accident Insurance Fund Corporation of a request for review or court appeal shall not stay payment of compensation to a claimant."[3]

The policy expressed in ORS 656.313 is consistent with the practice of proceeding to rate the extent of a claimant's disability pending an appeal of a determination that the claim is compensable. If compensability and extent of disability had been

determined in the same hearing, ORS 656.313 would preclude a stay of payment of the compensation awarded. We perceive no salient difference between that situation and this, other than the fortuity of a bifurcated hearing in this case. We note that the legislature has specifically provided a mechanism for delaying payment of disputed medical expenses pending appeal on the issue of their compensability. ORS 656.313(3).[4] It is fair to assume that if it had intended that the processing of extent of disability claims be stayed pending appeal of a determination that the disability is compensable, it would have so provided.

SAIF contends that ORS chapter 19, pertaining generally to appeals from lower courts, applies to workers' compensation proceedings and would divest the referee and Board of jurisdiction to take further action on the claim until compensability was finally determined in the appellate process. ORS chapter 19 governs appellate review of lower court decisions, not administrative tribunals. The workers' compensation statutory scheme contains its own provisions governing appeals, see, e.g., ORS 656.298; they appear to be complete and do not prevent the referee or Board from processing extent of disability claims pending appeal of an order finding compensability. We conclude that the referee and Board had jurisdiction here.[5]

Although we affirm the Board's order on the jurisdictional issue, the extent of disability question has not yet been reviewed on the merits, because the Board based its ruling on the sole ground that the claim was not compensable. In the appeal on compensability taken from one of the two orders, we held the claim compensable, thereby superseding the Board's order

on compensability. SAIF, however, is entitled to have the extent of disability reviewed.

Order affirmed on jurisdictional issue; remanded for review of extent of disability.

FOOTNOTES

1

The precise chronological history is as follows:

May 2, 1977: Claimant requests hearing on denial of claim.

January 31, 1978: Referee reverses denial and orders SAIF to accept claim.

March 21, 1979: Board on review affirms referee on compensability.

November 16, 1979: Claimant requests hearing on extent of disability.

February 19, 1980: Court of Appeals affirms (without opinion) the Board's order in compensability case. Maddox v. SAIF, 44 Or App 520, 605 P2d 1391 (1980).

April 17, 1980: SAIF files motion with Board to dismiss requested hearing on extent while compensability issue was pending on appeal through the courts.

June 30, 1980: Referee awards claimant permanent total disability.

January 20, 1981: Supreme Court remands compensability case to Court of Appeals for reconsideration in light of James v. SAIF, 290 Or 343, 624 P2d 565 (1981). Maddox v. SAIF, 290 Or 357, 624 P2d 570 (1981).

March 9, 1981: Court of Appeals remands compensability case to Board. Maddox v. SAIF, 51 Or App 2, 624 P2d 643 (1981).

December 7, 1981: Board on remand holds claim not compensable.

December 7, 1981: Board on review of extent case

reverses referee on the basis of its holding the claim not compensable.

December 28, 1981: Board denies SAIF's motion for reconsideration and explains why it did not grant SAIF's motion to dismiss.

December 31, 1981: Claimant seeks judicial review of Board's December 7th order on compensability.

January 6, 1982: SAIF files petition for judicial review of December 7, 1981 order on extent of disability.

September 29, 1982: Court of Appeals holds claim compensable. Maddox v. SAIF, 59 Or App 508, 651 P2d 180 (1982).

2

Claimant's motion to dismiss the appeal, filed after oral argument, is denied. The issue raised in this appeal may well have been moot after the Board ruled the claim not compensable, but we have since ruled the claim compensable. Maddox v. SAIF, 59 Or App 508, 651 P2d 180 (1982). We proceed to the merits because, notwithstanding any erstwhile mootness, SAIF's jurisdictional argument, if accepted, could affect the course of the proceedings here by rendering the referee's ruling on extent of disability a nullity.

3

The wording of the current statute is substantially similar:

"Filing by an employer or the insurer of a request for review or court appeal shall not stay payment of compensation to a claimant."

4

ORS 656.313(3) provides:

"(3) If an insurer or self-insured employer denies the compensability of all or any portion of a claim submitted for medical services, the insurer or self-insured employer shall send notice of the denial to each provider of such medical services. After receiving notice of the denial, a medical service provider may submit bills for the disputed medical services to the provider of health insurance for the injured worker. The health insurance provider shall pay all such bills in accordance with the limits, terms and conditions of the policy. If the injured worker has no health insurance, such bills may be submitted to the injured worker. A provider of disputed medical services shall make no further effort to collect disputed medical service bills from the injured worker until the issue of compensability of the medical services has been finally determined. When the compensability issue has been finally determined, the insurer or self-insured employer shall notify each affected health insurance provider of the results of the determination, including the results of proceedings under ORS 656.289(4) and the amount of any settlement. If the services are determined to be compensable, each health insurance provider that has paid claims pursuant to this subsection has a right of action to recover the costs thereof from the insurer or self-insured employer. As used in this subsection, 'health insurance' has the meaning for that term provided in ORS 731.162."

5

We express no opinion as to whether the Board may, by rule, stay hearings on extent of disability under the circumstances presented here.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the matter of the compensation of
Linda D. Mackay, Claimant.

Linda D. Mackay,

Petitioner,

v. WCB Case No. 81-02371
CA A23379

State Accident Insurance Fund
Corporation,

Respondent.

* * * * * * * *

Judicial Review from Workers' Compensation Board.

Argued and submitted May 12, 1982.

Michael N. Gutzler, Salem, argued the cause and filed the brief for petitioner.

Darrell E. Bewley, Appellate Counsel, State Accident Insurance Fund Corporation, Salem, argued the cause and filed the brief for respondent.

Before Gillette, Presiding Judge, and Warden and Young, Judges.

WARDEN, J. FILED: December 8, 1982

Affirmed.

WARDEN, J.

Claimant appeals from an order of the Workers' Compensation Board, that affirmed the referee's order affirming SAIF's denial of petitioner's claim. We affirm.

Claimant is a school-bus driver. On November 17, 1980, she completed her bus round at 4:30 p.m., parked the bus, disembarked and began walking across the bus parking lot to the

bus barn, where she was to punch out on a time clock. She testified that she injured her back when "I was walking across the parking lot and my right leg buckled from beneath me and I fell." She testified that she had not tripped over anything but that she had been working more hours than normal and had experienced some low back discomfort during that week.

Claimant saw her doctor at 5 p.m. that day for a regularly scheduled appointment to receive treatment for a previous work related neck and mid-back injury. She told her doctor that she had fallen that day and had some low-back pain. The doctor determined that the low-back injury was "completely separate" from the area previously injured and completed a claim form for a new injury. On that form, the doctor marked "Yes" in answer to the question, "Is the condition requiring treatment the result of the industrial injury or exposure described?" SAIF does not contest that the fall caused the low-back injury.

The referee found claimant to be a credible witness but concluded that she had not proved by a preponderance of the evidence that the injury was work connected, because there was no medical evidence of a work-connected cause of the collapse of claimant's leg. On appeal, she argues that her case is indistinguishable from Hubble v. SAIF, 56 Or App 154, 641 P2d 593, rev den 293 Or 103 (1982). SAIF argues that Hubble is distinguishable because claimant's job did not require a substantial amount of walking, as did Hubble's job. We find Hubble to be distinguishable on an additional basis.

The issue, as the referee saw it and as we see it, is whether the evidence shows that the cause of her fall was

work-connected. The claimant in Hubble did just that. We conclude that claimant here had the same burden. There is uncontroverted medical evidence that claimant's back was injured by the fall. SAIF does not contest that she fell during working hours and on her employer's premises, i.e. in the course of employment, but that is only one consideration in the analysis of the unitary work-connection test adopted in Rogers v. SAIF, 289 Or 633, 616 P2d 485 (1980). Another is that the injury arose out of employment. ORS 656.005(8)(a). Although these elements are not to be applied as separate tests, an injury that has sufficient work relationship necessarily arises out of and in the course of employment. Rogers, 289 Or at 643.

We recently adopted Professor Larson's analysis of unexplained falls. Phil A. Livesley Co. v. Russ, 60 Or App ___, ___ P2d ___ (1982). There we held that a claimant will have carried the burden of proof of work connection by showing that the injury occurred on the employer's premises during work hours and that the cause is unknown and not particular to the claimant. In that case, like this one, the claimant fell at and during work and was injured as a result. Unlike this case, the lay evidence and medical reports in Livesley persuasively eliminated all idiopathic[1] factors of causation; therefore, the claimant had shown the cause of the injury to be unknown and not particular to him.

The lay evidence and medical reports here do not eliminate all idiopathic factors of causation. Unlike Hubble v. SAIF, supra, there was no medical evidence that claimant's knee buckled as a result of a risk of her employment. Claimant's

testimony raised an inference of possible connection between extra work hours, low-back pain and the buckled knee, but the referee found that inference was insufficient to meet the preponderance of evidence burden. We agree. Claimant's evidence showed no more than that it was equally possible that the cause of claimant's fall, her buckling knee, was idiopathic as that it was connected. That is not enough to satisfy her burden of proof. Without more, such a fall is not compensable. See Phil A. Livesley Co. v. Russ, supra.

Affirmed.

FOOTNOTE

1

As we did in Livesley, we use the term "idiopathic" here to mean "peculiar to the individual" and not as "arising from an unknown cause."

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the matter of the compensation of
Irene Penifold, claimant.

Irene Penifold,

Petitioner,

v. WCB No. 78-9826
CA A23514

State Accident Insurance Fund
Corporation,

Respondent.

* * * * * * * * *

Judicial review from Workers' Compensation Board.

Argued and submitted June 9, 1982.

Peter McSwain, Eugene, argued the cause for petitioner. On the brief were Evohl F. Malagon and Malagon & Velure, Eugene.

Darrell E. Bewley, Appellate Counsel, State Accident Insurance Fund Corporation, Salem, argued the cause and filed the brief for respondent.

Before Gillette, Presiding Judge, and Warden and Young, Judges.

WARDEN, J. FILED: DECEMBER 8, 1982

Reversed and remanded with instructions to order the claim accepted.

WARDEN, J.

Claimant seeks review of an order of the Workers' Compensation Board affirming the referee's denial of her occupational disease claim. In an earlier decision in this case, we remanded it to the referee for reconsideration in light of claimant's additional medical evidence. Penifold v. SAIF, 49 Or

App 1015, 621 P2d 646 (1980). In the proceedings leading to that decision, the referee had found claimant's contact dermatitis to be compensable. The Board had reversed, finding that her condition resulted from exposure to substances encountered off the job. On remand, the referee determined that claimant's dermatitis was not compensable. The Board affirmed, and claimant appeals. We reverse.

Claimant had been a nurse's aide at Eugene Hospital and Clinic for about seven years without incident. During October, 1976, however, she began suffering from contact dermatitis on her hands and forearms. She filed a claim on November 19, 1976. It was accepted and later closed with payment of one day's temporary total disability and no finding of permanent disability.[1]

Claimant's condition flared up again in April, 1977, and she began wearing rubber gloves at home to avoid contact with potentially irritating substances. The condition flared up again in September, 1978, and she filed a claim for aggravation of her previously accepted claim. She was examined by Dr. Moyer, who prescribed medication but did not specifically diagnose claimant's condition. In February, 1979, claimant was examined by Dr. Rollins, who found her to be sensitive to certain substances used in cosmetics and hand creams and to substances found in rubber gloves. He diagnosed contact dermatitis that is aggravated by the use of rubber gloves, exposure to irritants at work and "contacts in her home." Claimant's employment was terminated by her employer on November 27, 1978, because she was "[u]nable to continue as nurse aide due to skin irritation from solution in hospital."

Claimant's medical expenses were not paid by SAIF. The nonpayment was considered a de facto denial of the claim, and she requested a hearing. The referee found claimant's condition to be compensable. SAIF requested review, and the Board reversed. As indicated above, this court remanded for consideration of medical reports received after the hearing. Those reports from Dr. Storrs state that from patch testing it was determined that the acute dermatitis that had developed during claimant's employment at Eugene Hospital was directly associated with rubber gloves and the Septisoft soap used in her work at the hospital, although allergic reactions to other substances were also found.

On remand, the referee determined that under the test established in James v. SAIF, 290 Or 343, 624 P2d 565 (1981), claimant's condition not compensable. The referee concluded that she had not established that her condition was caused by circumstances to which she was not ordinarily subjected or exposed other than during her employment. The referee pointed out that, although claimant was exposed to Septisoft soap only on the job, she wore rubber gloves at home as well as on the job and was potentially exposed to the cosmetic ingredients to which she was sensitive only at home. The Board affirmed the referee, applying a rule it had recently established, requiring that in order to prove entitlement to compensation for an occupational disease a claimant must show that the work exposure was the "significant predominant cause" of the condition.

First, we note that the Board's formulation of the rule for compensability of occupational diseases, although it may not materially differ from the rule established by the Supreme Court and this court, was adopted before our decision in SAIF v.

Gygi, 55 Or App 570, 639 P2d 655, rev den 292 Or 825 (1982). In James v. SAIF, supra, the Supreme Court held that a claimant seeking compensation for an occupational disease must show that the condition arose within the scope of employment and that it "was caused by circumstances 'to which an employe is not ordinarily subjected or exposed other than during a period of regular actual employment.' ORS 656.802(1)(a)." 290 Or at 348. In Gygi, we held that a disease is compensable "[i]f the at-work conditions, when compared to the nonemployment exposure, are the major contributing cause of the disability * * *." 55 Or App at 574. The question presented, then, is whether claimant has met her burden to prove that her exposure at work was "the major contributing cause" of her contact dermatitis. We conclude that she has met that burden.

The three suggested causes for the flare-up of claimant's dermatitis during her work at Eugene Hospital are Septisoft soap, to which claimant was exposed only at work, certain cosmetic ingredients, to which she was not exposed at work, and rubber gloves, which she wore at work and at home. We do not consider the cosmetic ingredients to be of significance because, although there was evidence that the ingredients are commonly used, there was no evidence that claimant actually used products containing them. More importantly, claimant's condition cleared up after she had left her employment at the hospital and stopped using rubber gloves. In addition, Dr. Storrs, although noting claimants' reaction to those cosmetic ingredients, concluded:

"* * * There is now no doubt in our minds that Mrs. Penifold's acute dermatitis, which occurred during

> the time that she was working at the Eugene Hospital and Clinic as a nurse's aide, was directly associated with her use of rubber gloves and Septisoft liquid soap. * * *."

If claimant's condition was produced solely by her exposure to Septisoft soap, the claim would be compensable. It is the use of the rubber gloves both at work and at home that creates a question as to causation. Claimant left her employment on November 27, 1978, thus terminating her exposure to Septisoft. She continued to wear rubber gloves at home to avoid contact with soaps and detergents until March, 1979, when she was informed of her sensitivity to the gloves. Claimant testified, however, that she did not begin to use rubber gloves at home until after she developed the skin problems. After claimant had left work and stopped using rubber gloves, her hands improved over a period of time. Dr. Storrs' report stated that it is not unusual for contact dermatitis symptoms to last for several months. We conclude from this that, although claimant's use of rubber gloves at home might have been a contributing factor to her condition, the at-work exposure to Septisoft soap was the major contributing cause and that claimant's dermatitis is a compensable occupational disease.

Reversed and remanded with instructions to order the claim accepted.

FOOTNOTE

1 Although this is not precisely the same situation as that presented in Frasure v. Agripac, 290 Or 99, 619 P2d 274 (1980), or Saxon v. Lamb-Weston, 49 Or App 887, 621 P2d 619 (1980), rev den 290 Or 727 (1981), claimant does not contend in this court that the employer is estopped to deny the compensability of her condition because it accepted her original claim. We need not decide, therefore, whether the fact that claimant's original claim was accepted and closed with an award of temporary total disability prevents the employer from contesting the compensability of this aggravation claim.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the matter of the compensation of
Richard R. Miller, Claimant,

Richard R. Miller,

Petitioner,

v. WCB No. 81-06585
CA A24589

State Accident Insurance Fund
Corporation,

Respondent.

* * * * * * * *

Judicial Review from Workers' Compensation Board.

Argued and submitted October 8, 1982.

Michael N. Gutzler, Salem, argued the cause for petitioner. With him on the briefs was Allen & Vick, Salem.

Donna Parton, Salem, argued the cause for respondent. On the brief was Darrell E. Bewley, Appellate Counsel, State Accident Insurance Fund Corporation, Salem.

Before Gillette, Presiding Judge, and Warden and Young, Judges.

WARDEN, J. FILED: DECEMBER 8, 1982

Affirmed.

WARDEN, J.

Compensability is the issue in this workers' compensation case. The question is whether a ruptured intevertebral disc is causally related to an earlier disc injury and operation at a different level and, therefore, compensable. The Workers' Compensation Board (Board) affirmed the referee's opinion and order upholding denial of the claim, and claimant petitions for review.

On November 13, 1979, claimant injured his back while

attempting to hook a trailer to a tractor. After conservative treatment failed, a myelogram was performed, which revealed a herniated disc fragment at the L5-S1 intervertebral disc level. Claimant's treating physician, Dr. Shaw, performed a discectomy on January 18, 1980 at the L5-S1 level. Claimant's recovery from surgery was long and difficult. On the second postoperative day, he developed a severe cough and experienced back pain that radiated into both legs, particularly the right one. His lung problem was diagnosed as pneumococcal pneumonia. Disc space infection was suspected, but a bone scan showed no evidence of it. At the time of his discharge from the hospital on February 11, 1980, he had minimal pain in his back and right gluteal area. His left leg pain had subsided, but he had a pronounced lumbosacral tilt.

Dr. Shaw continued to see claimant on an outpatient basis. He examined claimant on July 16, 1980. Claimant still complained of pain in the low back and the front of the left thigh, particularly after prolonged sitting or standing, but Dr. Shaw was of the opinion that his condition was medically stationary at that time. On September 18, 1980, by determination order, claimant was awarded 15 percent unscheduled permanent partial disability resulting from the back injury. The award was later increased to 22.5 percent by stipulation.

In May, 1981, claimant experienced an acute exacerbation of his left hip and leg pain. Bed rest did not relieve the pain, and claimant was hospitalized on June 11, 1981. A myelogram revealed a large extradural defect on the left side, this time at the L4-5 level. The myelogram also showed "only minimal asymmetry at the L5-S1 level without a defect or post-

operative change at this level." An electromyogram (EMG) indicated an L5 nerve root impairment and "marked abnormalities" in muscles of the lower left extremity. On June 18, 1981, Dr. Shaw wrote to claimant's attorney:

> "Richard's back problem is obviously getting somewhat confusing at this point. The defect seen at the L4-5 level on the new myelogram most likely represents a new rupture of the disc at this level. Richard, of course, denies any new injury. The absence of muscle atrophy in his left leg, in spite of the EMG findings, would also go along with a more recent lesion of this particular nerve root. However, the other possibilities that need to be considered are a reherniation of a fragment of disc material from the previously operated level with displacement proximally or a small epidural abscess in the upper level. As my previous notes have indicated, Richard did have somewhat of a 'stormy' postoperative period after his surgery and there was clinical suspicion that he may have had a disc space infection though we could never prove this on the bone scan. One other remote possibility is a ruptured L4-5 disc secondary to the severe coughing bouts that Richard had when he developed a pneumonia following his previous surgery. Richard has appeared to have a significant functional overlay to his symptoms as well and this has further complicated a clear picture of what is, in fact, going on. In any case, I feel, in view of the EMG and myelographic findings, Richard does need to have the L4-5 level explored in the very near future."

Dr. Shaw telephoned SAIF and requested authorization for surgery. SAIF asked that surgery be delayed until a second opinion could be obtained. By certified mail, it sent claimant a notice of an appointment for him to be examined by Orthopaedic Consultants, but the notice was returned "unclaimed." Claimant's attorney was also notified of the appointment, but claimant did not keep it.[1] On July 10, 1981, SAIF denied claimant's application to reopen his claim. He requested a hearing, which was held on October 13, 1981. He testified that his right-leg pain was alleviated by his first surgery but that the pain immediately switched to and continued in his left leg. He stated

that he had not suffered any back injuries since his surgery.

This is a case that requires expert medical opinion to sustain claimant's burden of proof on the issue of causation. See Larson v. State Ind. Acc. Com., 209 Or 389, 399, 307 P2d 314 (1957). For the necessary medical opinion, claimant relies almost entirely on this statement contained in a letter dated August 14, 1981, to his attorney from Dr. Shaw:

> "As I have indicated to you in my previous letter, [claimant's] case has been quite complicated but if an injury can be ruled out after he had his lumbar discectomy on January 18, 1980, his ongoing problems would have to be related, by history, to his surgery or postoperative period."

Claimant's argument is that, because his testimony that he has not had any injuries to his back since his surgery "rules out" an intervening injury, the condition of Dr. Shaw's opinion on causation is satisfied.

Claimant has not met his burden of proof on causation. Dr. Shaw's opinion of August 14 standing by itself is but an expression of uncertainty. Whether an intervening injury is the cause of claimant's new disc problem is the very issue on which compensability turns, but on this issue Dr. Shaw is silent in his letter of August 14. Moreover, Dr. Shaw's opinion of June 18, which is a more detailed discussion of claimant's situation than that of August 14, does not support compensability. That opinion states that the defect at the L4-5 level "most likely represents a new rupture" and that the "absence of muscle atrophy in his left leg, in spite of the EMG findings, would also go along with a more recent lesion of this particular nerve root." Dr. Shaw discusses three possible ways in which the new defect could be causally related to the early

surgery: a reherniation of a fragment of disc material from the previously operated level with displacement proximally, an epidural abscess from disc space infection resulting from the surgery or a rupture resulting from claimant's coughing bout during his pneumonia. However, Dr. Shaw discusses these only in terms of possibilities and in fact discounts the latter two. We thus have no expert medical opinion affirmatively attributing claimant's current condition to his industrial injury and the consequent surgery as more than a possibility. That claimant suffered pain in his left leg immediately after his surgery is circumstantial evidence of causation but is insufficient to carry claimant's burden of proof. Claimant has failed to show that his present back problem is more likely than not connected to his earlier compensable injury.[2]

Affirmed.

FOOTNOTES

1 SAIF claims that claimant's failure to respond to its request for an independent examination provides an independent ground for denial of the claim under ORS 656.325. Because of our disposition of the case, we do not reach that question.

2 The Board relied in part on our statement in Hamel v. Tri-Met, 54 Or App 503, 508, 635 P2d 662 (1981), that "relatively minor activity can trigger the herniation of a vertebral disc." That statement was made in reliance on medical evidence that was presented in that case, not as a matter of judicial notice, and we caution the Board against use in one case of evidence produced in another.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of
Brenda L. Henn, Claimant.

Brenda L. Henn,

Petitioner,

v. WCB No. 80-05494
CA A24058

State Accident Insurance Fund
Corporation,

Respondent.

* * * * * * * *

Judicial Review from Workers' Compensation Board.

Argued and submitted July 8, 1982.

J. Michael Alexander, Salem, argued the cause for petitioner. With him on the brief was Brown, Burt, Swanson, Lathen & Alexander, Salem.

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. FILED: December 8, 1982

Thornton, J., dissenting.

VAN HOOMISSEN, J.

Claimant appeals from an order of the Workers' Compensation Board that held that her work as a magazine salesperson was as an independent contractor, not an employe. In January, 1980, she answered a classified ad in a newspaper for a job as a sales representative for the company. She went to work as an "authorized representative" of the company, selling

subscriptions. She allegedly suffered tendonitis following a fall that occurred while she was making her rounds as a salesperson.

A company "Representatives' Agreement" signed by claimant provides that, as an "authorized representative" of the company, she agreed to comply with a company policy prohibiting various types of false, misleading and deceptive representations in her sales work and had to account for materials provided by the company and to fill out and properly process subscription forms. She was required to forward to the company any down payments received from subscribers. The agreement further provided that she had to abide by all applicable laws and that authorization to represent the company could be withdrawn for violation of any of the requirements of the agreement. Finally, the agreement provided:

> "I recognize that, as an independent contractor, I am self-employed, that Federal, State and local taxes are not deducted from my commissions and that I may, if I wish, engage in other remunerative endeavors without jeopardizing my authorization to represent Parents Home Service Institute, Inc."

The company considered representatives to be independent contractors. The company encouraged, but did not require, representatives to work eight hours a day. No particular hours were specified. Claimant worked for four to five hours on some days and about eight hours on other days. She was not penalized for working less than eight hours a day.

The company did not require any experience for the representative position, nor did claimant have any previous experience in sales work. The company provided a three-day training session in sales technique, given at its Portland

offices. The training was designed to minimize the possibility of representatives misinforming customers. She was taught how to present the product and was required to memorize the essential elements of a sales pitch. Representatives were encouraged to personalize their sales efforts so long as the presentations were not too lengthy.

The company agreed that, once claimant had put in 172 hours of work (the equivalent of one month of regular work in her first month), her commission would exceed $516; if not, the company would pay her the difference between $516 and the commission she actually earned. After 172 hours of work she would also be paid a mileage allowance of about $30. No other benefits were provided. Other than the one-time guaranteed minimum payment for 172 hours (which comes to $3.00 per hour) she was paid only on the basis of commissions. Representatives were allowed to draw on their commissions at any time; at the end of each month any commissions not drawn would be paid. Claimant did not work for 172 hours, so she never received the minimum payment of $516, and she never received the mileage allowance.

In order to show claimant what was to be done and how to do it, a supervisor accompanied her on her first three days of sales work. The supervisor did not actually accompany her to the homes. Instead, claimant visited certain homes while the supervisor visited other homes nearby. After the first three days she worked entirely on her own.

Claimant's job was to visit homes and to offer a simple gift (a growth chart) initially if the resident would allow her to make a sales presentation. As part of the sales presentation, she would offer the prospect a "free" copy of Mothers' Home

Encyclopedia if the prospect agreed to subscribe to Parents' Magazine. The encyclopedia and the magazine were the only publications offered by the company. If the prospect agreed to subscribe, she presented the encyclopedia, had the prospect sign a completed subscription contract and collected a down payment. As part of the sales effort, she showed the prospect a notebook filled with pages taken from previous issues of the magazine. The company provided the gift growth charts, encyclopedias and subscription contract forms. At the suggestion of the company, she displayed the sample magazine pages supplied by the company in a photo album supplied by her.

From time to time an area representative visited claimant to replenish her supplies. The area representative also occasionally provided her with leads to potential customers, consisting of lists of previous subscribers to Parents' Magazine. Claimant was supposed to telephone a person at the company offices every day in order to report her sales results. She called in on most days but failed to do so on some days. Consistent with the authorization agreement, representatives were allowed to engage in other work and could represent other companies during their sales rounds. Some did so, but claimant did not choose to. The company preferred that she work around her home area and advertised "work in your area" as an aspect of the job. However, she was allowed to sell wherever she wished and to whomever she wished. She chose to work in her home area, consisting of McMinnville and several nearby towns. She was the only person covering the McMinnville area. She used her own automobile in her representative work.

By the express provisions of the Oregon Workers' Compensation Act,[1] the right to direct and control the services of a person is an essential ingredient in the test for determining who is an employer within the meaning of the Act. Woody v. Waibel, 276 Or 189, 196, 554 P2d 492 (1976). The principal factors showing right of control are: (1) direct evidence of the right to or the exercise of control; (2) the method of payment; (3) the furnishing of equipment; and (4) the right to fire. Marcum v. SAIF, 29 Or App 843, 845, 565 P2d 399 (1977); 1C Larson, Workmen's Compensation Law § 44.00.

Direct evidence of control is slight. Although the employer preferred that claimant work eight hours and phone in receipts every day, she was not required to do so and often did not. Further, she was free to use her own sales technique as long as her representations were not "false, misleading, or deceptive" and did not otherwise violate the law. She also had discretion in choosing the sales area she covered and the customers she solicited. Further evidence on the parties' relationship is found in their agreement, which provided that she was a self-employed independent contractor and that taxes were not to be deducted from her commissions. While the fact that either or both of the parties considered their relationship to be that of independent contractor is not controlling, Woody v. Waibel, supra, a plain statement that the parties intend the relationship of independent contractor and not employe is not always to be disregarded. In a close case, it may swing the balance. 1C Larson, Workmen's Compensation Law § 46.30.

Claimant was being paid on commission.[2] When payment is by quantity or percentage, the method of payment test largely

becomes neutral. To the extent that it indicates continuing service, it suggests employment; to the extent that it lessens an employer's interest in the details of how the employe spends her time, it has been said to suggest an independent contractor relationship. 1C Larson, Workmen's Compensation Law § 44.33(b). It has generally been held that a commission salesman who works on a part-time basis, selling only when he feels like it or when the opportunity presents itself, is an independent contractor. 1C Larson, Workmen's Compensation Law § 45.23.

Claimant furnished her own car and the notebook in which she displayed the sample magazine stories. The free gifts and the contract forms were supplied by the employer. This factor is not particularly helpful in this situation.

The agreement signed by claimant when she was hired indicated that her "authorization to represent is subject to withdrawal as a consequence of a violation" of its various provisions prohibiting false or misleading representations and failure to return materials and proceeds. An unqualified right to fire, indicative of an employer-employe relationship, must be distinguished from the right to terminate the contract of an independent contractor for bona fide reasons of dissatisfaction. The exercise of such a right is still consistent with the idea that a satisfactory end result is all that is aimed for by the contract. Marcum v. SAIF, supra, 29 Or App at 847; 1C Larson, Workmen's Compensation Law § 44.35. No evidence was offered here that the employer could discharge claimant for other than violations of their agreement.

On de novo review, we conclude that claimant was an independent contractor. Indeed, the facts are remarkably similar

to a New York case in which, according to Larson, "every fact relating to control was overwhelmingly on the side of independent contractorship":

> "[The claimant] 'was [to be] free to exercise her own discretion and judgment with respect to the persons from which she would solicit applications and with respect to the time, place and manner of solicitation'; her payment was by commission, not by time; she paid her own expenses and used her own car; she was not required to make any report of her activities or to attend any meetings, although meetings were held which she could attend if she wished; she had no office space: the company, after her initial training period, did not in fact exercise any control over her work, beyond limiting her to a certain territory and forbidding her to sell competing insurance; and, for good measure, the written contract said explicitly that she should not be an employee but an independent contractor. * * *" 1C Larson, Workmen's Compensation Law § 43.54, citing Gordon v. New York Life Ins. Co., 275 App Div 135, 89 NYS2d 83 (1949), rev'd 300 NY 652, 90 NE2d 898 (1950).

Claimant asserts that under the "relative nature of the work" test her work was so intricately involved with the business of the employer as to make her an employe. Although this test is recognized in Oregon, it is used only if the relationship betwen employer and employe cannot be sufficiently ascertained by use of the traditional control test. Woody v. Waiber, supra, at 197. Application of the control test convinces us that the Board's decision was correct.

Affirmed.

FOOTNOTES

1

ORS 656.005(14), (28) define "employer" and "worker":

> "(14) 'Employer' means any person * * * who contracts to pay a remuneration for and secures the right to direct and control the services of any person."
>
> "(28) 'Worker' means any person * * * who engages to furnish services for a remuneration, subject to the direction and control of an employer * * *."

Had claimant worked 172 hours before she was injured, she would have received a guaranteed return of $516, if her commissions did not exceed that. The dissent relies, in part, on this method of payment in concluding an employer-employe relationship exists. However, at the time of her alleged injury, she was not yet entitled to the benefit of a guaranteed wage.

THORNTON, J., dissenting.

From my review of this record and the authorities cited by both sides, I am convinced that claimant was an employe of Parents Home Service Institute, Inc., and as such was covered under the Oregon Workers' Compensation Act. ORS 656.005(28); Woody v. Waibel, 276 Or 189, 554 P2d 692 (1976). I base this conclusion on the following.

First, the amount of control the employer was authorized to exercise over claimant's work. Although the agreement between the parties indicated that claimant was an independent contractor, the record discloses significant direct evidence of control. The employe was specifically trained by the company and was given a prepared sales pitch to assist in making sales. She was directed to make daily reports to her employer and actually did so at least every other day. In addition, although the employes were not required to work specific hours, the job was advertised as full-time, and it is apparent that such an effort was expected. An employe such as claimant might have been able to work at other jobs, but that right was really nothing more than the opportunity of almost anyone in the work force to "moonlight."

Second, the method of payment. Although the method of payment was couched in terms of commissions rather than a set wage during the initial period of employment, the employer's sales representatives were being paid a specific salary. The income of $516 for the first 172 hours ($3 per hour) was guaranteed regardless of sales and is in reality an established salary.

Third, the furnishing of equipment. The employer provided all the materials and supplies necessary to solicit orders.

Fourth, the right to fire. The employer definitely had the right to fire claimant if she violated any of the terms of the agreement. This proviso definitely is not consistent with an independent contractor status.

Fifth, the relative nature of the work. As in Woody v. Waibel, supra, the employe's sales solicitations formed an essential and regular part of the employer's marketing enterprise. Certain aspects of the job required close cooperation between claimant and her employer. Claimant certainly did not hold herself out to the public or other perspective employers as performing an independent business service.

> "If the worker does not hold himself out to the public as performing an independent business service, and regularly devotes all or most of his independent time to the particular employer, he is probably an employee, regardless of other factors." 1B Larson, Workmen's Compensation Law, § 45.31(a) at 8.109.

The above conclusion that the claimant was an employe for purposes of the Workers' Compensation law is supported by an

analogous line of cases involving similar claims of independent contractor status for purposes of the unemployment compensation law. See, e.g., Journal Pub. Co. v. State U. C. Com., 175 Or 627, 155 P2d 570 (1945), where the court denied the Journal's assertion that newspaper carriers were independent contractors for purposes of the unemployment compensation laws. To the same effect, see Revlon Services, Inc. v. Emp. Div., 30 Or App 729, 567 P2d 1072 (1977); Mt. Jefferson Carpets v. Emp. Div., 25 Or App 375, 548 P2d 1354 (1976); Portland Newcomers v. Morgan, 17 Or App 333, 513 P2d 473 (1973); but see Pam's Carpet Service, Inc. v. Employment Div., 46 Or App 675, 613 P2d 52 (1980). Although the above cases involved a different statute, as well as slightly different language in the relevant definition section, the fundamental principle is identical.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of
Michael Slaughter, Claimant.

Michael Slaughter,

Petitioner,

v. No. 80-1527
CA A23461

State Accident Insurance Fund
Corporation,

Respondent.

* * * * * *

Judicial Review from Workers' Compensation Board.

Argued and submitted June 9, 1982.

Robert Moon, Portland, argued the cause for petitioner. On the brief was John C. O'Brien, Jr., Portland.

Darrell E. Bewley, Appellate Counsel, State Accident Insurance Fund, Salem, argued the cause and filed the brief for respondent.

Before Gillette, Presiding Judge, and Warden and Young, Judges.

FILED: DECEMBER 8, 1982

YOUNG, J.

Reversed; referee's order reinstated.

YOUNG, J.

The sole issue is whether claimant's injuries arose out of and in the course of employment, ORS 656.005(8)(a). Claimant, a traveling employe, was severely beaten in a tavern fight during a forced layover. The referee found the injuries compensable. The Workers' Compensation Board reversed, citing Hackney v. Tillamook Growers Coop., 39 Or App 655, 593 P2d 1195, rev den 286 Or 449 (1979). We review de novo, ORS 656.298(6), and reverse and reinstate the referee's order.

Claimant is a long-haul truck driver who uses his employer's truck at his employer's direction. Claimant unloaded cargo in Las Vegas and later during the evening of May 24, 1979, arrived in Indio, California, to pick up a load of corn. He was directed to stay overnight and to telephone his employer in the morning for directions to the corn's location. Around 10 p.m., claimant refueled and parked his truck at a service station. With nothing to do until morning, claimant went to the Date Room Bar ten blocks away. Claimant is an Anglo-American; the tavern was patronized almost exclusively by Hispanic-Americans. Claimant had never been to the tavern before. It is unknown whether he ate at the tavern. He did drink. Just before 11:30 p.m., he went to the men's room. A fight ensued between claimant and three or four unidentified patrons, spilling out of the rest room, out the back door and into the parking lot. Claimant was left severely beaten. Police noticed alcohol on his breath. Although he was treated at a local hospital, no test of blood alcohol was ever made. Doctors found that he had multiple cuts, bruises and fractures of the jaw and skull. He underwent brain surgery to relieve pressure from a subdural hygroma. After more than a month in California hospitals, he was transferred as a mental patient to a Portland hospital. Later, for a time, he lived with his parents, while regaining the ability to care for himself.

There was no evidence that claimant initiated the fight. There was no evidence that he has been involved in any on - or off-the-job altercations in the past, and there is no evidence that he has a quarrelsome nature. His employer has not contended that he engaged in any wilful misconduct. In fact,

while questioning the assumption, the Board observed that "[a]ll parties seem to assume that claimant was the innocent victim of an unprovoked attack." Because of his severe head injuries, claimant is unable to recall any events of the night in Indio.[1] Assuming without deciding that initiating a fight might be a distinct departure on a personal errand,[2] in light of all the circumstances we find that, in any event, claimant did not initiate the fight.

The compensability of claimant's injuries depends on whether his presence in a tavern took him outside the scope of coverage for traveling employes. This court addressed the coverage for such employes in Simons v. SWF Plywood Co., 26 Or App 137, 552 P2d 268 (1976). In that case, the claimant examined some equipment in Eugene at 5 p.m., flew to Medford where he spent the evening drinking with other company executives in an airport bar and intermittently discussed business until 11 p.m. He rode with his immediate superior in a car bound for Klamath Falls, where he was to stay in a motel and attend to business the next day. He was severely injured when the car collided with another car. We held that, because the claimant was a traveling employe and because the combined business and social interlude did not change the business character of his travels, the injury was work-related. We quoted language from Professor Larson that sketched the scope of coverage for traveling employes:

> "The general rule applicable to injuries sustained by traveling employes is stated by Larson in the following terms:
>
> > "'Employes whose work entails travel away from the employer's premises are held in the majority of jurisdictions to be within the course of their employment continuously during the trip, except when a distinct departure on a personal errand is shown. Thus, injuries arising out of the necessity

> of sleeping in hotels or eating in restaurants away from home are usually held compensable.' 1 Larson, Workmen's Compensation law 5-172, § 25.00 (1972)." Simons v. SWF Plywood Co., supra, 26 Or App at 143. (Emphasis supplied.)

We faced the traveling employe issue again in Hackney v. Tillamook Growers Coop, 39 Or App 655, 593 P2d 1195 (1979). The claimant, who was an assistant driver, and the driver of the truck received orders from their dispatcher on Saturday morning to leave Florida and to pick up a load in South Carolina on Monday morning. The driver and the claimant delayed leaving and instead spent the afternoon in a motel bar. They drank beer and watched television. At about 5:30 p.m., the driver broke the claimant's arm in an arm wrestling match. The court held:

> "In the instant case, the claimant's injury arose after 5 1/2 hours of delay and the consumption of 'three or four beers.' Claimant's decision to arm wrestle during the layover had no business benefit to his employer. * * * We conclude that the injury did not occur while claimant was acting in the course and scope of employment." Hackney v. Tillamook Growers Coop, supra, 39 Or App at 659.

The Board found the present case to be a "carbon copy" of Hackney. It expressed "some doubt [about] the correctness of the holding in Hackney" but felt constrained to deny this claim. Hackney is not controlling, because a "personal errand" was found there, in large part because of Hackney's delay in leaving Florida. See Hackney v. Tillamook Growers Coop, supra, 39 Or App at 658-59. The perceived disregard of the dispatch direction made the personal errand "distinct." In the case at hand, claimant did not disobey but rather followed instructions. He was passing time in Indio on a forced layover.

Claimant's presence in a liquor establishment does not ipso facto connote a "distinct departure on a personal errand."

Simons v. SWF Plywood Co., supra. Our per curiam opinion in Rogers v. SAIF, 43 Or App 692, 603 P2d 783 (1979), which denied benefits with a citation to Hackney, was reversed on review, 289 Or 633, 616 P2d 485 (1980); the Supreme Court looked beyond the claimant's presence in the bar to find a work connection.[3]

In the instant case, a work connection was created by claimant's status as a traveling employe. That is, traveling employes are considered to be within the scope of employment while away from home. Simons v. SWF Plywood Co., supra. As the general rule in Simons implies:

> "The course of employment of a traveling worker is necessarily broader than that of an ordinary employe, and is to be liberally construed to effectuate the purposes of the Act." Schreckengost v. Workmen's Comp. Appeal Bd., 43 Pa Cmwlth Ct 587, 403 A2d 165, 167 (1979).[4]

The broader coverage is not, however, unlimited. Although a traveling employe will remain covered while engaged in some personal activities such as eating or sleeping, he will not be covered while engaging in other personal activities that are a "distinct departure on a personal errand." Simons v. SWF Plywood Co, supra. Other jurisdictions have explained the limits on coverage for traveling employes in terms of reasonableness of the activity. One court states:

> "Where an employe, as part of his duties, is directed to remain in a particular place or locality until directed otherwise or for a specified length of time, 'the rule applied is simply that the employe is not expected to wait immobile, but may indulge in any reasonable activity at that place, and if he does so the risk inherent in such activity is an incident of his employment.'
>
> "* * * [T]he test as to whether specific activities are considered to be within the scope of employment or purely personal activities is the reasonableness of such activities. Such an employe may

satisfy physical needs including relaxation." Robards v. New York Div. Electric Products, Inc., 33 App Div 2d 1067, 307 NYS 2d 599, 600-01 (1970).

See also Wright v. Industrial Cmsn., 62 Ill 2d 65, 338 NE2d 379 (1975); Epp v. Midwestern Machinery Co., 296 Minn 231, 208 NW2d 87 (1973); Cavalcante v. Lockheed Electroncis Co., 85 NJ Super 320, 204 A2d 621 (1964) aff'd 90 NJ Super 243, 217 A2d 140 (1966); Schreckengost v. Workmen's Comepnsation Appeal Board, supra.

We believe that the general rule of continuous coverage in Simons is best understood as a statement that injuries are compensable when resulting from activities reasonably related to the claimant's travel status. Not all activities would necessarily be covered. Clearly, some could be so unrelated to the employe's travels as to be excluded from the scope of coverage.

Here, claimant's forced layover as a traveling employe furnishes the work connection. Claimant's need to "kill time" arose out of the necessity of following orders to spend the night in Indio. His activity in passing time at a tavern during a forced layover was reasonable, and the claim is compensable.

Reversed; the referee's order is reinstated.

FOOTNOTES

1

During his recovery, claimant was often unable to recognize his employer, mother or father. His memory extends back only to a time several weeks after he had been moved to Portland.

2

ORS 656.005(8)(a), which defines a "compensable injury," was amended in 1981 by the addition of the following language:

> "* * * 'Compensable injury' does not include injury to any active participant in assaults or combats which are not connected to the job assignment and which amount to a deviation from customary duties." Or Laws 1981, ch 535, §30.

3

In Rogers, the claimant, who was a supervisor of a dredging project, suffered a fatal heart attack after spending most of the evening in a motel bar, engaging in horseplay, as well as fulfilling his duties as project superintendent to his men who congregated there. Because the events of the evening were found to be a material contributing cause of the heart attack, and because those events were work related, the court held claimant's death compensable.

4

The claimant in Schreckengost was a truck driver. He was told to go to Ohio and return with a load of salt. When he arrived, the salt plant was closed. He parked his truck at the plant and went with other drivers to dinner at a restaurant and for beer at a bar. The claimant and the other drivers returned to their trucks to sleep but left again to get snacks. They became lost on their way back. Claimant was accosted by a man who demanded his wallet and then shot him. The court found:

> "[The Claimant's] second excursion for refreshment during his evening at the salt plant was not so inconsistent with the purpose of his trip to Cleveland as to constitute an abandonment of his employment or such a deviation therefrom as should have caused us to conclude that he was no longer in the course of his employment." Schreckengost v. Workmen's Comp. Appeal Bd., supra, 403 A2d at 167.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of
Phyllis Hall, Claimant.

The Home Insurance Company,

Petitioner,

v. No. 80-08467
CA A22454

Phyllis Hall,

Respondent.

* * * * * *

Judicial Review from Workers' Compensation Board.

Argued and submitted May 12, 1982.

Deborah S. MacMillan, Portland, argued the cause for petitioner. With her on the brief were Frank A. Moscato and Moscato & Meyers, Portland.

Richard Roll, Portland, argued the cause for respondent. On the brief was Peter O. Hansen, Portland.

Before Gillette, Presiding Judge, and Warden and Young, Judges.

FILED: DECEMBER 15, 1982

WARDEN, J.

Order modified to award claimant 75 percent unscheduled permanent partial disability.

WARDEN, J.

The question presented in this workers' compensation case is the extent of claimant's disability. The referee and the Workers' Compensation Board found claimant to be permanently and totally disabled as the result of an on-the-job injury to her lower back. The insurer appeals, and we modify the award.

Claimant was injured in October, 1975, when she tripped over the foot of a co-worker and fell. She was treated by

several doctors. She has continued to have significant pain in her back and both legs, along with numbness and tingling in her legs. She returned to her former employment on an assembly line on a part-time basis in 1976, but has not worked since September, 1977. She testified that she is unable to sit or stand for prolonged periods and that she has difficulty walking any distance, driving and climbing stairs. She testified that she has to lie down several times a day to obtain relief from the pain she experiences.

The medical evidence indicates that claimant was treated with pain medication, a back brace and physical therapy after her injury. Several myelograms were performed over the period of her treatment, but all returned basically normal results, given her history of back surgery.1 In October, 1977, Dr. Berkeley, who had become claimant's treating physician, performed exploratory surgery and removed excessive scar tissue entrapping the left nerve root and theca at the L4-5 level. The post-operative report indicates that claimant will continue to have radicular problems, irrespective of treatment, "due to her peculiar tendency in forming this very dense scar tissue in her spinal canal." He concluded:

> "In view of the clinical and surgical findings, I do not think that this lady will be able to assume work in the future."

He has continued to be be of the opinion that claimant is totally disabled.

The other doctors who have examined claimant, however, have found her to be only moderately disabled and concluded that she could work, with limitations on prolonged sitting or standing and on bending and lifting. Those doctors include Dr. Mason, who

performed claimant's 1973 surgery and treated claimant for a time following that injury, and two separate teams of three doctors each from Orthopedic Consultants. In addition, Dr. Geist, who also treated claimant for a time, recommended that she be retrained for office work. Dr. Keizer, who apparently examined claimant on only one occasion, concluded that she could do light work.

Although Dr. Berkeley is claimant's treating physician, we are not persuaded by his opinion that claimant is totally disabled, in light of the conclusions reached by all of the other doctors who have examined her. We conclude that the medical evidence by itself does not establish that claimant is permanently and totally disabled.

Claimant contends, then, that we should find her totally disabled because of her physical condition plus the non-medical factors. See Wilson v. Weyerhaeuser, 30 Or App 403, 567 P2d 567 (1977). Claimant, who is now 57 years old, points to her age, the facts that she has only a 10th grade education and no special job skills, and that her physical condition limits her ability to sit or stand for extended periods, bend, twist, lift, climb stairs or drive a car for any distance. She argues that this, when considered with the medical evidence, satisfies her burden to prove that she is permanently and totally disabled.

ORS 656.206(3) provides:

> "The worker has the burden of proving permanent total disability status and must establish that the worker is willing to seek regular gainful employment and that the worker has made reasonable efforts to obtain such employment."

Claimant has not established that she is willing to seek regular

gainful employment and that she has made reasonable efforts to do so. After her last surgery in late 1977, claimant made no effort to obtain employment until one month before the hearing, which was held on March 17, 1981. In his opinion, the referee noted:

> "* * * [Claimant] made numerous contacts in February, 1981 for employment opportunities. It appears obvious to me the potential employment contacts were made solely for the purpose of being able to so testify at her upcoming hearing. She applied for jobs in areas where she had no training or skills and applied for work she testified she didn't feel she could perform."

It appears that claimant determined long before the hearing that she would not return to work. A vocational assistance report of May, 1978, indicates that claimant's file was being closed because claimant did not require further services, because she did not anticipate returning to work.

Further, we do not find claimant to be in that class of persons of whom it may be said that efforts to obtain employment would obviously be futile. See Morris v. Denny's, 50 Or App 533, 623 P2d 1118 (1981); Butcher v. SAIF, 45 Or App 313, 608 P2d 575 (1980). Claimant has not established that she is totally disabled as required by ORS 656.206(3).

The question of the extent of claimant's disability remains. Her back injury has obviously seriously impaired her earning capacity. See ORS 656.214(5). Given her physical condition, her age and job experience, we find an award of 75 percent permanent partial unscheduled disability to be appropriate.

Order modified to award claimant 75 percent unscheduled permanent partial disability.

FOOTNOTE

She had previously undergone a lumbar laminectomy in November, 1973.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of
Lester J. Wilson, Claimant.

Willamette Poultry Company and State
Accident Insurance Fund Corporation,

Petitioners,

v. No. 80-06346
CA A23560

Lester J. Wilson,

Respondent.

* * * * * *

Judicial Review from Workers' Compensation Board.

Argued and submitted May 12, 1982.

Peter L. Barnhisel, Corvallis, argued the cause for petitioners. With him on the brief was Fenner, Barnhisel, Morris & Willis, Corvallis.

Robert W. Muir, Albany, argued the cause for respondent. With him on the brief was Emmons, Kyle, Kropp & Kryger, Albany.

Before Gillette, Presiding Judge, and Warden and Young, Judges.

FILED: DECEMBER 15, 1982

WARDEN, J.

Order modified to award claimant 80 percent unscheduled permanent partial disability.

WARDEN, J.

The issue in this workers' compensation case is the extent of claimant's disability. Employer seeks reversal of a Board order affirming the referee's award of permanent total disability.

Claimant, a 41-year-old truck driver, suffered a lumbo-sacral strain while placing a pallet jack onto his truck. Back surgery, a laminectomy and diskectomy, was performed on October 13, 1979, two months after the accident. Dr. Tsai, the

treating neurosurgeon, reported a satisfactory post-operative course. Claimant suffered aching below the incision, with some pain occasionally radiating down the upper portion of the left leg. Dr. Tsai further reported no motor weakness and no sensory "dermatome." He prescribed no pain medication but advised claimant to walk two miles a day. He recommended job placement with weight-bearing limited to an occasional 25 pounds, with no turning or twisting.

Claimant was authorized employment re-entry services and was referred to VERK Consultants. After an initial interview and vocational testing, the consultants found that the main problem was claimant's lack of motivation. Claimant told the consultants that he experienced constant aching that often increased to intense pain. He was adamant in his belief that his physical condition could be improved by additional medical attention and that he was not capable of returning to employment until further improvement occurred. In addition to what the consultants deemed an attitudinal problem, claimant is also limited by his illiteracy. Although he actually completed six years of school, he can write only his name and read only simple road signs. Testing revealed that he was qualified for only a few occupations, including truck-driving, operating machines, electric-wire rewinding and time-keeping. It was recommended that claimant enroll in an adult basic education course through a community college to learn to read and write.

Convinced that Dr. Tsai's treatment had been inadequate, claimant sought additional medical attention from Dr. Cronk, who diagnosed degenerataive lumbrosacral disc disease with some functional overlay. He recommended that claimant be

evaluated by Orthopedic Consultants, who diagnosed chronic lumbrosacral strain and concluded that the condition was not stationary. They recommended supervised physical therapy and a repeat myelogram.

During the next few months claimant continued treatment with Dr. Cronk. He showed some physical improvement but continued to complain of nearly constant severe pain. Electric shock and physical therapy were tried but were discontinued by claimant as unhelpful. He was referred to Dr. Throop for neurological consultation, who also recommended that a second myelogram be performed. During that time, claimant enrolled in a community college literacy course but discontinued it because he was in "too much pain." On May 5, 1980, employment re-entry service was withdrawn, because claimant felt that he was physically unable to benefit from vocational rehabilitation.

On May 14, 1980, a second myelogram was performed. Dr. Cronk reported that it "failed to reveal any convincing abnormalities." He concluded that claimant was ready either to return to some form of light work or enroll in a pain clinic. In June, 1980, rehabilitation counseling was again authorized. On July 7, 1980, claimant was awarded temporary total disability and 15 percent unscheduled low back disability. He continued to be treated by his family physician, Dr. Neal, who, on September 23, 1980, reported:

> "I feel that he is now ready to be released to work and that he could do light duty which consisted of not doing any lifting over twenty five pounds and not doing any work where he would be involved in any prolonged stooping, where he would not be involved in repetitive twisting and bending and where he could break up his time so that he would not have to be sitting in one position for long hours. I do feel that this man

> is capable of employment under these limitations and perhaps in the future those restrictions might even be lifted if he continues to improve."

Claimant returned to VERK Consultants. On their advice, he applied in Salem and Albany for work as a bus driver, even though he did not feel he was "really able to do it." He also applied to Willamette Landfill to drive a "Cat on the dump." He testified that his former employer would take him back whenever he was capable of truck-driving or would hire him if "he had something that he thought I could do." A vocational counselor offered claimant a 13-week course in bench-welding in Portland, but he refused, because he did not want to be away from his home. Another rehabilitation consultant concluded that claimant could handle the work of a security guard and would be limited to light, sedentary work.

Claimant does not contend that his physical impairment is complete. Rather, he argues that his physical condition, coupled with his age, illiteracy and limited experience, effectively precludes him from regularly performing work at a gainful and suitable occupation. Employer maintains that claimant's lack of "motivation" to rejoin the work force is a major factor in his inability to secure employment. The referee found that claimant had satisfied his burden to establish that he is permanently and totally disabled as a result of his industrial injury. Relying on Wilson v. Weyerhaeuser, 30 Or App 403, 567 P2d 567 (1977), he concluded that claimant's physical conditions of less than total incapacity together with his limited personal resources amounted to permanent total disability as defined by ORS 656.206. On de novo review, we reach a different conclusion.

The burden to prove permanent total disability is on the claimant. Wilson v. Weyerhaeuser, supra. The worker is also required to establish that he is willing to seek regular gainful employment and that he has made reasonable efforts to obtain employment. ORS 656.206(3). Claimant has not met this statutory requirement.

Claimant's case has been referred to VERK Consultants three times since his surgery, and twice the consultants' job development efforts were thwarted by claimant's adamantly asserted belief, despite the opinions of his doctors, that he is physically incapable of returning to work. Throughout the vocational reports, there are references to claimant's "unrealistic belief" that he will improve physically to the degree that he will be able to return to truck driving. Concern is also expressed that he not "succumb to a lifestyle pattern which is focused on his personal pain experience" and that he may be "avoiding confronting returning to employment, being active on a daily basis since that is unknown to him." These concerns appear to be borne out by claimant's refusal to take welding classes, his failure to pursue literacy courses and his application only for jobs that entail driving vehicles, even though he feels that he is incapable of physically performing the work required. Claimant professes a strong desire to work but explains that presently he is not "rushing in to" apply for jobs because:

> "* * * at the present time I could not go out here and hold down a job, so why should I mess up a possibility of maybe that being a permanent job later on, when if I go out there and work a day or two and have to take a week off to recuperate, or if I work a week and have to take a

week or two off, there's nobody around -- there's too many unemployed people to put up with something like that there. I feel I don't want to mess up my chance of having maybe a job at that place later on when I am able to do it."

Claimant is not on pain medication and is not involved in physical therapy. At the time of the hearing, however, he was enrolled in a pain clinic. The medical reports refer to subjective symptoms of back pain and indicate that claimant's complaints are excessive and unsubstantiated by physical examination. This is supported by the second myelogram, which revealed "no convincing abnormalities." At the hearing, claimant reiterated his belief that the doctors had not exhausted all avenues of treatment and voiced his disagreement with the medical reports:

"Q. Well, if the doctor says that physically you are able to handle such and such a job would you go ahead and try your best?

"A. It just depends on what job it was. If there is something I know -- because the doctor does not know how I feel, I can tell him how I feel, or I can tell you -- but if I felt that it was going to damage me, no, I wouldn't do it.

"Q. Not even if the doctor said --

"A. No, not even if the doctor said, because he don't know how I hurt. He don't know how I feel. I can tell him, but, no, if you or anybody say, "Hey, here's a job, you do that," if I felt it was going to damage me I don't care if it was my doctor or who it was, I would tell him no. And just like here a while back --

"Q. Okay. Now, wouldn't you be able to trust what the doctor is able to test out on your muscles and nerves and your whole body? Don't you feel you could be confident and trust those tests and those things that he is able to determine, as to whether or not you are able to do such and such a thing?

"A. That's not telling me how bad a pain I got. And it's not all in my head."

The evidence does not justify an award of permanent total disability. The vocational experts testified that claimant is capable of performing certain jobs. Efforts toward rehabilitation and job development have been met with strong resistance. Claimant meets any job suggestion other than truck-driving with undue apprehension. His asserted belief that he hurts too much to seek employment or to develop literacy skills does not relieve him of the statutory requirements. Smith v. SAIF, 51 Or App 833, 627 P2d 495 (1981); Potterf v. SAIF, 41 Or App 755, 598 P2d 1290 (1979).

There remains the issue of the extent of claimant's permanent partial disability, measured by the loss of earning capacity resulting from his compensable injury. ORS 656.214(5). Taking into account claimant's age, limited education, training, skills and work exposure, we find that he is entitled to an award of 80 percent unscheduled permanent partial disability.

The order of the Board is modified to award claimant 80 percent unscheduled permanent partial disability.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of
Dianne L. James, Claimant.

State Accident Insurance Fund Corporation,

Petitioner,

v.

No. 77-06474
CA A23245

Dianne L. James,

Respondent - Cross-Petitioner.

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Judicial Review from Workers' Compensation Board.

Argued and submitted June 10, 1982.

Darrell E. Bewley, Appellate Counsel, State Accident Insurance Fund Corporation, Salem, argued the cause and filed the brief for petitioner.

Gary M. Galton, Portland, argued the cause for respondent - cross-petitioner. On the brief were Alan M. Scott, Charles D. Colett, and Galton, Popick & Scott, Portland.

Before Richardson, Presiding Judge, and Thornton and Van Hoomissen, Judges.

RICHARDSON, P.J.

FILED: December 22, 1982

Order requiring SAIF to accept claim affirmed; remanded for award of attorney fees.

RICHARDSON, P. J.

SAIF appeals an order of the Workers' Compensation Board holding that claimant's emotional disability is a compensable occupational disease. This is the second appeal in this case. In the first, we affirmed the Board's original order that found claimant's disability to be compensable. James v. SAIF, 44 Or App 405, 605 P2d 1368 (1980). The Supreme Court granted review and remanded to this court, stating:

"In the present case there is a fact question whether claimant's condition was caused by

> circumstances 'to which an employee is not ordinarily subjected or exposed other than during a period of regular actual employment." 290 Or 343, 351, 624 P2d 565 (1981).

We, in turn, remanded the case to the Board, saying:

> "Because the Supreme Court established a criterion for compensability of an occupational disease different than had been previously applied, the parties may not have adequately presented their case. They should have an opportunity to develop the case consistent with the statutory criterion interpreted by the Supreme Court. Accordingly, we remand the case to the Workers' Compensation Board for a determination of compensability. The Board, as it deems appropriate, may request additional briefing, additional evidence or remand the case to the referee for a further hearing." 51 Or App 201, 202, 624 P2d 644 (1981).

On remand, the parties did not present further evidence, and the Board ruled on the existing record that the condition was compensable. The facts underlying claimant's claim are stated in our first opinion, 44 Or App at 407, and that of the Supreme Court, 290 Or at 345, and need not be restated.

Essentially, SAIF argues that claimant had a preexisting emotional disorder that made her susceptible to stress and resulted in disability. It contends that she responded to employment and nonemployment stresses that were both causes of her disability and that, under the Supreme Court's formulation, her disability is therefore not compensable.

In SAIF v. Gygi, 55 Or App 570, 574, 639 P2d 655, rev den 292 Or 825 (1982), we stated:

> "We conclude that ORS 656.802(1)(a) does not require that the occupational disease be caused or aggravated solely by the work conditions. If the at-work conditions, when compared to the nonemployment exposure, are the major contributing cause of the disability, then compensation is warranted."

We conclude from our de novo review of the record that the

at-work stress was the major contributing cause of claimant's disability.

SAIF also contends that there is no evidence that claimant's preexisting mental disorder was caused or aggravated by the work environment. That argument was also made in the original appeal. We concluded that claimant's underlying pathology was exacerbated and not simply made symptomatic by the conditions of her employment. We adhere to that conclusion.

Claimant cross-appeals, contending that the Board erred in not awarding her attorney fees pursuant to ORS 656.382(2) and ORS 656.386(1) on remand. SAIF agrees that the Board did err.

Order requiring SAIF to accept claim affirmed; remanded for award of attorney fees.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of
Robert A. Parker, Claimant.

State Accident Insurance Fund Corporation,

Petitioner,

v.

WCB No. 80-00711
CA A23246

Robert A. Parker,

Respondent.

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Judicial Review from Workers' Compensation Board.

Argued and submitted May 10, 1982.

Darrell E. Bewley, Appellate Counsel, State Accident Insurance Fund Corporation, Salem, argued the cause and filed the brief for petitioner.

Milo Pope, Mt. Vernon, argued the cause for respondent. With him on the brief was Kilpatricks & Pope, Mt. Vernon.

Before Buttler, Presiding Judge, and Warren and Rossman, Judges.

BUTTLER, P. J.

FILED 12/22/82.

Affirmed.

BUTTLER, P. J.

SAIF seeks judicial review of a determination by the Workers' Compensation Board that SAIF was liable for all future medical expenses on respondent's claim, because it did not retain a reserve for estimated future medical expenses from the proceeds of a third-party claim pursuant to ORS 656.593(1)(c).[1] We affirm.

In October, 1977, claimant sustained a serious industrial accident. He elected to pursue his remedy against a third party (ORS 656.576 to 656.595) and was successful. Out of

the gross settlement, SAIF deducted and paid: (a) attorney fees and costs incurred on the third-party claim; (b) a sum equal to 25 percent to claimant (see n 1, supra), and (c) SAIF's expenditures on respondent's claim up to that time. SAIF did not estimate claimant's future medical expenses; instead it distributed the entire balance to claimant on June 15, 1979, advising claimant's counsel by cover letter:

> "Please advise your client that the sum of $44,417.57 will operate as a bar to future compensation in this claim, exclusive of such rights as the claimant is entitled under ORS 656.273 and ORS 656.278."

On the third-party settlement distribution form, the following language was typed:

> "Balance to claimant (this will operate as a bar to further compensation in this claim, exclusive of his rights under ORS 656.273 and ORS 656.278) $44,417.57."

Less than a week later, claimant submitted a bill to SAIF for medical services related to his industrial injury. After SAIF refused to pay, claimant requested a hearing. Both the referee and the Board ruled that SAIF was required to pay the disputed bill as part of the future medical expenses.

In relevant part, the Board's order states:

> "We adopt as our own the following portions of the Referee's order, with which we fully agree:
>
> "'One of the purposes of the Workers' Compensation Law is to insure that a claimant will receive continued and adequate medical care, reasonable and necessary because of his industrial injury. This is the purpose of Section ORS 656.245. Simply because the Fund does not wish to encumber itself with additional bookkeeping, it is not relieved of its duty to ascertain that such provisions are made.
>
> "'In this particular case, claimant sustained a very serious injury and it is reasonable and logical to anticipate continued medical treatment. While it is true that in this particular case that claimant received a large settlement, and substantial funds beyond the amount paid to him or on his behalf by the Fund, that is not to say that the claimant would always

have this money, with which to pay future medical expenses. As the carrier, the Fund is duty-bound, under the provisions of the statute, to retain sufficient funds, for this purpose, rather than placing the burden on the claimant to retain them.

"'In addition, while the statute contemplates that the Fund shall retain sufficient monies for future medical expenses, it makes no provision for incorrect estimating. By the silence on this point, it appears that if the Fund does not retain sufficient monies, any additional expenses still must be paid under ORS 656.245. Under the Fund's argument, the claimant would be responsible. For example, if the Fund retained $2,000.00, and the claimant, over a period of years, incurred $3,000.00 worth of .245 billings, would he or she then have to pay the difference? What if the balance of the settlement was only $2,000.00 and the Fund kept it all? Would claimant then be responsible? I think not, and the same logic must apply in this case. The Fund elected to retain zero dollars. This, then, was its estimate as to future medical expenses, and any amount over and above the figure remains its responsibility to pay.'

"'* * * * *'

"We appreciate there are significant practical difficulties in determining amounts to be retained by a carrier for the present value of its likely future claim costs. See Leroy R. Schlecht, WCB Case No. 79-06304 (decided this date). But such practical difficulties cannot alter the statutory mandate that a reserve for future claim costs 'shall' be retained, ORS 656.593(1)(c); nor justify SAIF's contrary 'policy.' We conclude that unless a carrier retains such a reserve from a third party settlement or judgment, the carrier is responsible for all future claim costs just as if there had been no third party settlement or judgment. To the extent any of the above-cited Board decisions are inconsistent, they are overruled."

We concur in the result reached by the Board. Under the statutory scheme,[2] neither a worker's election to pursue a third-party recovery nor the worker's receipt of his share of the proceeds recovered absolves the carrier of its duty to provide continued medical services. At the time of the third-party settlement distribution (June, 1979), ORS 656.245(1) provided:

"(1) For every compensable injury, the direct

> responsibility employer or the State Accident Insurance Fund shall cause to be provided medical services for conditions resulting from the injury for such period as the nature of the injury or the process of the recovery requires, including such medical services as may be required after a determination of permanent disability. Such medical services shall include medical, surgical, hospital, nursing, ambulances and other related services, and drugs, medicine, crutches and prosthetic appliances, braces and supports and where necessary, physical restorative services."

That section describes in unqualified terms the ongoing duty of the insurer to provide continuing medical services for compensable injuries.3

An injured worker is given the right to pursue a recovery against a negligent third party by ORS 656.154;4 the incidents of that right are governed by ORS 656.576 to 656.595. There is nothing in those sections or in any other section of ORS chapter 656 specifically relieving the insurer of its obligation to furnish medical services under ORS 656.245 when there has been an election to pursue a third-party recovery. ORS 656.580(1) seems to suggest that the manner and amount of benefits "paid" to the worker might change on recovery of damages in a third-party action:

> "The worker or his beneficiaries, as the case may be, shall be paid the benefits provided by ORS 656.001 to 656.794 in the same manner and to the same extent as if no right of action existed against the employer or third party, until damages are recovered from such employer or third party."

Medical services, unlike disability payments, however, are not benefits that are "paid" to the worker, although they are a part of the compensation to which an injured worker is entitled under the Act. More significantly, the thrust of ORS 656.580(1) is not to authorize termination of any benefits after recovery of damages, but to ensure that benefits paid before the recovery be treated as if no election had taken place and, under subsection

(2), to give the paying agency a lien for those expenditures.

The fact of election does not appear from the statutory scheme to have been intended by the legislature to terminate medical benefits. Actually, it is not a true election of remedies as that term is commonly used. If the worker does not proceed against the third-party wrongdoer, his election not to do so operates as an assignment of his claim to the paying agency, ORS 656.591(1), and under ORS 656.591(2):

> "Any sum recovered by the paying agency in excess of the expenses incurred in making such recovery and the amount expended by the paying agency for compensation, first aid or other medical, surgical or hospital service, together with the present worth of the monthly payments of compensation to which such worker or other beneficiaries may be entitled under ORS 656.001 to 656.794, shall be paid such worker or other beneficiaries."

Whether the worker or the paying agency proceeds against the third party, it appears that the effect on the worker and on the paying agency is the same: the paying agency is repaid what it has paid out as of the time of recovery and may retain the present worth of estimated future expenditures. Certainly the decision of the paying agency to pursue the claim cannot affect the worker's rights to medical services: the effect on the worker and the paying agency is the same regardless of who pursues the claim, the election of the worker to pursue it cannot affect his right to medical services under ORS 656.245.

As we view the statutory scheme, its primary function and purpose is to shift to the wrongdoer, at least in part, the cost of compensating the injured worker, giving both the paying agency and the worker some benefit from the third-party claim recovery. It would not be consistent with that scheme to terminate the worker's right to have paid his medical expenses

incurred after the recovery; neither would it be consistent with the remedial purpose of the Act to make the worker whole.5

Finally, it is explicit in the statutory scheme that receipt of proceeds of the third-party recovery by the claimant does not preclude him from receiving other benefits to which he may be entitled. ORS 656.593(2) provides:

> "The amount retained by the worker or the beneficiaries of the worker shall be in addition to the compensation or other benefits to which such worker or beneficiaries are entitled under ORS 656.001 to 656.794."

"Compensation" includes medical services. ORS 656.005(9).6 In other words, the amount of the third-party recovery turned over to the worker (his minimum share plus any excess over the amount retained by the paying agency) is in addition to the medical services to which claimant is entitled under ORS 656.245. We conclude that neither the fact of election nor receipt of a third-party recovery, in whatever amount, terminates a worker's entitlement to medical benefits under ORS 656.245.

It remains to determine the effect of SAIF's failure to withhold any amount as its estimate of the present value of reasonably anticipated future expenditures for compensation and other costs. Under ORS 656.580(2), the paying agency has a lien against the cause of action against the third party, with priority over all other claims except the cost of the recovery. The claim may not be settled without the consent of the paying agency. ORS 656.587. Whether the claimant or the paying agency maintains the action, the paying agency is given a lien for its share of the proceeds, consisting of two parts: (1) the amount of its accrued expenditures for compensation, including medical expenses; and (2) the present value of

estimated future expenditures for compensation (including medical expenses). ORS 656.593(1)(c). Any excess amount must be paid to the claimant, and in the event of a conflict about how much is retained by the paying agency, the Board resolves the dispute. ORS 656.593(1)(d).

Under the statute, retention of the proceeds to pay its estimated future expenditures appears to be mandatory:

> "The paying agency shall * * * retain the balance of the recovery * * * to the extent that it is compensated for the present value of its reasonably to be expected future expenditures for compensation and other costs of the worker's claim * * *." ORS 656.593(1)(c). (Emphasis supplied.)

However, given the overall statutory scheme relating to third-party claims, under which the paying agency is given a lien on the cause of action and on the proceeds, we believe that the most reasonable construction of the foregoing language is that the paying agency must retain the estimated amounts for the stated purposes or lose its lien on the proceeds.

Here, SAIF did not retain any part of the proceeds to secure the tag end portion of its right to recoupment, and having turned the entire balance of the proceeds over to claimant, SAIF gave up its rights relating to future expenditures. The statutory scheme appears to limit the paying agency's right to reimbursement to the retained fund; there is no provision permitting the paying agency to claim reimbursement from the worker any other way. Accordingly, if the paying agency pays over the fund, it also gives up its right to reimbursement for those future expenses.[7]

In essence, SAIF's position is that it gave up its right to a security for future expenditures in exchange for claimant's assuming all future medical costs. The insurer,

however, was not authorized to make such an arrangement, because the retention of a reserve is the extent of its right to reimbursement from the proceeds. Although it may be tempting to say that the worker must pay for his medical expenses (at least to the extent of the balance he received), to permit SAIF to make that kind of arrangement conflicts with the right of the worker to have the amount of retainage (i.e., the amount that the paying agency may use to pay future expenses) either agreed to by him or determined by the Board. ORS 656.593(1)(d). Among other things, the paying agency's obligations for medical expenses may exceed the amount retained; here, SAIF purported to avoid all liability for those expenses by retaining nothing.

For the foregoing reasons, we conclude that the Board properly required SAIF to pay the medical services bill.

Affirmed.

FOOTNOTES

1

At the time of claimant's injury, ORS 656.593 provided in relevant part:

> "(1) If the worker or his beneficiaries elect to recover damages from the employer or third person, notice of such election shall be given the paying agency by personal service or by registered or certified mail. The paying agency likewise shall be given notice of the name of the court in which such action is brought, and a return showing service of such notice on the paying agency shall be filed with the clerk of the court but shall not be a part of the record except to give notice to the defendant of the lien of the paying agency, as provided in this section. The proceeds of any damages recovered from an employer or third person by the worker or beneficiaries shall be subject to a lien of the paying agency for its share of the proceeds as set forth in this section and the total proceeds shall be distributed as follows:
>
> "(a) Costs and attorney fees incurred shall be paid, such attorney fees in no event to exceed the

advisory schedule of fees established by the board for such actions.

"(b) The worker or his beneficiaries shall receive at least 25 percent of the balance of such recovery.

"(c) The paying agency shall be paid and retain the balance of the recovery, but only to the extent that it is compensated for its expenditures for compensation, first aid or other medical, surgical or hospital service, and for the present value of its reasonably to be expected future expenditures for compensation and other costs of the worker's claim under ORS 656.001 to 656.794 exclusive of any compensation which may become payable under ORS 656.273 or 656.278.

"(d) The balance of the recovery shall be paid to the worker or his beneficiaries forthwith. Any conflict as to the amount of the balance which may be retained by the paying agency shall be resolved by the board." (Emphasis supplied.)

The present statute provides for distribution of at least 33-1/3 percent of the recovery to the worker or his beneficiaries under subsection (1)(a).

2

We analyze the statutory scheme as of the time of the October, 1977, injury. ORS 656.202(2). The current statutes, although amended in 1981, are substantially similar with respect to the issues raised here.

3

In 1981, the following sentence was added to ORS 656.245(1):

"* * * The duty to provide such medical services continues for the life of the worker." Or Laws 1981, ch 535, § 31.

4

ORS 656.154 provides:

> "If the injury to a worker is due to the negligence or wrong of a third person not in the same employ, the injured worker, or if dealth results from the injury, his widow, children or other dependents, as the case may be, may elect to seek a remedy against such third person."

5

As Larson has said generally, the theory of third-party recovery is to shift liability to the actual wrongdoer when that objective can be achieved without interfering with the overriding social policy of making the injured worker whole:

> "The concept underlying third party actions is the moral idea that the ultimate loss from wrongdoing should fall upon the wrongdoer. As mentioned at the close of the preceding chapter, every mature loss-adjusting mechanism must look in two directions: it must make the injured person whole, and it must also seek out the true wrongdoer whenever possible. While compensation law, in its social legislation aspect, is almost entirely preoccupied with the former function, it is not so devoid of moral content as to overlook the latter. It should never be forgotten that the distortions of our old-fashioned fault concepts that have been thought advisable for reasons of social policy are exclusively limited to providing an assured recovery for the injured person; they have never gone on -- once the injured person was made whole -- to change the rules on how the ultimate burden was borne." 2A Larson, Workers' Compensation Law, § 71.10 (1982).

6

ORS 656.005(9) provided:

> "'Compensation' includes all benefits, including medical services, provided for a compensable injury to a subject worker or the worker's beneficiaries by a direct responsibility employer or the State Accident Insurance Fund pursuant to this chapter."

7

We recognize that there is an apparent anomaly in holding that the claimant is entitled to payment of his medical expenses, notwithstanding his successful third-party claim, and permitting the paying agency to reimburse itself from funds retained for that purpose under ORS 656.593(1)(c). The statutory scheme, however, must be harmonized to the extent possible, and we believe the lien theory comes as close as possible to making sense in the overall scheme.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation
of Michelle C. Mendoza, Claimant.

Michelle C. Mendoza,

Petitioner,

v. No. 80-07482
CA A23714

SAIF Corporation,

Respondent.

* * * * * *

Judicial Review from Workers' Compensation Board.

Argued and submitted June 9, 1982.

Peter McSwain, Eugene, argued the cause for petitioner. On the brief was Evohl F. Malagon and Malagon & Velure, Eugene.

Darrell Bewley, Appellate Counsel, State Accident Insurance Fund, Salem, argued the cause and filed the brief for respondent.

Before Warden, Presiding Judge, and Richardson and Young, Judges.

WARDEN, J.

FILED: December 29, 1982

Reversed and remanded for entry of an order that the claim be accepted.

WARDEN, J.

Claimant seeks review of an order of the Workers' Compensation Board denying compensation. She filed a claim for compensation after she began to experience pain in her back and neck while working at a plant nursery. SAIF denied the claim and the referee and Board affirmed that denial. We find that claimant has met her burden to prove that the claim is compensable and reverse.

Claimant worked at Mitsch Nursery from August, 1979, to

May, 1980. The work required bending, lifting, digging cuttings while on her knees and lifting pots weighing as much as 40 pounds. She testified that she sometimes experienced a sore back during work but that in May, 1980, the back pain continued after she had left work and became more severe. On May 24, 1980, she was examined by Dr. Willeford, who diagnosed heat myositis (inflammation) in claimant's trapezius and supraspinous muscles. He prescribed analgesics and exercise. His report included a history in which claimant stated that her work required a great deal of lifting and bending; he concluded that that "was most likely the precipitating factor or culprit."

Her condition did not improve, and she went to see Dr. Buttler, a chiropractor, on May 28. After being examined by him, she called her employers and informed them that she had been advised not to return to work for a time. Dr. Buttler's initial report to SAIF included his diagnosis that claimant was suffering from cervical, thoracic and lumrosacral strain. He recommended chiropractic manipulation, physiotherapy, exercise and rest. He prescribed a back brace. His report included his opinion that claimant's condition was work related. Although there are no other reports from Dr. Buttler in the record, claimant testified that she had continued seeing him for treatment every two or three weeks up to the time of the hearing.

Claimant was re-examined by Dr. Willeford on June 11. He found that the "muscles of her posterior neck and dorsal spine showed some spasm * * *." He prescribed anti-inflammatory drugs, heat and massage. He again diagnosed acute myositis primarily involving claimant's posterior neck and shoulder muscles.

The referee concluded that claimant did not carry her

burden to prove the compensability of her back condition. That conclusion was based primarily on the referee's finding that claimant was not a credible witness. Although we usually defer to a referee's finding on the issue of credibility, see Hannan v. Good Samaritan Hosp., 4 Or App 178, 471 P2d 831, 476 P2d 931 (1970), rev den (1971) the referee's opinion in this case is so replete with inaccurate and irrelevant statements that his finding on the issue of credibility is not to be relied upon. The Board stated: "Certainly the Referee could have and maybe should have more accurately recited the evidence on which be based his credibility finding." It concluded, however, that the referee's finding on credibility should not be disturbed. We do not agree.

The evidence in this case includes reports from a medical doctor and a chiropractor, both of whom treated claimant. Both were of the opinion that her myositis was work related. The referee discounted their opinions, because he concluded that the only connection between claimant's concededly real condition and her work "comes from the lips of claimant." The record does not support that conclusion. In the history given to both doctors, claimant described the type of work she did at the nursery. She also described that work in her testimony at the hearing. Co-workers of claimant, called by SAIF, also testified to the kind of work done, and the owners of the nursery described the work. Those descriptions of the work corroborated that given by claimant. From her description the doctors concluded that her myositis was work related. That conclusion cannot be said to come only "from the lips of claimant."

In addition, the referee seemed to place particular emphasis on the fact that claimant's co-workers testified, with one exception, that they had never heard claimant complain about her back. This testimony is not as significant as the referee appears to have considered it to be, because, as the referee himself noted:

> "There is no reason to disbelieve that Dr. Willeford found acute myositis involving the posterior neck and shoulder muscles primarily."

There is no medical evidence indicating that claimant did not, in fact, suffer from acute myositis; nor is there any evidence that claimant experienced any trauma or injury outside of work that could have caused the condition. There was, in fact, testimony from claimant and from one of her high school teachers, with whose family claimant had been living in the spring of 1980, that claimant had had no accidents or injuries outside of work.

We find that claimant has met her burden of establishing that her myositis was compensable. We therefore reverse and remand to the Board for entry of an order requiring SAIF to accept the claim.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of
Daniel Mullins, Claimant.

Daniel Mullins,

Petitioner,

v. WCB No. 80-09638
CA A24162

State Accident Insurance Fund
Corporation,

Respondent.

* * * * * * * * *

Judicial Review from Workers' Compensation Board.

Argued and submitted october 8, 1982

James A. Nelson, Portland, argued the cause for petitioner. With him on the brief was Gilley, Busey, Howard & Rindfusz, Portland.

Donna Parton, Portland, argued the cause for respondent. With her on the brief was Darrell E. Bewley, Appellate Counsel, State Accident Insurance Fund Corporation, Salem.

Before Gillette, Presiding Judge, and Warden and Young, Judges.

PER CURIAM. FILED: December 29, 1982

Reversed and remanded for entry of an order that the claim be accepted.

PER CURIAM

Claimant appeals the order of the Workers' Compensation Board affirming the referee's denial of his claim for aggravation. We reverse.

Claimant suffered an on-the-job injury on December 19, 1978, and an off-the-job injury on July 4, 1980. The successive

injuries first produced and then exacerbated a fracture of the tuberosity of the carpal scaphoid in claimant's right wrist. The referee found that after the initial injury claimant had a fibrous union in the fracture area which made a reinjury more likely. The referee denied the claim with the explanation that the second incident was a material contributing cause of the worsened condition. The referee misapplied the test for determining compensability of subsequent injuries.

There was no evidence to contradict the treating physician's testimony that claimant had only a fibrous union in the area of the fracture following the initial injury. The bone was not able to take as much stress as a normal one. After the second incident, the fracture was more obvious and the fracture fragment slightly displaced. Claimant's condition has worsened since the prior determination order. We hold that claimant's initial on-the-job injury was a material contributing cause of his worsened condition. Grable v. Weyerhaeuser Company, 55 Or App 627, 639 P2d 677 (1982).

Reversed and remanded for entry of an order that the claim be accepted.

IN THE SUPREME COURT OF THE STATE OF OREGON

In banc*

In the Matter of the Compensation of the Beneficiaries of Marian A. Williams, Deceased.

HEWITT,
Respondent on Review,
v.
STATE ACCIDENT INSURANCE FUND CORPORATION,
Petitioner on Review.

(CA 19548, SC 28252)

On review from Court of Appeals.**

Argued and submitted April 7, 1982.

Darrell E. Bewley, Salem, Appellate Counsel for State Accident Insurance Fund, argued the cause and filed the petition and supplemental brief for petitioner on review. With him on the brief were K.R. Maloney, General Counsel, and James A. Blevins, Chief Trial Counsel, State Accident Insurance Fund, Salem.

Eric R. Friedman, Portland, argued the cause for respondent on review. With him on the briefs was Fellow, McCarthy, Zikes & Kayser, P.C., Portland.

Margaret H. Leek Leiberan and Mitchell, Lang & Smith, Portland, filed a brief Amicus Curiae on behalf of the American Civil Liberties Union.

Cynthia L. Barrett, Portland, filed a brief Amicus Curiae on behalf of the Oregon Trial Lawyers Association.

ROBERTS, J.

The decision of the Court of Appeals is affirmed.

Peterson, J. concurred in part and dissented in part and filed an opinion in which Campbell, J. joins.

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* Denecke, C.J., retired June 30, 1982.

** Judicial Review from Workers' Compensation Board (No. 79-7248) 54 Or App 398, 635 P2d 384 (1981).

ROBERTS, J.

We are asked in this case to determine the constitutionality of ORS 656.226, a portion of the Oregon workers' compensation laws which provides:

"In case an unmarried man and an unmarried woman have cohabited in this state as husband and wife for over

> one year prior to the date of an accidental injury received by such man, and children are living as a result of that relation, the woman and the children are entitled to compensation under ORS 656.001 to 656.794 the same as if the man and woman had been legally married."

Claimant in this case, Floyd Hewitt, Jr., cohabited in Oregon with Marian A. Williams, a female, from 1974 until Williams's death as a result of a compensable industrial accident in 1979. When a child was born to the couple in 1976, claimant and Williams executed a joint declaration of paternity naming claimant as father. Following Williams's death, claimant filed a claim for compensation under ORS 656.226, claiming benefits for himself. The referee and Worker's Compensation Board denied his claim, both stating they were without jurisdiction to reach the constitutional issue.[1] The Court of Appeals reversed and ordered that benefits be paid to claimant as if ORS 656.226 were written in gender-neutral terms.

ORS 656.226 is not unusual in its attempt to classify recipients of workers' compensation benefits on the basis of gender. Though not cited by the parties, we have discovered cases from seven other states holding unconstitutional workers' compensation statutes which granted automatic death benefits to widows, but allowed such benefits to widowers only upon a showing of dependency. *See Arp v. Workers' Compensation Appeal Board.,* 19 Cal 3d 395, 138 Cal Rptr 293, 563 P2d 849 (1977); *Insurance Company of North America v. Russell,* 246 Ga. 269, 271 SE 2d 178 (1980); *Day v. W.A. Foote Memorial Hospital, Inc.,* 412 Mich. 698, 316 NW 2d 712 (1982); *Tomarchio v. Township of Greenwich,* 75 N.J. 62, 379 A2d 848 (1977); *Passante v. Walden Printing Company,* 385 N.Y.S.2d 178, 53 A.D. 8

(1976); *Davis v. Aetna Life & Cas. Co.,* 603 S.W.2d 718 (Tenn 1980). *Swafford v. Tyson Foods, Inc.,* 7 Ark App 343, 621 SW2d 862 (1981). In all of these cases the courts found the statutes at issue violative of the equal protection clause of the fourteenth amendment to the United States Constitution.[2] In so doing, the courts commonly relied on the cases of *Wengler v. Druggists Mutual Insurance Company,* 446 U.S. 142, 100 S Ct 1540, 64 LEd 2d 107 (1980) and *Weinberger v. Wiesenfeld,* 420 U.S. 636, 95 S Ct 1225, 43 LEd 2d 514 (1975). *Wiesenfeld* formed the basis of the Court of Appeals opinion in the present case as well, that court finding "no meaningful distinction between *[Wiesenfeld]* and the case at hand." 54 Or App 398, 403, 635 P2d 384 (1981).

Claimant challenges the constitutionality of ORS 656.226 under the fourteenth amendment to the United States Constitution and article I, section 20 of the Oregon

[1] It appears from the record that SAIF paid $1,000 funeral expenses and has paid, on behalf of claimant's and decedent's child, benefits of $100 per month.

[2] Only the California Supreme Court, in *Arp v. Workers' Compensation Appeal Board,* 19 Cal 3d 395, 138 Cal Rptr 293, 563 P2d 849 (1977), based its holding on state constitutional grounds as well.

Constitution. Article I, section 20, states:

> "No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not belong to all citizens."

The fourteenth amendment to the United States Constitution states, in pertinent part:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

This court's forays into the field of alleged gender discrimination have been neither frequent nor recent.[3] This court first considered the issue of gender discrimination in the case of *State v. Baker,* 50 Or 381, 92 P 1076 (1907). *Baker* was a criminal prosecution against the proprietors of a saloon for allowing a woman under the age of 21 to

remain in or about their saloon. Defendants contended that because the law permitted males over the age of 18 to enter and remain in a saloon, but denied that right to women between the ages of 18 and 21, it was invalid. *Baker* illustrates two points. First, it recognized that men and women constitute "classes" within the meaning of article I, section 20. Second, it shows the view of its era that the "general welfare and good morals" might be pursued by regulating the personal conduct of one of these classes, women, for no better reason than to match that individual conduct to the stereotype imposed upon their sex. The court observed, "By nature citizens are divided into the two great classes of men and women, and the recognition of this classification by laws having for their object the promoting of the general welfare and good morals, does not constitute an unjust discrimination." 50 Or at 385-86. Other language from the opinion states: "The liberties or rights of every citizen are subject to such limitations in their enjoyment as will prevent them from being dangerous or harmful to the body politic * * *." 50 Or at 385. *Baker* is an early example of a "balancing" test approach to "class legislation."

It was not until 1956 that this court again considered the validity of legislation which effects unequal treatment of men and women. In *State v. Hunter,* 208 Or 282, 300 P2d 455 (1956) we upheld the constitutionality of a statute which prohibited females from participating in wrestling exhibitions or competitions. We restated *State v. Baker* to the effect that nature divides citizens "into the two great classes of men and women," and elaborated:

> "We take judicial notice of the physical differences between men and women. These differences have been recognized in many legislative acts, particularly in the field of labor and industry, and most of such acts have been upheld

[3] Nor has the Court of Appeals had much opportunity in this area. *See State v. Hodgdon,* 31 Or App 791, 571 P2d 557 (1977); *State v. Goddard,* 5 Or App 454, 485 P2d 650 (1971); *State v. Bearcub,* 1 Or App 579, 465 P2d 252 (1970).

as a proper exercise of the police power in the interests of the public health, safety, morals, and welfare * * *. Moreover, there is no inherent right to engage in public exhibitions of boxing and wrestling. Both sports have long been licensed and regulated by penal statute and, in some cases, absolutely prohibited. It is axiomatic that the Fourteenth Amendment to the U.S. Constitution does not protect those liberties which civilized states regard as properly subject to regulation by penal law. Neither does Art 1, § 20, of the Oregon Constitution." 208 Or at 286-87.

In *Hunter* this court found that the legislative classification denying women the right to participate in public wrestling events was based upon a reasonable distinction having a fair and substantial relation to the object of the legislation. Surely no judge today, however, would attempt to justify a statute in the language used by this court then to hypothesize the statutory objective in *Hunter:*

"In addition to the protection of the public health, morals, safety, and welfare, what other considerations might have entered the legislative mind in enacting the statute in question? We believe that we are justified in taking judicial notice of the fact that the membership of the legislative assembly which enacted this statute was predominately masculine. The fact is important in determining what the legislature might have had in mind with respect to this particular statute, in addition to its concern for the public weal. It seems to us that its purpose, although somewhat selfish in nature, stands out in the statute like a sore thumb. Obviously it intended that there should be at least one island on the sea of life reserved for man that would be impregnable to the assault of woman. It had watched her emerge from long tresses and demure ways to bobbed hair and almost complete sophistication; from a creature needing and depending upon the protection and chivalry of man to one asserting complete independence. She had already invaded practically every activity formerly considered suitable and appropriate for men only. In the field of sports she had taken up, among other games, baseball, basketball, golf, bowling, hockey, long distance swimming, and racing, in all of which she had become more or less proficient, and in some had excelled. In the business and industrial fields as an employe or as an executive, in the professions, in politics, as well as in almost every other line of human endeavor, she had matched her wits and prowess with those of mere man, and, we are frank to concede, in many instances had outdone him. In these circumstances, is it any wonder that the legislative assembly took advantage of the police power of the state in its decision to halt this ever-increasing feminine encroachment upon what for ages had been considered strictly as manly arts and privileges? Was the Act an injust and unconstitutional discrimination against woman? Have her civil or political rights been unconstitutionally denied her? Under the circumstances, we think not." 208 Or at 287-88.[4]

[4] In two other Oregon cases, *State v. Muller,* 48 Or 252, 85 P 855 (1906) *aff'd* 208 US 412, 28 S Ct 324, 52 LEd 551 (1908) and *Stettler v. O'Hara,* 69 Or 519, 139 P 743 (1914) *aff'd* 243 US 629, 37 S Ct 475, 61 LEd 937 (1916), this court addressed itself to the treatment of women in employment. Those cases involved challenges to laws which discriminated either on the basis of type of business, *Muller,* or location of business, *Stettler.* Neither involved gender discrimination. Both cases were resolved pursuant to the "liberty of contract" versus "police power" analysis of that period.

The United States Supreme Court historically has also upheld the constitutionality of gender specific laws.[5] Its willingness to overturn them is a very recent development. That development began with *Reed v. Reed,* 404 US 71, 92 S Ct 251, 30 LEd 2d 225 (1971), in which a unanimous court held a statutory preference for male estate administrators unconstitutional because it provided "dissimilar treatment for men and women who are * * * similarly situated." 44 US at 77. The court framed the issue as "whether a difference in the sex of competing applicants (as estate administrator) * * * bears a rational relationship to a state objective that is sought to be advanced * * *." 404 US at 76. The court held the state's objective, administrative convenience, insufficient to justify the classification.

In *Frontiero v. Richardson,* 411 US 677, 93 S Ct 1764, 36 LEd 2d 583 (1973), a female military officer challenged a requirement that she demonstrate that her spouse was dependent upon her for at least fifty percent of his maintenance in order to receive dependents' benefits. Male personnel received the benefits without such a showing on the part of female dependents. Four of the justices found gender, like race, to be a "suspect" classification bearing a heavy burden of justification. Justice Stewart found "invidious discrimination" on the basis of *Reed.* The three justices who joined Justice Powell in concurring on the basis of *Reed* specifically stated they would not add gender to the list of suspect categories.

Weinberger v. Wiesenfeld, supra, relied upon by the Oregon Court of Appeals in this case, invalidated a provision of the Social Security Act which made the widow and children of a deceased husband automatic beneficiaries but excluded a widower as a deceased wife's beneficiary. The court found that the purpose of the statute was to allow children deprived of one parent the attention of the other parent. Given this purpose, the court held the genderbased classification "entirely irrational." 420 US at 651. It concluded "[i]t is no less important for a child to be cared for by its sole surviving parent when that parent is male rather than female." 420 US at 652.

Wengler v. Druggists Mutual Insurance Company, supra, invalidated a statute similar to the one at issue in this case. There the husband claimed workers' compensation benefits for the death of his wife in a work-related accident. The law required Wengler, because he was a man, to demonstrate his dependency in order to be eligible for compensation. This he was unable to do. In deciding the

[5] *See Bradwell v. Illinois,* 83 US (16 Wall.) 130 (1872), (prohibiting married women from practicing law); *Minor v. Happersett,* 88 US (21 Wall.) 162 (1874), (granting only men the right to vote); *Goesaert v. Cleary,* 335 US 464, 69 S Ct 198, 93 LEd 163 (1948) *overruled* 429 US 190, 210, 97 S Ct 451, 50 LEd 2d 397 (1976) (forbidding women to work as bartenders); and *Hoyt v. Florida,* 368 US 57, 82 S Ct 159, 7 LEd 2d 118 (1961), (exempting women from jury duty).

case the court refers to a "heightened scrutiny under the Equal Protection Clause." 446 US at 152.

The Supreme Court when faced with gender discrimination challenges imposes what has come to be known as an "intermediate tier" scrutiny somewhere between a "rational basis" equal protection test and a "strict scrutiny" test. Emden, *Intermediate Tier Analysis of Sex Discrimination Cases: Legal Perpetuation of Traditional Myths,* 43 Alb L Rev 73, 1978-1979; Gunther, *The Supreme Court 1971 Term — Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 Harv L Rev 1, 34 (1972-1973). The apparent inconsistency of results[6] under the court's "heightened" but not "strict"

scrutiny has sparked criticism for failure to provide a consistent analysis offering guidelines to trial and appellate courts. One early commentator said, "[T]he Court is not certain what constitutes sex discrimination, how virulent this form of discrimination is or how it should be analyzed in terms of due process and equal protection." Johnston, *Sex Discrimination and the Supreme Court — 1971-1974,* 49 NYUL Rev 617, 689 (1974). The kaleidoscope of standards and rationales underlying the United States Supreme Court decisions prompted one judge to write, "* * * the lower courts searching for guidance in the 1970's Supreme Court's sex discrimination precedents have 'an uncomfortable feeling,' like players in a shell game who are not absolutely sure there is a pea." *Vorchheimer v. School District of Philadelphia,* 400 F.Supp. 326, 340-41 (ED Pa 1975) *rev'd* 532 F2d 880 (3rd Cir 1976) *aff'd by an equally divided court* 430 US 703, 97 S Ct 1671, 51 LEd 2d 751 (1977).

There is no requirement in this case that this court adopt a fourteenth amendment standard for the application of article I, section 20, or that we decide this case on the basis of the federal gender discrimination cases. Claimant here alleges the invalidity of ORS 656.226 under both the federal and state constitutions. It is our duty to determine what the standard should be under our own constitution for statutes that classify on the basis of gender. In doing so, we

[6] *Compare Frontiero v. Richardson, supra,* (striking down a requirement that female but not male military personnel demonstrate spouse's dependency in order to receive dependent's benefits) *with Personnel Administration of Massachusetts v. Feeney,* 442 US 256, 99 S Ct 2282, 60 LEd 2d 870 (1979) (upholding the lifetime preference for veterans in the civil service system); *and Rostker v. Goldberg,* 453 US 57, 101 S Ct 2646, 69 LEd 2d 478 (1981) (validating the Military Selective Service Act which authorized a presidential proclamation requiring men, but not women, to register for the draft). *Compare Cleveland Board of Education v. LaFleur,* 414 US 632, 94 S Ct 791, 39 LEd 2d 52 (1974) (holding that the school board could not require all teachers to stop work after four or five months of pregnancy) *and Geduldig v. Aiello,* 417 US 484, 94 S Ct 2485, 41 LEd 2d 256 (1974) (upholding California's disability insurance system for private employees which excluded from coverage disability due to normal pregnancy). *Compare Craig v. Boren,* 429 US 190, 97 S Ct 451, 50 LEd 2d 397 (1976) (invalidating an Oklahoma statute which forbade the sale of 3.2% beer to males under the age of 21 and females under the age of 18) *and Michael M. v. Superior Court of Sonomo County,* 450 US 464, 101 S Ct 1200, 67 LEd 2d 437 (1981) (declaring valid a California law which makes sexual relationship with a female under the age of 18 a crime while not imposing a like penalty against a female who has a sexual relationship with a male under 18).

decline the opportunity to adopt the present standards of the United States Supreme Court's opinions. This court has not considered the validity of a gender-specific statute challenged under article I, section 20 of our own constitution in twenty-six years. As a result we are not hampered by recent holdings attempting to whittle away at stereotyped and outmoded notions of "proper" roles for men and women. We are free in Oregon to begin our analysis of

genderbased laws on a clean slate. There is no violation of claimant's fourteenth amendment rights if those rights are protected under the Oregon Constitution. *Sterling v. Cupp,* 290 Or 611, 614, 625 P2d 123 (1981). It is therefore appropriate to decide this case on the basis of whether ORS 656.226 violates article I, section 20.

Article I, section 20, of the Oregon Constitution has been said to be the "antithesis" of the equal protection clause of the fourteenth amendment. *State ex rel Reed v. Schwab,* 287 Or 411, 417, 600 P2d 387 (1979) *cert denied* 444 US 1088, 100 S Ct 1051, 62 LEd 2d 776 (1980); *State v. Savage,* 96 Or 53, 59, 184 P 567, 189 P 427 (1919). While the fourteenth amendment forbids curtailment of rights belonging to a particular group or individual, article I, section 20, prevents the enlargement of rights. *See* Linde, *Without "Due Process,"* 49 Or L Rev 125, 141 (1969-1970). There is an historical basis for this distinction. The Reconstruction Congress, which adopted the fourteenth amendment in 1868, was concerned with discrimination against disfavored groups or individuals, specifically, former slaves. *State v. Bunting,* 71 Or 259, 263, 139 P 731 (1914). When article I, section 20, was adopted as a part of the Oregon Constitution nine years earlier, in 1859, the concern of its drafters was with favoritism and the granting of special privileges for a select few. *State v. Clark,* 291 Or 231, 236, 630 P2d 810 *cert denied* 454 US 1084, 102 S Ct 640, 70 LEd 2d 619 (1981); *School Dist. No. 12 v. Wasco County,* 270 Or 622, 628, 529 P2d 386 (1974).

It is quite clear that the law in question, ORS 656.226, grants an economic privilege to certain women who have cohabited with men and produced a child or children as a result of that cohabitation, while withholding such benefits from men who might request them on the same terms. It grants as well to certain working men the privilege of providing benefits through workers' compensation to keep their family unit intact following accidental death but withholds the same benefit from working women. It discriminates against men in claimant's position who have cohabited with female workers and fathered a child by denying them benefits altogether, and it discriminates against women such as Williams by denying them the privilege of providing through their employment for their

surviving family unit.[7] The privilege created by ORS 656.226 is bestowed or withheld solely on the basis of gender.

We have often said in *dicta* that like the fourteenth amendment, article I, section 20, of the Oregon Constitution prohibits disparate treatment of groups or individuals by virtue of "invidious" social categories. A number of opinions have noted that compliance with article I, section 20 will correspond to compliance with the equal protection clause. *City of Klamath Falls v. Winter, supra; Tharalson v. State Department of Revenue,* 281 Or 9, 573 P2d 298 (1978); *Nilsen v. Davidson Industries, Inc.,* 226 Or 164, 360 P2d 307 (1961); *Plummer v. Donald M. Drake Company,* 212 Or 430, 320 P2d 245 (1958); *Savage v. Martin, supra, State v. Savage, supra.* In *Olsen v. State ex rel Johnson,* 276 Or 9, 554 P2d 139 (1976), this court said of the developing equal protection jurisprudence of the United States Supreme Court: "We do not have any difficulty following that part of the analysis which asks whether the classification is made on the basis of a suspect class such as race or sex and, if so, holding that such a classification is subject to a strict scrutiny." *Olsen,* 276 Or at 19.[8]

This "suspect class" and "strict scrutiny" language has found its way into the law of the various states as well, as courts have been called upon to determine the constitutionality of particular state statutes in the face of state

constitutional challenges. Eighteen state constitutions contain provisions proscribing discrimination on the basis of gender.[9] Many of these states have incorporated the "suspect class" analysis of the federal cases to invalidate genderbased legislation under their state constitutions. *Maryland State Board of Barber Examiners v. Kuhn,* 270 Md 496, 312 A2d 216 (1973) (dictum); *People v. Ellis,* 57 Ill 2d 127, 311 NE2d 98 (1974); *Darrin v. Gould,* 85 Wash 2d 859, 540 P2d 882 (1975); *Page v. Welfare Commissioner,* 170 Conn 258, 365 A2d 1118 (1976) (dictum); *Mercer v. Board of Trustees, North Forest Independent School District,* 538 SW2d 201 (Tex Civ App 1976); *Lowell v. Kowalski,* 405 NE2d 135 (Mass 1980); *Hardy v. Stumpf,* 21 Cal 3d 1, 145 Cal Rptr 176, 576 P2d 1342 (1978) (dictum); *Sail'er Inn, Inc. v. Kirby,* 5 Cal 3d 1, 95 Cal Rptr 329, 485 P2d 529 (1971) (decided under the state and federal equal protection clauses).

[7] Claimant's supplemental brief before us characterizes the privilege also as "the privilege of the surviving partner * * * to exercise that constitutionally protected right to the companionship, care, custody, and the management of children he or she *[sic]* has sired and raised * * *" citing *Stanley v. Illinois,* 405 US 645, 651, 92 S Ct 1208, 31 LEd 2d 551 (1972). *Stanley* involved a statute by which children of unmarried fathers, upon the death of the mother, were declared wards of the state without any hearing on parental fitness. Without articulating a "fundamental interest" test, the court said that "[t]he private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection." 405 US at 651. We do not pass upon the merits of this argument as applied to the facts of claimant's case, because this issue was not raised at trial or on appeal.

[8] *Olsen* involved an equal protection challenge to the state's system of public school financing. This court examined the United States Supreme Court's analysis in *San Antonio School District v. Rodriquez,* 411 US 1, 93 S Ct 1278, 36 LEd 2d 16 (1973) and ultimately rejected plaintiffs' claim that education was a fundamental right compelling "strict scrutiny." The opinion in *San Antonio* also considered a classification on the basis of wealth, and held such a classification not "suspect." The opinion makes no mention of race or gender.

Oregon has no equal rights provision related specifically to gender, yet we do not feel constrained to limit our application of article I, section 20 on this basis. By its terms article I, section 20 forbids the granting of privileges to "any citizen" or any "class of citizens." The privileges of ORS 656.226 extend to the classes of working men, and

[9] State constitutional provisions proscribing discrimination on the basis of gender and dates of enactment:

Alaska Const. art. I § 3, 1972
California Const. art. I § 8, (enacted in 1879 as art. 20 § 18, amend in 1970, ren. in 1974)
1970, ren. in 1974)
Colorado Const. art. II § 29, 1972
Connecticut Const. art. I § 20, 1974
Hawaii Const. art. I § 5, 1968, art. I § 21, 1972 (rev. in 1978)
Illinois Const. art. I § 18, 1970
Louisiana Const. art. I § 3, 1974
Maryland Const. Declaration of Rights, art. 46, 1972
Massachusetts Const. pt. 1, art. I, 1976
Montana Const. art. II § 4, 1972 (art. IX § 12, of the 1889 constitution provided for women's suffrage)
New Hampshire Const. pt. 1 art. 2, 1974
New Mexico Const. art. II § 18, 1972
Pennsylvania Const. art. I § 28, 1971
Texas Const. art. I § 3a, 1972
Utah Const. art. IV § 1, 1894
Virginia Const. art. I § 11, 1971
Washington Const. art. XXXI § 1, 1972
Wyoming Const. art. I § 3, 1889

Most of these provisions are similar to the proposed federal Equal Rights Amendment which reads: "Equality of rights under the law shall not be denied or abridged by the United States or any state on account of sex." (Colo., Ill., Md., Mass., N.H., N.M., Pa., Tex., Wash.) Alabama, Connecticut, Hawaii, Montana and Virginia include sex with race, color, national origin, etc. The California provision reads:

> "§ 8. Business, profession, vocation or employment; sex, race, creed, color, or national or ethic origin
>
> "Sec. 8. A person may not be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, creed, color, or national or ethic origin."

The Louisiana provision reads:

> "§ 3. Right to Individual Dignity
>
> "Section 3. No person shall be denied the equal protection of the laws. No law shall discriminate against a person because of race or religious ideas, beliefs, or affiliations. No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations. Slavery and involuntary servitude are prohibited, except in the latter case as punishment for crime."

The Utah provision appears in Article IV entitled Elections and Right of Suffrage:

> "Section I. [Equal political rights.]
>
> "The rights of citizens of the State of Utah to vote and hold office shall not be denied or abridged on account of sex. Both male and female citizens of this State shall enjoy equally all civil, political and religious rights and privileges."

The Wyoming provision states:

> "§ 3. Equal political rights.
>
> "Since equality in the enjoyment of natural and civil rights is only made sure through political equality, the laws of this state affecting the political rights and privileges of its citizens shall be without distinction of race, color, sex, or any circumstance or condition whatsoever other than individual incompetency, or unworthiness duly ascertained by a court of competent jurisdiction."

women with children by working men. Like other state and federal courts, we agree that a classification is "suspect" when it focuses on "immutable" personal characteristics. It can be suspected of reflecting "invidious" social or political premises, that is to say, prejudice or stereotyped prejudgments. Historically, the most obvious such classification, and the one recognized to be such within the special concerns that gave rise to the fourteenth amendment, was, of

course, racial discrimination.[10] But when we consider "classification" by collective human characteristics apart from whether the discrimination is adverse, in violation of the equal protection clause, or favorable, as proscribed by article I, section 20, we find that classification of one's personal privileges and immunities by one's gender is at least as old as by race, and as much based on unexamined societal stereotypes and prejudices. Gender is a visible characteristic determined by causes not within the control of the individual. It bears no relation to ability to contribute to or participate in society. The purposeful historical, legal, economic and political unequal treatment of women is well known.[11] Accordingly, we hold that when classifications are made on the basis of gender, they are, like racial,[12] alienage[13] and nationality[14] classifications, inherently suspect. The suspicion may be overcome if the reason for the classification reflects specific biological differences between men and women. It is not overcome when other personal characteristics or social roles are assigned to men or women because of their gender and for no other reason. That is exactly the kind of stereotyping which renders the classification suspect in the first place.

SAIF argues that the statute embodies legislative concern for workers' dependents and its purpose is to provide only for women because women are assumed to be dependent on men more often than the reverse. If we were convinced of this interpretation the issue of the constitutionality of the classification could be speedily resolved. The assumption of female dependency is "an archaic and

overbroad generalization." *Schlesinger v. Ballard,* 419 US 498, 508, 95 S Ct 572, 42 LEd 2d 610 (1975). Such a

[10] The notion of suspect classifications was originally formulated in United States Supreme Court cases involving racial discrimination. *See McLaughlin v. Florida,* 379 US 184, 196, 85 S Ct 283, 13 LEd 2d 222 (1965).

[11] Until the passage of the nineteenth amendment to the federal constitution in 1920 women were denied the right to vote. It was not until the passage of the Civil Rights Act of 1957 that women became eligible to serve on federal juries. *See Sail'er Inn, Inc. v. Kirby, supra,* 5 Cal 3d at 19, n. 19, 95 Cal Rprt at 341, 485 P2d at 541. *Kahn v. Shevin,* 416 US 351, 353-54 n. 4 and 5, 94 S Ct 1734, 40 LEd 2d 189 (1974).

[12] *Loving v. Virginia,* 388 US 1, 11, 87 S Ct 1817, 18 LEd 2d 1010 (1967); *Bolling v. Sharpe,* 347 US 497, 499, 74 S Ct 693, 98 LEd 884 (1954).

[13] *Graham v. Richardson,* 403 US 365, 372, 91 S Ct 1848, 29 LEd 2d 534 (1971).

[14] *Oyama v. California,* 332 US 633, 646, 68 S Ct 269, 92 LEd 249 (1948).

statutory classification relying on gender as legislative shorthand for dependency is the kind of stereotype that cannot withstand an article I, section 20 challenge. *Cf.,* under the federal constitution, *Schlesinger v. Ballard, supra; Califano v. Goldfarb,* 430 US 199, 217, 97 S Ct 1021, 51 LEd 2d 270 (1977); *Frontiero v. Richardson, supra.*

The Court of Appeals found it apparent from the statute that its purpose was to give assistance to the surviving members of the family, not to women as a disadvantaged group, *supra,* 54 Or App at 402. ORS 656.226 was originally enacted in 1927 and has continued in force with little change. No legislative history of ORS 656.226 exists to clarify its original purpose and we are reluctant to surmise.

In 1973, ORS 656.226 was the subject of discussion during proffered amendments to the workers' compensation statutes. Senator Burbidge proposed Senate Bill 46 to equalize gender specific language throughout Chapter 656. In introducing the package to the Senate Labor Committee on February 8, 1973, Senator Burbidge indicated that the amendments were prepared to remedy serious inequities in benefits in keeping with the cost of living, adding "there are as many working women as men." Minutes, Senate Labor Committee, February 8, 1973, at 3. A statement of that date drafted by Robert Babcock, a Portland attorney, states that the effect of the amendments is to "erase the only remaining distinctions of treatment under the Oregon Workmen's *[sic]* Compensation Act which are based on the sex of the workman *[sic]* or the beneficiary." Minutes, Senate Labor Committee, February 8, 1973, Exhibit B, at 1. That exhibit specifically addresses ORS 656.226. It notes that one purpose of the workers' compensation laws is to reduce litigation. The exhibit explains that without the amendments the "common law husband" receives no benefits under the act; he nonetheless retains his potential right of action for death or injury of his partner. The amendment would serve to avoid this frustration of the purpose of the act.

The section of the bill amending ORS 656.226 to incorporate gender neutral language remained in effect

throughout Senate amendments but the House Committee on Labor and Industrial Relations, at Representative Wilhelms's initiative, struck the gender neutral language of ORS 656.226. Wilhelms commented that he desired to withhold ORS 656.226 benefits from "an able-bodied man who was cohabiting with a woman worker who was injured or killed." House Labor and Industrial Relations Committee, May 21, 1973. Before the vote there was considerable discussion that if the gender neutral language were eliminated the law would continue as it was and children would receive benefits. It was emphasized twice that the major concern was for the children. *Id.* On June 15, 1973, Mr. Kulongoski (not a legislator at that time) explained to the committee the need for the Senate language in order to avoid discrimination. Representative Elliott, a committee

member, was of the opinion that there would be a legal problem with discrimination against the woman worker and moved to restore the gender neutral language. One committee member expressed concern that without the amendment "what you're doing here in effect is recognizing a common law marriage for one and not the other." House Labor and Industrial Relations Committee, June 15, 1973. Another committee member indicated that the statute sought to provide benefits not to women but to the "survivor whoever that may be." *Id.* Representative Elliott's motion to restore carried. Representatives Wilhelms and Patterson arrived after the vote and voted against and successfully prevented moving the bill to the floor with a do pass recommendation.

Discussion of the constitutionality of the statute ensued. When faced with a suggestion by one committee member that judicial invalidation of the statute could follow a successful constitutional attack, another committee member responded that they did not want "the attorney general or the court to throw it out." *Id.* There was general agreement among committee members in support of this sentiment. In an apparent attempt to resolve the impasse created by Representative Wilhelms's dissatisfaction with the Senate amendment one committee member suggested they delete the entire section. This idea gained no support. The discussion once again indicates the committee's concern that benefits be available to children. *Id.* No

resolution of the issue was reached at this meeting. On June 18, 1973, Representative Wilhelms again moved to delete the gender neutral language. The motion carried without discussion and the amended bill passed to the floor.

While the Committee's reasons for the ultimate rejection of gender neutral amendments to ORS 656.226 are open to conjecture,[15] its perception of the purpose of ORS 656.226 is clear. The committee recognized the statute as one designed primarily to ensure entitlement to benefits for the worker's family unit, not the adult partner alone. A concern with the welfare of workers' children dominated the debates. The Committee was aware that throughout the workers compensation statutes, illegitimate as well as legitimate children enjoy equal entitlement to benefits. ORS 656.005(6). Significantly, the Committee rejected a proposal that ORS 656.226 be deleted in its entirety, desiring instead to ensure that eligible children receive the additional benefits available to the family through application of ORS 656.226.

That the statute was designed to benefit the family unit is apparent from the eligibility requirements of the statute itself. Without a child of the relationship living

[15] Petitioner relies on Representative Wilhelms's comment expressing his desire to withhold ORS 656.226 benefits from able-bodied men. In light of subsequent committee discussion it is very doubtful that Rep. Wilhelms was expressing more than a personal opinion.

with the family a cohabitor is ineligible. *Thomas v. SAIF,* 8 Or App 414, 495 P2d 46 (1972). Without an entitled parent, *i.e.,* cohabitation for over one year prior to injury, a child cannot benefit. A family must exist before entitlements ensue.[16]

It is apparent that the gender classification of ORS 656.226 is not based on intrinsic differences between the sexes. Rather, it reflects assumptions about the relative social roles and the probable dependency of men and women. Families of deceased male workers may receive benefits

regardless of marital status of the mother while families of deceased female workers may receive benefits only if the parents were married. Accordingly we find the statute unconstitutional.

We turn now to the issue of the appropriate remedy. Respondent urges invalidation of the entire statute arguing that whenever a statute is found unconstitutional its invalidation is the only remedy; claimant desires extension of benefits to himself and all classes unconstitutionally excluded.

Cases from other jurisdictions have remedied unconstitutional provisions in workers' compensation laws with a variety of results. Thus *Arp v. Workers' Compensation Appeal Board, supra,* invalidated a statutory presumption of female dependency and held extension of benefits to be inappropriate without a reasonably clear expression of legislative intent. The court was careful to demonstrate that the family unit would not suffer as a result of its decision. Both parents remained eligible if they could demonstrate dependency; and the children would now receive the full death benefit that was originally awarded to the widow. *Day v. W.A. Foote Memorial Hospital, Inc., supra,* invalidated a similar statutory presumption of dependency for widows. The court found extension inappropriate in light of a deliberate legislative decision to exclude widowers. *Swafford v. Tyson Foods, Inc., supra,* struck a similar statutory presumption and extended benefits. The court indicated that legislative abolition of the gender distinction after the case was filed demonstrated an intent to provide compensation to all survivors equally. *Tomarchio v. Township of Greenwich, supra,* extended a similar dependency presumption to widowers. The court was presuaded that in light of legislative revisions to the workers' compensation laws subsequent to the filing of the case extension was the remedy least destructive of the dominant plan to provide dependency benefits. *Davis v. Aetna Life & Cas. Co., supra,* extended a similar dependency presumption to men. Legislative revisions since the case arose indicated to the court

[16] We note that petitioner's earlier interpretation of the purpose of ORS 656.226 in *Kempf v. SAIF,* 34 Or App 877, 580 P2d 1032 (1978), corresponds with our own. In *Kempf* SAIF argued that the purpose of the statute was not to provide compensation to surviving partners in their own right, but to protect children by insuring that the surviving parent who has responsibility for such children is not left destitute. 34 Or App at 883 n. 1 (Joseph, J. dissenting).

an intent to provide equal treatment. *Passante v. Walden Printing Company, supra,* extended the statutory presumption of dependency to widowers without discussion. In *Insurance Company of North America v. Russell, supra,* a

similar presumption was both eliminated for women and rewritten for men. After the court's decision, survivors of both gender could recover upon proof of dependency. Widowers were no longer required to prove, in addition to dependency, incapacity to support themselves. In *Fenske v. Public Employees Retirement System Board of Administration,* 103 Cal App 3d 590, 163 Cal Rptr 182 (1980), the California Court of Appeals reviewed the *Arp* remedy. *Fenske* addressed the constitutionality of an entitlement available only to men which allowed an employee to elect a job classification which resulted in an increased retirement pension if the employee became disabled. Rather than invalidate the regulation after finding it unconstitutional, the court extended the entitlement to the female plaintiff indicating that "[t]his is the very type of situation in which *Arp* would extend the benefits rather than invalidate the statute." (Footnote omitted.) 103 Cal App 3d at 598, 163 Cal Rptr at 187. Of significance to the court was the fact that invalidation would result in an absolute denial of benefits to both males and females, unlike the situation in *Arp,* and in contradiction of legislative intent. *Fenske,* while not involving a workers' compensation statute, is most closely analogous to the situation in the present case. Invalidation of ORS 656.226 will result in total elimination of statutory benefits for all recipients. In the above cited workers' compensation cases benefits remained available even where the statute was invalidated so long as an applicant could demonstrate actual dependency.

Our sister states' decisions are illustrative for a number of reasons. First, they demonstrate there is no universal rule compelling invalidation of constitutionally defective statutes. Second, contrary to the dissent's view that we should not extend the statute, these opinions affirm that courts are not without power to repair such statutes in appropriate circumstances. Finally, they provide an analytical framework by which the appropriate remedy may be assessed: we first examine the legislative purpose in providing benefits under the challenged statute; we then resolve what the legislature would have done if faced with the invalid statute. Would it terminate coverage to all recipients or extend benefits to those improperly excluded? We find equally strong support for the

proposition that courts are empowered to extend underinclusive statutes from the United States Supreme Court. Justice Harlan concurring in *Welsh v. United States,* 398 US 333, 361, 90 S Ct 1792, 26 LEd 2d 308 (1970) stated:

> "Where a statute is defective because of underinclusion there exist two remedial alternatives: a court may either

declare [the statute] a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by exclusion."

Wiesenfeld, supra, examined the legislative purpose in providing Social Security benefits to widows and found extension of benefits to widowers the alternative least disruptive of that purpose.

In *Wengler, supra,* the United States Supreme Court remanded the case to the Missouri Supreme Court for the specific purpose of addressing the issue of extension or invalidation. The court stated:

"We are left with the question whether the defect should be cured by extending the presumption of dependence to widowers or by eliminating it for widows. Because state legislation is at issue, and because a remedial outcome consonant with the state legislature's overall purpose is preferable, we believe that state judges are better positioned to choose an appropriate method of remedying the constitutional violation." 446 US at 152-53.

As we have seen, the purpose of ORS 656.226 is to provide benefits to families of workers injured or killed on the job. Except for his gender, claimant and his family in this case fulfill the statutory requirements for entitlement. In resolving how the legislature would have remedied the invalidation of the statute we need not hypothesize. We have seen that when faced with the issue of the statute's discriminatory impact on women workers the committee was in general agreement that they did not want the statute "thrown out." When presented with the suggestion that they delete the statute entirely committee members thought it more important to ensure benefits to the family unit. Thus, given the choice between eliminating the statute entirely or passing it out of committee in potentially unconstitutional form, they chose to preserve existing entitlements to male workers' families. Invalidation here

would deprive all cohabitants of unmarried workers of benefits. This is in clear conflict with legislative intent. We note that one objective of the workers' compensation law is "to provide * * * fair, adequate and reasonable income benefits to injured workers and their dependents." ORS 656.012(2)(a). Extension of benefits in this case advances the purpose of the legislation and comports with the overall statutory scheme.[17]

[17] We do not read *Pavlicek v. SIAC,* 235 Or 490, 385 P2d 159 (1963) to compel invalidation whenever a nonseverable statute is held unconstitutional. *Pavlicek* involved a worker's challenge to the constitutionality of the Oregon Occupational Disease Law on the grounds that the statute failed to provide for jury trial or judicial review of the commission's decision. The court rejected the claim because it reasoned that severance, the requested remedy, would not provide the relief sought. 235 Or at 492-93, 495. The court did not reach the constitutional issue but stated in dicta that a finding of unconstitutionality would compel invalidation of the entire statutory scheme. 235 Or at 495. The *Pavlicek* court correctly assumed that no other course was available short of rewriting the procedures available to a litigant at the agency level. The instant case is quite different. It does not concern the adequacy of procedural due process rights afforded by statute but addresses rather the propriety of an underinclusive classification which confers benefits.

This court has never addressed the issue of remedy in a case like the present. Our analysis appropriately includes consideration of the remedial alternative of extension of benefits to the excluded class. This is so because even though the classification is unconstitutional the underlying purpose of the statute remains valid. Where, as here, the statutory classification is underinclusive, the court must examine legislative history to assess how best to maintain the objective sought to be achieved by the statute. In addition, we are reluctant to adopt a policy of *per se* invalidation of statutes containing discriminatory classifications. Such a policy provides a disincentive for litigants to challenge objectionable statutes. More importantly, we are not convinced that denial of benefits to all adequately and fairly resolves the problem of discriminatory laws. We see no reason why in this case, for example, the entitlements of female cohabitants and their families should be eliminated so that the rights of male cohabitants and their families may be vindicated.[18]

Having resolved that the purpose of ORS 656.226 is to provide benefits to families of injured workers and in light of the legislative reluctance to eliminate the statute when faced nine years ago with the hypothetical facts of the case we are in fact deciding today, we affirm the Court of Appeals decision, recognizing that extension of benefits to claimant most effectively fulfills the purpose of the legislation.

Affirmed.

[18] The dissent criticizes the majority for "legislating" by extending the statute. It should be pointed out that the dissent's remedy would repeal the entire statute, a result no less "legislating" in effect and contrary to the statute's purpose and the intent expressed in the legislative history described in the text of this opinion. The dissent suggests alternate remedies the legislature may choose were we to invalidate the statute. Those remedies are no less available to the legislature by the extension of the statute to the excluded males should it decide to amend the law.

PETERSON, J., concurring in part; dissenting in part.

I concur in that portion of the majority opinion which holds that ORS 656.226 is invalid because it impermissibly discriminates on gender grounds against men in claimant's position and discriminates against women by denying them the privilege "of providing through their employment for their surviving family unit." ____ Or at ____. I dissent, however, from that part of the opinion which extends benefits to the claimant. In my opinion, this court lacks the power to legislatively repair the constitutional infirmity of ORS 656.226.

The vexing problem in this case is whether, because ORS 656.226 is unconstitutional, we should remedy the constitutional imperfection by extending the benefits to the underincluded class, represented in this case by the plaintiff. Cases such as this raise particularly difficult questions of extension versus invalidation because if the

statute is merely invalidated without extension, the claimant does not obtain benefits (even though he prevailed in having the statute declared unconstitutional) *and* the spectre arises that those needy persons now receiving benefits will also lose them if extension is not granted. Therefore, as many of the cases cited in the majority opinion demonstrate, many courts grant extension without consideration or discussion of the vexing separation of powers question implicit in the extension-invalidation controversy.

See generally, Note, *Extension versus Invalidation of Underinclusive Statutes: A Remedial Alternative,* 12 Colum J L & Soc Probs 115 (1975).

In 1973, Senate Bill 46 proposed to amend ORS 656.226 to read:

> (Bracketed words represent deleted language; italicized words are new language):
>
> "656.226 In case an unmarried man and an unmarried woman have cohabited in this state as husband and wife for over one year prior to the date of an accidental injury received by [such man] *one of them,* and children are living as a result of that relation, the [woman] *other* and the children are entitled to compensation under ORS 656.001 to 656.794 the same as if the man and woman had been legally married."

The amendment was rejected. One irrebutable conclusion can be drawn from the 1973 history: The legislature then intended that ORS 656.226 should not be amended to extend benefits to cohabiting males on the same terms as cohabiting females. This court has, by judicial legislation, now passed the very measure which the legislature rejected in 1973.

Legislatures pass laws. Courts interpret laws. Had it known that ORS 656.226 would be held invalid, the legislature may well have enacted the statute proposed in SB 46. But I do not know that, and neither does any other member of this court. Why, then, does the majority judicially amend the statute in the very manner the legislature rejected in 1973? Apparently because of its perception of what the legislature would have done had it known that we would invalidate the statute.

The solution enacted by the majority is only one of several actions the legislature might take after this law is nullified. There are other possible solutions to the problem, each solution having significant fiscal and sociological consequences. If we do nothing but discharge our constitutionally-appointed task and nullify the offending statute, the legislature, when it convenes in January, 1983, will undoubtedly consider the problem. It might consider these solutions in responding to our decision invalidating ORS 656.226:

1. Do nothing.

2. Extend the benefits of ORS 656.226 consistent with this court's judicial extension of coverage by amendment along the lines proposed in 1973.

3. Provide benefits to male and female cohabitants alike, but only if the injured person was a family's principal wage earner.

4. Provide benefits to male and female cohabitants alike if proof of dependency is shown.

5. Decide upon a solution incorporating some of the features of 2, 3, and 4 above.

The legislature could also provide for continued benefits to claimants who were receiving benefits before the date of our decision invalidating ORS 656.226, and whose benefits had been terminated, as well as benefits to claimants whose claims arose between the date of our decision and the date of the amendment.

Legislatures should not look to courts to discharge legislative functions. When legislatures pass laws which may be unconstitutional, expecting the courts to rewrite the law in constitutional terms, courts should not accept the invitation.[1]

True, many courts, when faced with the choice of invalidation of an unconstitutional benefits statute vis-a-vis extension of underinclusive statutes by judicial act have extended benefits to the excluded class. Most of the cases in which judicial extension has occurred involved statutes which already extended benefits to the excluded class, but required a higher showing—a greater degree of proof—to qualify for benefits. One leading case, *Califano v. Goldfarb,* 430 US 199, 97 S Ct 1021, 51 L Ed 2d 270 (1977), typifies such cases. There, widows of deceased workers qualified for survivor's benefits without proof of dependency. Widowers were ineligible unless they proved that they received more than half of their support from their deceased wife. The Supreme Court struck the requirement

that male claimants make a greater showing than female claimants in order to qualify and granted extension without discussion of the issue. *Accord: Frontiero v. Richardson,* 411 US 677, 93 S Ct 1764, 36 L Ed 2d 583 (1973), in which the Supreme Court struck a similar provision requiring that spouses of servicewomen prove that she supplied more than half of her husband's support in order for him to receive dependents' benefits in the same manner as a spouse of a serviceman, and applied the statute as if the exception to coverage did not exist. The cases cited on pages ____ of the majority opinion fall within that category.[2]

[1] Situations in which legislatures enact legislation using broad language, leaving it to the courts to interpret ambiguous terms, are distinguishable. *See, e.g., DeCicco v. Ober Logging Co.,* 251 Or 576, 579, 447 P2d 297 (1968).

[2] Moreover, in a number of cases cited by the majority, by the time of the appellate court decision the legislature had already made the change made by the court. In most cases ordering extension, extension was ordered without discussion of the issue whether extension was appropriate and permissible.

The only recent Supreme Court case discussing the question of extension versus invalidation is *Califano v. Westcott,* 443 US 76, 99 S Ct 2655, 61 L Ed 2d 382 (1979) (AFDC - Unemployed Father program provided welfare benefits to families with young children in which the father was unemployed, but not to families with young children in which the mother was unemployed, held violative of equal protection component of Fifth Amendment due process; extension to families with unemployed mothers held proper remedy). In *Westcott* the Massachusetts Public Welfare Commissioner stipulated that some form of judicial extension should be made. 443 US at 90. The commissioner argued that the least disruptive extension would be to extend benefits to children when the unemployed person was the principal wage earner. This suggestion was rejected, and extension was granted because nullification "* * * would impose hardship on beneficiaries whom Congress plainly meant to protect." 443 US at 90. The court specifically noted that "[s]ince no party has presented the issue of extension versus nullification for review, we would be inclined to consider it only if the power to order extension were clearly beyond the constitutional competence of a federal district court." 443 US at 91. Even so, four justices dissented on the ground that the court was usurping the prerogatives of the legislature. 443 US at 93-96.[3]

There can be no denying that this court is legislating, and I believe that in so doing we violate the separation of powers clause of the Oregon Constitution.[4] It may be that the legislature would enact ORS 656.226 in the very form the majority has. On the other hand, it might not. In addition, the very fact that this court has passed SB 46 may have a future effect upon further legislative consideration of this question.

The effect of this court's opinion is to enact a new law. I have no experience as a legislator, but I suspect that it is sometimes impossible to obtain a majority for any *one* change to a statute even though a majority of the legislators agree that *some* change should be made. Thus, the fact that we nullify and extend may have legislative significance apart from the outcome of this case. If the legislture is unable to agree on a solution, this court's "legislative" solution would remain in force.

[3] In addition to the commissioner's stipulation for extension, there was a compelling practical reason for the *Westcott* extension: all benefits to dependent children would be limited if extension was not ordered. In the case at bar (contrary to the statement on page 22 of the majority opinion that "[i]nvalidation here would deprive all cohabitants of unmarried workers of benefits"), children of injured workers, male or female, would continue to receive benefits under ORS 656.204(4).

[4] Article III, section 1, of the Oregon Constitution provides:

"The powers of the Government shall be divided into three seperate (sic) departments, the Legislative, the Executive, including the administrative, and the Judicial; and no person charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided."

The point is not only that courts are forbidden to legislate, we lack the resources to make legislative decisions. Though we may possess judicial ingenuity, we have no knowledge of the fiscal implications of our opinion, and little knowledge of its other implications. We have no idea what the legislature's collective belief is concerning the extension of benefits to able-bodied, nondependent male claimants[5] as compared with some other form of relief to families of injured or deceased unmarried workers who have living children as a result of cohabiting with another person. Were I a legislator, in all probability I would do what the majority has done in extending benefits. But I

might vote for some other solution, were I convinced that there are other policies which suggest a different answer, or other needs which are greater or more immediate, or if my constitutents disfavored the extension of benefits.

The legislature convenes in two months, perhaps earlier. It has the power to avoid almost every adverse effect of invalidation, even those occurring before it convenes. That is its constitutionally-appointed job, and we should let them do it.[6]

The legislature, by virtue of Article III, section 1, of the Oregon Constitution has been determined to be better able to yoke in common harness the diverse temperaments, qualities and needs of our society. Although this is an appealing case for extension, I believe that our deference to the legislative department is compelled, lest the judicial lamb swallow the legislative lion.

Campbell, J., joins in this opinion.

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[5] I should point out that the legislature has not required a showing of dependency for nondependent, able-bodied male spouses to receive benefits. *See, e.g.,* ORS 656.204.

[6] Particularly when time is not of the essence.

IN THE SUPREME COURT OF THE STATE OF OREGON

In Banc

In the Matter of the Compensation of
Orville A. Bales, Claimant.

Orville A. Bales,

Respondent on Review,

v.

State Accident Insurance
Fund Corporation,

Petitioner on Review.

* * * * *
NO. 80-03397
CA A23327
SC 28780

On review from the Court of Appeals.*

Argued and submitted November 1, 1982.

Darrell E. Bewley, State Accident Insurance Fund, argued the cause and filed briefs for petitioner on review.

Benton Flaxel, Bend, argued the cause and filed the petition for respondent on review. With him on the brief in the Court of Appeals was Flaxel, Todd & Nylander, Bend.

LENT, C.J.

Reversed and remanded to the Court of Appeals.

* Judicial Review from Workers' Compensation Board.
57 Or App 621, 646 P2d 83 (1982).

LENT, C.J.

The issue is whether the opinion evidence of an expert that a claimant's heart attack was not caused by his job activity should be given "less weight," as a matter of law, because the expert belongs to a school of medical thought that holds that stress does not cause heart attacks. In this case, the Court of Appeals, Bales v. SAIF, 57 Or App 621, 626, 646 P2d

83 (1982), held that the opinion should be given less weight, relying upon what this court said in Clayton v. Compensation Department, 253 Or 397, 454 P2d 628 (1969). We quote from the Court of Appeals decision:

> "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 the 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." (Emphasis added)

57 Or App at 625-26, 646 P2d at 84-85. The Court of Appeals reversed the Workers' Compensation Board's decision, in which the claim was held not to be compensable.

We allowed review under ORS 2.520 to clarify the effect of our decision in Clayton v. Compensation Department, supra.

Under the rule of Weller v. Union Carbide, 288 Or 27, 29, 602 P2d 259 (1979), we take the following historical facts as found by the Court of Appeals:

> "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."

Bales v. SAIF, 57 Or App 621, 623, 646 P2d 83, (1982).

The "physician in North Bend," a general practitioner, opined by letter, which was received by SAIF on April 7, 1980, that

> "pulling on the green chain * * * was a materially contributing cause of his myocardial infarction."

This opinion was rendered by the treating physician after he had the benefit of consultation with the "cardiac specialist in Eugene" who performed the coronary angiogram.

By letter dated April 8, 1980, SAIF denied the claim.

By letter dated April 11, 1980, SAIF asked the Eugene specialist for an opinion whether the work activity caused the heart condition or if the condition was the result of "natural

disease progress." The Eugene specialist wrote, in toto:

> "It is my opinion that the myocardial infarction sustained by Orville A. Bales on March 3, 1980, was related to a natural disease process and was neither directly nor indirectly related to his work activity."

Claimant's counsel wrote to a cardiologist who taught at the University of Oregon Health Sciences Center, requesting his opinion on causation. The teaching cardiologist had the entire medical file to examine and was made aware of the conflicting opinions of the North Bend and Eugene doctors as to causation. The teaching cardiologist did not physically examine the claimant but expressed his conclusion as follows:

> "To recapitulate, it would be my medical opinion that Mr. Bales' work activity was a material and significant factor in contributing to the development of his acute myocardial infarction of that date."

At the hearing before the referee, the medical and hospital files and the reports of the three doctors were received in evidence. The testimony of the Eugene specialist upon deposition was also received. To get the full flavor of that witness' testimony, we shall quote liberally from the deposition. Upon examination by claimant's counsel, the witness was asked the reason for his letter opinion in full, supra.

> "Q. What is your reason for your opinion of that?
>
> "A. 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. And so, I don't think that you can relate a disease process to his work activity.
>
> "Q. Doctor, in your opinion, can stress, emotional or exertional stress contribute to a heart attack?
>
> "A. Not necessarily in this case.
>
> "Q. But, just in general terms, can it contribute?

"A. That's an impossible question to answer. I, of course, don't know. I think no one does.

"Q. In your opinion is what I'm interested in.

"A. In my opinion I think--

"[SAIF'S COUNSEL]. I think he said he had no opinion.

"THE WITNESS: This does not cause heart attacks, physical or emotional stress.

"Q. [CLAIMANT'S COUNSEL]. I want to make sure that we distinguish between a cause, a sole cause and a contributing cause."

"Heart attacks result from people like Mr. Bales suffering from coronary artery disease primarily caused by lack of sufficient blood supply to the heart muscles, isn't that correct?

"A. No one knows.

"Q. No one knows.

"A. That's right.

"Q. No one knows what causes the attack?

"A. That's right.

"Q. And in your opinion what causes the attack?

"A. I don't know.

"Q. And if you do not know what causes it, Doctor, how can you say that work activity or stresses is not a cause or contributing cause?

"A. On the basis of statistics. 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.

"There's no indication that physical or emotional activity relates to the onset of myocardial infarction.

"Q. And so, on that basis you conclude that exertion has--is not a cause.

"A. Right."

The doctor went on to distinguish between a heart attack and "sudden death syndrome."

"A. You see, there you're talking about the sudden death syndrome. The sudden death syndrome is a different thing. That's not a heart attack.

"And sure, sudden death syndrome is related to physical exercise.

"Q. What is the sudden death syndrome?

"A. It's dying suddenly for no apparent cause. And generally, at the postmortem exam you find nothing, perhaps find extensive coronary artery disease. And you assume that the patient developed a sudden rhythm disturbance that caused death.

"And I think that that may be an area of confusion, because there is a definite relationship between physical activity and the sudden death syndrome, particularly in coronary disease patients. But, they don't make it to the hospital to show that they have a heart attack.

"In fact, heart attacks don't come about as a result of physical or emotional stress."

Claimant's counsel sought to ascertain what the doctor meant by a heart attack:

"Q. What is a heart attack then?

"A. Well, a heart attack is the damage of heart muscle. And that's caused -- we don't know what causes it, but it's a situation where there is congestion of the blood vessels in the heart there, oxygen cannot be exchanged from the arteries to the veins in the normal process and that heart muscles die because of lack of oxygen.

"What triggers it, what is the process, no one knows.

"Q. You say it is caused by congestion in the blood vessels within the heart.

"A. Within the heart.

"Q. Occlusion of the coronary artery supplying the heart, would that produce a heart attack?

"A. Well, yes, if blood vessels blocked off or occluded from an artery supplying an area of the heart, that usually will produce a heart attack. Not always, but usually.

"Q. And that can occur without a congestion of the vessels within the heart itself?

"A. You are really getting into technical pathalogical [sic] areas.

"No, they develop congestion of blood vessels. That's part of the injury process is that congestion occurring. That's what happens as the injury progresses, they develop congestion and they don't exchange oxygen."

Claimant's counsel returned to the issue of causation:

"Q. Doctor, in your opinion, can -- and if I am understanding you correctly, in your opinion, then, is that exertion or stress, physical or otherwise, is -- can never be a causative factor in a heart attack?

"A. I never say never.

"Q. Well, I am seeking your opinion.

"A. My opinion is that it is not a factor in the vast majority of heart attacks. Not any kind of factor, not direct or indirect.

"Q. And you say in the vast majority. That implies that in some cases it might be.

"A. As I say, I never say never. I can't know what a small percentage -- an unusual situation it might be a factor. That's why I was hanging back on waiting so long to answer your question before. Because, it, of course, there is a shadow of the question in any circumstance.

"Q. Doctor, in your opinion, is that the prevailing medical view on that subject?

"A. Among my colleagues in this state, yes.

"Q. Are you acquainted with a Dr. Herbert Griswold? [2]

"A. He is the exception.

"Q. He is the one exception?

"A. I wouldn't say that. He is a major exception.

"Q. He has a contrary view?

"A. Yes.

"Q. And there are others that, I believe, share his view.

"A. Maybe a few.

"Q. Is that the -- is your view the prevailing view taught at the University of Oregon Health Sciences?

"A. I really don't know.

"Q. Doctor, a person with coronary artery disease, has restricted pumping, so far as blood supply to the heart is concerned, is that correct?

"A. Has restricted blood flow in the coronary arteries.

"Q. Do you know if such a person engages in strenuous physical activity, or anybody that engages in strenuous physical activity are going to create a demand for more blood to the muscle or oxygenation, is that correct?

"A. Right.

"Q. What effect does that fact that they can't get it there, people with coronary artery disease or coronary artery insufficiency, what happens when the blood, they can't provide enough blood flow through those restricted vessels through those heart muscles?

"A. They usually get pain.

"Q. And that's call[ed] angina?

"A. Yes.

"Q. And if they continue exerting with pain, what happens?

"A. I've never seen anybody that did that.

"Q. What happens if, Doctor, if the heart does not get enough blood and demand is such that the heart just doesn't get enough blood to supply its needs?

"A. Well, the muscle dies.

"Q. And that's what's involved in the heart attack?

"A. Yes.

"Q. But, again, it's your opinion that that can't be caused by exertion.

"A. Right.

"Q. And again, Doctor, as I understood what you've told us, that you just don't know what causes heart attacks.

"A. That's right.

"Q. And we don't know what caused the heart attack in this case, Mr. Bales' case?

"A. That's right.

"Q. But, there's no question but that he did have a heart attack?

"A. Yes."

On examination by SAIF's counsel, the witness elaborated:

"Q. One last question: Can you give us an idea of the percentage of your colleagues that would agree with you and disagree with Dr. Griswold on the idea of the role exertion plays in producing myocardial infarction?

"[CLAIMANT'S COUNSEL]. Let's define colleagues, first.

"Q. [SAIF'S COUNSEL]. I assume, when you used the term, colleagues, you were talking about cardiologists in the State of Oregon.

"A. Yes. I think cardiologists in large, that I have talked to, cardiologists all over the world, I would say, that probably 75 percent believe that physicial exertion and emotional stress don't cause heart attacks. And there is an article in circulation, 1962, which is a committee on cause and effect, or cause of -- I can't remember the exact title, I'm sorry. I could give it to you. But, in that article it says that there is no evidence that myocardial infarction is caused by physical or emotional stress.

"That is a statement of a committee of the American Heart Association. That has never been changed. The majority of cardiologists today still support that statement."

We turn to an examination of the precise question presented to us in Clayton v. Compensation Department, supra. The claim was for an accident which occurred in 1965 and was, therefore, tried by jury under the then-existing law in workers' compensation cases. The claimant had suffered a fatal heart

attack while he was on the job. This court stated the crucial question as being whether the stress and fatigue suffered by claimant on the job was a causal factor in producing his heart attack. The only medical witness was the same cardiologist, Dr. Griswold, who rendered an opinion favorable to the claimant in the case at bar. In Clayton, the witness testified that the medical profession does not "understand how stress may or may not contribute to such an episode." He indicated that the question in Clayton's case on causation was close but that:

> "The reasonable probability is that more chance that it did than it didn't."

253 Or at 401. The defendant moved for a directed verdict on the ground that this was insufficient to carry the case to the jury on the issue of causation. The trial judge allowed the motion but submitted the case to the jury under then ORS 18.140(2).[3] The jury found, in answer to an interrogatory, "that the work activity of the plaintiff * * * [was] a material, contributing, precipitating or causal factor in producing or hastening the death of" plaintiff. The trial court thereafter entered judgment notwithstanding the verdict for defendant on the trial court's perception of Dr. Griswold's testimony as not being sufficient to establish a medical probability of causation. The question on appeal in Clayton, therefore, was whether the court could say there was no evidence to support the verdict. Oregon Constitution, Article VII (Amended), Section 3. The question was not whether this, or any, court should subscribe to any particular school of medical thought. Where a verdict is directed against a party, or where judgment notwithstanding the verdict is entered after verdict, the losing

party is entitled to have all evidence in his favor considered as being true.

This court made the statement that:

> "We have chosen to reject the view that exertion or stress can never be a causative factor in these cases." (Emphasis added)

253 Or at 402. It is a strange statement, considering our role under the constitution. We were not required to enter upon factfinding in Clayton; we did not cite any other case in which we had made such a finding. The statement is not, and clearly should not have been, a rule of law. We concluded that the evidence in Clayton was sufficient to present a case for the jury's resolution as a matter of fact. Our result was correct, but the case does not stand for the proposition that any given witness' testimony is to be disregarded as a matter of law because of the school of medical thought to which he belongs. On the other hand, the testimony of a medical witness should not necessarily be given less weight, as a matter of law, simply because he espouses the thoughts of a minority of the medical profession.[4]

Because the Court of Appeals believed that this court required that the Eugene specialist's opinion was to be given less weight because of his faction's school of thought that stress never causes heart attacks, the cause must be remanded for the Court of Appeals to exercise its factfinding function upon the basis of what weight that court finds should be accorded to the testimony.

Reversed and remanded to the Court of Appeals.

FOOTNOTES

1. In arriving at his opinion, the cardiologist assumed correctly that the claimant was engaged in work on the morning in question that was more strenuous than the work he had previously performed. He also assumed that the claimant, at the relevant time, had been involved in pulling "heavy timbers" off the green chain. The words "heavy timbers" were not used by any witness at the later hearing before the referee to describe the kind of lumber claimant was pulling from the green chain. It appears to be uncontradicted that the green lumber he was pulling was sometimes one inch, and sometimes two inches thick, that it was from three to six inches wide, and some of it was up to twenty-four feet long. It seems fair to say that the heaviest lumber he pulled, therefore, would be a green 2X6, twenty-four feet long. There is no direct evidence as to what such a piece of "dimension" lumber would weigh.

2. Dr. Griswold is the cardiologist from the University of Oregon Health Sciences Center mentioned earlier in the text.

3. ORS 18.140(2) provided:

> "In any case where, in the opinion of the court, a motion for a directed verdict ought to be granted, it may nevertheless, at the request of the adverse party, submit the case to the jury with leave to the moving party to move for judgment in his favor if the verdict is otherwise than as would have been directed."

Compare, ORCP 63B.

4. The medical truth of yesterday may well be the laughing stock of today; today's medical truth may be likewise treated tomorrow. History teaches us that the vast majority of doctors 100 years ago, both in practice and in the universities and hospitals, believed Dr. Ignaz Phillipp Semmelweis not only to be wrong, but probably not completely sane, simply because he insisted that a doctor ought to wash his hands with a watery solution of chloride of lime before delivering a baby if the doctor had just been dissecting a cadaver or engaged in some other activity that had caused the doctor's hands to become unclean. Semmelweis' observations of the high incidence of puerperal fever in mothers whose babies were delivered with the assistance of doctors whose hands and clothing were unclean led him to believe there was a causal connection between the lack of cleanliness and the ensuing fever. See, e.g., "Immortal Magyar" by Frank G. Slaughter, M.D., 1950. The work of Joseph Lister was eventually to explain why Semmelweis was right, but he was right even when

he was a minority of little more than one. In any field of science, today's truth may tomorrow be shown to be false. Consider the history of the views of planetary revolution. Were Johannes Keppler and Galileo, on the one hand, or those who believed the sun revolved around the earth, on the other hand, correct? Who were in the majority, and who in the minority, in that time?

It is to be remembered that the witness who testifies to an expert opinion is subject to cross examination concerning how he arrived at that opinion, and the cross examiner is to be given great latitude in eliciting testimony to vitiate the opinion. Wulff v. Sprouse-Reitz Co, Inc., 262 Or 293, 309, 498 P2d 766 (1972).

The factfinder must discharge his task on the record made in the particular case. The facts found upon the record and evidence in one case do not become a rule of law to be applied to the determination of the facts upon another record and other evidence. Bend Millwork v. Dept. of Revenue, 285 Or 577, 585-587, 592 P2d 986 (1979).

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